THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

NOT REPORTABLE

Case no: 2025-072452

In the matter between:

TWK AGRI (PTY) LTD Applicant

and

ROLINE HOLTZHAUSEN (neé FERMOR) First Respondent

MRA INSURANCE BROKERS (PTY) LTD Second Respondent

Heard: 11 June 2025

Delivered: 23 June 2025. Served on the parties by email, and case lines.

Summary: Urgent application re restraint of trade. Requirements established for final order interdicting disclosure of confidential information and conducting business contrary to restraint agreement.

JUDGMENT

DANIELS J

Introduction

[1] The applicant seeks a final interdictory relief against the first respondent, on an urgent basis, in the following terms:

1.1 Soliciting the custom of or dealing with or in any manner transacting with, in competition to the applicant, any business, company, firm, undertaking, association or person which has been a customer or supplier of the applicant in the territory (i.e. within the area of long – term insurance including all categories and sub categories) short term insurance (including all categories and sub categories) retail pension benefits, pension fund benefits, participatory interests in collective scheme, investments and health service benefits) for a period of twenty four months;

1.2 Offering employment to or in any way causing to be employed any person who was employed by the applicant as at the termination of the employment of the first respondent with the applicant for a period of twenty four months.

[2] Although the applicant argued for an order interdicting the disclosure of confidential information, such as clients and client information, this relief is not clear from its notice of motion. I deal with this matter later.

Urgency

[3] The applicant approached the court on an urgent basis, but allowed sufficient time for the filing of opposing papers and full opposition by the first respondent. The first respondent contended that the applicant was supine for approximately six weeks and there is little to be gained by bringing the application at such a late stage. It is trite that, although applications seeking orders in restraint of trade are said to have the "inherent quality of urgency" the applicant must nevertheless show that the application is urgent.[1] The applicant set out the grounds of urgency, in detail, in its

[1] See *Vumatel (Pty) Ltd v Majra & others* (2018) 39 ILJ 2771 (LC) at paras [4] to [8]

founding papers, which I see no reason to repeat. I accept that the applicant proceeded with expedition while taking appropriate steps to try to avoid litigation. There can be no question that the applicant cannot achieve substantial redress in the normal course, by which time its rights would likely have been extinguished by the passage of time. Having considered the submissions, and the applicable principles,[2] I am satisfied that the applicant has made out its case for urgency.

Factual matrix

[4] The applicant is a diversified group of entities providing services in the agricultural, forestry, grain, mining, and financial sectors. One of its divisions falls in the insurance industry. It is well known that the industry is a highly competitive, and one in which the relationship of trust between the broker and the client is critical.

[5] The first respondent was employed by the applicant as a short term insurance broker, based at its head office, for about seven years. A significant proportion of her remuneration derived from commission, 30%, payable from client premiums. During this time, the first respondent held a portfolio of approximately R25 000 000, 00 which she described as an average portfolio when considered against the insurance business of the applicant as a whole.

[6] It was common cause that brokers in the industry are encouraged to, and do in fact, establish intimate bonds with their clients. Brokers are required to familiarise themselves with the needs of clients. It is common for clients to follow the brokers when they leave their employer. The first respondent conceded that she had established strong bonds with her clients during her time with the applicant, but she also maintained that she had relationships with several clients before working at the applicant.

[2] See *East Rock Trading 7 (Pty) Ltd & another v Eagle Valley Granite (Pty) Ltd & others* [2011] ZAGPJHC 196; [2012] JOL 28244 (GSJ) at para [6]; *Jiba v Minister: Department of Justice & B Constitutional Development & others* (2010) 31 ILJ 112 (LC); *AMCU & others v Northam Platinum Ltd & another* (2016) 37 ILJ 2840 (LC) paras [20] to [26]

[7] The first respondent was engaged by the applicant during March 2018, but only asked to sign a restraint agreement two months later. She alleged, with no proof, that the applicant had deliberately delayed presenting the agreement to her in order to pressurize her into signing it.

[8] It is common cause that the applicant and the first respondent concluded a restraint of trade agreement as well as a separate confidentiality agreement. The confidentiality agreement records that certain information is confidential including the benefits accruing to the first respondent by the applicant, business methods and secrets, technology information, client lists and records, client's financial information, contractual or financial arrangements between the applicant and any other entities it deals with, sales expertise, data relating to clients and product suppliers. The confidentiality provisions are echoed in the restraint agreement.

[9] The terms of the restraint agreement are broader than the applicant seeks to enforce in this matter. In essence, the restraint included an undertaking by the first respondent that she would not be interested in, engaged in, or associated with (whether as owner, employee, agent, consultant, or broker) any business in competition with the applicant for a period of twenty four months following the termination of her employment with the applicant. The applicant, however, seeks only to interdict the first respondent from soliciting the custom of the applicant, transacting with the clientele of the applicant, and disclosing confidential information.

[10] The first respondent alleges that, had she known of the wide terms of the restraint earlier, she would have reconsidered seeking employment with the applicant. On the other hand, the applicant avers that, from the commencement of her employment, the first respondent was aware that she would be required to sign a restraint agreement. She was advised as much in the offer of employment issued to her on 6 February 2018.

[11] The first respondent gave notice of her resignation to the applicant on 4 March 2025, informing it of her resignation with effect from 31 March. She commenced employment with the second respondent the very next day. The second

respondent, MRA Insurance Brokers ("MRA") is the largest broker in Mbombela, and indeed the whole of Mpumalanga. It is a direct competitor of the applicant.

[12] At the time the urgent application was launched, only one and half months after the first respondent had resigned, approximately twenty three clients had cancelled their insurance policies with the applicant. First respondent stated that several of these clients had terminated their policies for reasons unrelated to her departure. A small number of these policies were personal, relating to either her or her family. However, the first respondent conceded that several of the policies were cancelled because the clients wished to move to the second respondent so she could service them. The first respondent denied soliciting the business of these clients and contended that they cancelled their policies voluntarily. Importantly, the first respondent does not deny that she now services several of these clients.[3] The first respondent also does not deny that the restraint agreement prevented her from transacting with, or engaging with, the former clients of the applicant.

<u>Factual disputes</u>

[13] In applications for final relief, when faced with factual disputes, our courts have consistently applied the principles set out in *Plascon-Evans Paints Ltd v Van* Riebeeck *Paints (Pty) Ltd*[4] which holds that, in general, the undisputed averments from the respondent constitutes the substratum upon which the dispute must be resolved.

[14] The *Plascon-Evans* principle is further clarified by *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[5] where Heher JA held:

> "[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that <u>an applicant who seeks final relief on</u>

[3] It was common cause that several former clients (of the applicant) are now serviced by the first respondent, through the second respondent, namely; Gercar (Pty) Ltd, PK Safaris (Pty) Ltd, JG Steyn, JH Du Preez, Bapela Engineering, A Benade, and Timbiwa Minerals.

[4] 1984 (3) SA 623 (A) at 634E - 635C (the "Plascon-Evans" principle)

[5] 2008 (3) SA 371 (SCA)

motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers*: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A - 153C* with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes

fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter." (own emphasis)

[15] The applicant alleges that the first respondent solicited the custom and clients of its business. As previously mentioned, the first respondent denies this and says they left the applicant voluntarily. The first respondent alleges the clients contacted her, and she never contacted them. With respect, I find this version to be far-fetched and untenable. While one accepts and understands that a broker must be intimately acquainted with the client's needs, it does not follow that every client is in regular, and frequent, contact with the broker. This will be dictated by the needs of the client. The first respondent does not explain how it came about that the clients became aware of her departure, or how they accessed her contact details. There can be no doubt that such information would not have been shared by the applicant. Finally, it is too much of a coincidence that so many clients decided to terminate their policies (with the applicant) and migrated to MRA shortly after first respondent joined it. The authorities are clear that, when the facts lie within the knowledge of the respondent, it is impermissible for him, or her, to simply rest their case on a bare denial. I therefore accept that the first respondent solicited the custom of the applicant's clients.

<u>Legal principles and analysis</u>

Protectable interests

[16] The first respondent denies that the applicant has protectable interests. It is unclear on what basis this denial is made. It is well established that the proprietary interests that can be protected by a restraint agreement are essentially of two kinds:[6]

16.1 All confidential matter useful for the carrying on of the business and which, if disclosed to the competitor, may assist him to gain a relative

[6] See *Tension Envelope Corp. (SA) Ltd v Zeller & another* 1970 WLD 333 at 347G-H

advantage. Such confidential material is sometimes referred to as "trade secrets."

16.2 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. This is an important aspect of its incorporeal property known as goodwill.[7]

[17] Whether information is confidential and protectable is a factual question, to be determined by reference to whether the information is: capable of application in a trade or industry, useful and not public knowledge; known only to a restricted number of people; and of economic value to the person seeking to protect it. The enquiry is objective. On the facts of this matter, objectively, there can be no doubt that the information is of economic value in the industry. This information extends, for example, to the client's identities, their contact details, their personal information, their financial needs and histories, and their ability to make regular payments of premiums. Naturally, this information would be known to only a small circle. None of this was seriously contested.

[18] The first respondent denied disclosing or sharing confidential information, trade secrets, or customer connections, with the second respondent. However it is unnecessary for applicant to prove that the first respondent has done so. It suffices that the first respondent had access to such information (which she acknowledged by signing agreements to that effect) and she may do so if so inclined. Where an employee becomes engaged with a competitor, there is a risk of disclosure and the employer is entitled to protect its commercial interests. This was explained in *Experian South Africa (Pty) Ltd v Haynes and another*[8] as follows:

"[18] In *Rawlins and Another v Caravan Truck (Pty) Ltd* [1992] SASCA 204; 1993 (1) SA 537 (A) at 541C–D Nestadt JA, <u>dealing with the issue of a party's relationship with customers, stated that the need of an employer to protect his</u>

[7] See *Sibex Engineering Services (Pty) Ltd v Van Wyk & another* 1991 (2) SA 482 (T) at 502D

[8] 2013 (1) SA 135 (GSJ); (2013) 34 ILJ 529 (GSJ)

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. The learned judge referred to Heydon *The Restraint of Trade Doctrine* (1971) at 108, where it is stated that the "*customer contact*" doctrine depended 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*". In *Morris (Herbert) Ltd Saxelby* (1916) 1 AC 88 (HL) at 709, 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 …*".

…

[20] As I have pointed out above, the *onus* is on the respondent to prove the unreasonableness of the restraint. He must establish that he had no access to confidential information and that he never acquired any significant personal knowledge of, or influence over, the applicant's customers whilst in the applicant's employ. It suffices if it is shown that trade connections through customer contact exist and that they can be exploited if the former employee were employed by a competitor. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant, if its former employee were to take up employment, becomes apparent. See *Den Braven SA (Pty) Limited v Pillay and Another* [2008] 3 All SA 518 (D) at paragraphs [17] to [18].

[21] Where an applicant as employer, has endeavoured to safeguard itself against the unpoliceable danger of the respondent communicating its trade secrets to, or utilising its customer connection on behalf of a rival concern after entering that rival concern's employ by obtaining a restraint preventing the respondent from being employed by a competitor, the risk that the respondent will do so is one which the applicant does not have to run and neither is it incumbent upon the applicant to enquire into the *bona fides* of the

<u>respondent</u>, and demonstrate that he is *mala fides* before being allowed to enforce its contractually agreed right to restrain the respondent from entering the employ of a direct competitor (see *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others* 2004 (4) SA 156 (W) at 166I to 167C). <u>In such circumstances, all that the applicant needs do is to show that there is secret information to which the respondent had access, and which, in theory, the respondent could transmit to the new employer should he desire to do so</u>.
(own emphasis)

[19] Accordingly, the applicant does not need to show that first respondent actually disclosed confidential information: it need only show that she could potentially do so. The very purpose of the restraint is to relieve the applicant from the burden of showing *bona fides* or lack of retained knowledge on the part of the respondent concerning the confidential information. The applicant does not need to content itself with crossing fingers and hoping the respondent will abide by the undertakings that she has given.

[20] While the confidential information cannot be expunged from the first respondent's mind, she can and should be prevented from sharing that information with third parties, or using such information to gain a competitive advantage. In *Printers and Finishers Ltd v Halloway*[9] the court held: "*The mere fact that the confidential information is not embodied in a document but is carried away by the employee in his head is not, of course, of itself a reason against the granting of an injunction to prevent its use or disclosure by him.*"

[21] The applicant did not seek a specific order interdicting the first respondent from disclosing confidential information. However, this relief was adequately dealt with in the founding papers and during argument. Furthermore, such relief is of the

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[9] See *Strike Productions (Pty) Ltd* v *Bon View Trading (Pty) Ltd & others* [2011] JOL 26664 (GSJ) at para [18]

same nature sought in the other prayers.[10] In the circumstances, the relief may be granted under the claim for 'further and alternative relief.'

Reasonableness of the restraint

[22] In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[11] the Appellate Division held that the party seeking to enforce a restraint must prove the agreement, and its breach. Thereafter, a respondent who seeks to avoid the restraint, bears an onus to demonstrate, on a balance of probabilities, that the restraint is unreasonable, and therefore unenforceable. The central question is whether the restraint is unreasonable in the context in which it is to be enforced. Factors the court will consider include the subject matter, area, and duration of the restraint.[12] Our courts are more likely to take a more favourable view of the restraint where the parties engaged on an equal footing when the restraint was agreed.[13] Although this is a question of fact there is a general acceptance that, in the employment context, parties rarely contract as equals. Exceptions will include instances where the employee is in senior management, highly skilled and in demand.

[23] In disputes concerning restraints, there arises a tension between the right of individuals to be economically active, to pursue his or her trade or profession, and the need for individuals to respect the agreements into which they have voluntarily entered. Contracts which unreasonably restrict the covenantor's freedom to trade, or work, are unreasonable and unenforceable.[14]

[24] Public policy dictates that agreements entered into voluntarily are binding and enforceable. The court must therefore strike a balance between the need to respect agreements,[15] the freedom of the individual employee to practice his trade, professional or occupation,[16] the nature of the restraint, and the competing interests

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[10] See *D.D v I.L and Another* (16939/2024) [2024] ZAWCHC 215 (20 August 2024)

[11] 1984 (4) SA 874 (A)
[12] Experian, cited in fn. 8 at para [57]
[13] *Dickinson Holding Group v Du Plessis* 2008 4 SA 218 N
[14] *J Louw & Co. (Pty) Ltd v Richer* 1987 (2) SA 237 (N) at 243 D - E
[15] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at para [94]
[16] See section 22 of the Constitution of the Republic of South Africa, 1996

of the parties.[17] It is necessary for the court to make value judgments[18] taking into account all the relevant considerations including the consideration that everyone should be economically active and productive.

[25] In this matter, it is common cause that the restraint exists and was breached. The restraint prohibited the first respondent from taking up employment with a competitor but she did exactly that. It is common cause that the first respondent, in breach of the restraint, is transacting with former clients of the applicant. That she does so at the request of the clients is of no moment. Moreover, on the facts, I have already found that first respondent solicited the clients of the applicant. In the circumstances, the burden lies with the first respondent to show that the restraint is unreasonable. Given that the applicant only seeks the partial enforcement of the restraint, and does not seek to extinguish the first respondent's ability to work in the industry, the burden of proving that the restraint is unreasonable will be even harder.

[26] The first respondent does not expressly take issue with the matter, area, or duration of the restraint. Instead, she says that she did not contract with the applicant as an equal party. On the facts of this matter, this is of no moment. The first respondent was fully aware that the applicant required her to sign a restraint. This was made clear to her when she was offered employment. She did little to enquire about the nature and extent of the restraint. Apart from the fact that the applicant is a large concern, and the first respondent is an employee, there is little detail of the extent of the inequality between the parties.

[27] In the circumstances, the first respondent has failed to demonstrate that the restraint is unreasonable.

<u>Conclusion</u>

[17] *Torrente & another v Grant Monaghan & Associates Incorporated (*2024) 45 ILJ 798 (LAC) at para [21]

[18] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 SCA at para [15]

[28] The applicant seeks a final interdict and must therefore satisfy three requirements[19] namely: a clear right, an injury actually committed or reasonably apprehended, and the absence of any alternative satisfactory remedy.

[29] As I explained above, I believe that the applicant has proven that it has a clear right to the relief sought in prayer 2.1 of the notice of motion. It proved the existence of the restraint, and the confidentiality agreement, and the breach thereof. There is no satisfactory alternative remedy. If the first respondent is not interdicted from disclosing the confidential information, relating to the clients and the business of the applicant, to third parties (including the second respondent) there is a reasonable apprehension that she will do so in breach of her confidentiality undertakings. The first respondent finds herself employed by the second respondent, in competition with the applicant. The temptation is always present to use her prior knowledge, gained during her employment with the applicant, to benefit herself and the second respondent.

[30] The applicant failed to prove any right to the relief sought in prayer 2.2 of the notice of motion. No factual basis was laid for such relief. I am therefore not inclined to grant such relief.

<u>Costs</u>

[31] The applicant did not vigorously pursue costs during argument. On balance, in my view, the requirements of law and fairness do not dictate that there should be a costs order.

Court Order

[32] In the circumstances, I make the following order:

32.1 The application may be heard as one of urgency, in accordance with Rule 38 of the Rules of this Court,

[19] *Setlogelo v Setlogelo* 1914 AD 221 and 227

32.2 The applicant is granted an order in terms of prayer 2.1 of the notice of motion,

32.3 The first respondent is interdicted for a period of 24 months (from the date of her termination of employment with the applicant) from using for her own benefit, or disclosing to second respondent, or any other party, the information identified as “confidential” in the restraint of trade and confidentiality agreements between herself and applicant.

32.4 There is no order as to costs.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv M Jacobs

Instructed by: Seymore Du Toit & Basson Attorneys

For the First Respondent:

Adv R Van Schalkwyk

Instructed by: Du Toit – Smuts Attorneys