



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JA2025-091548

In the matter between:

BACKSPORTS (PTY) LIMITED

Appellant

and

OFENTSE MOTLHANKE

First Respondent

O MEDIA VISUALS PTY LTD

Second

Respondent

Heard: 30 July 2025

Order: 30 July 2025

Reasons: 27 October 2025

Coram: Nkutha-Nkontwana JA, Tokota AJA et Djaje AJA

REASONS FOR ORDER

DJAJE, AJA

Introduction

[1] This urgent appeal was heard on 30 July 2025, and an order upholding the appeal was granted as follows:

- '1. The appeal is upheld.
2. The order of the Labour Court is set aside and substituted with paragraph 2 and 3 of the Notice of Motion as follows:
 - 2.1 Rectification of the employment contract between the Applicant (represented by Erwin Schmidt) and the First Respondent (annexure "AS4") is allowed by substituting the date in the offer of employment "27 November 2024" with "27 November 2023" and by substituting the date of the acceptance portion signed by the First Respondent "11/12/2024" with the date "11/12/2023".
 - 2.2 Interdicting and restraining the First Respondent for the remaining period of the restraint period in his contract of employment with the Applicant dated 11 December 2023, alternatively for an unlimited period from:
 - 2.2.1 soliciting work from the Applicant's customers (including SuperSport Schools (Pty) Limited, Central Gauteng Athletics and Oban Productions (Pty) Limited directly and indirectly;
 - 2.2.2 soliciting the Applicant's current employees, and/or any persons who was employed by the Applicant at any time during a 12 (twelve) month period preceding the termination date, from joining him in any intended business undertaking which operates in the same field of activity or industry in which the Applicant is currently operating, indirectly or directly;

2.2.3 uttering threats in respect of the Applicant's employees;

2.2.4 harassing the Applicant, Applicant's directors and employees and from injuring the Applicant's directors and employees;

2.2.5 damaging or sabotaging the Applicant's assets (including any OB Trucks- used by the Applicant).

3. The Respondent is to pay the costs of the main application including costs of the appeal.'

[2] This judgment contains the reasons for the above order.

[3] The appellant challenges the entire judgment of the court *a quo*, wherein the court dismissed the appellant's claim to enforce a restraint of trade agreement and a final interdict against the first and second respondents (collectively the respondents). The first respondent is the sole director of the second respondent. The appellant sought the following order against the first respondent:

'

3. Interdicting and restraining the first respondent for the remaining period of restraint period in his contract of employment with the applicant dated 11 December 2023, alternatively for an unlimited period from:

3.1 soliciting work from the applicant's customers (including Supersport Schools (Pty) Limited, Central Gauteng Athletics and Oban Productions (Pty) Limited directly or indirectly;

3.2 soliciting applicants' current employees, and /or any persons who were employed by the applicant at any time during a 12 (twelve) month period preceding the termination date, from joining him in any intended business undertaking which operates in the same field of activity or industry on which the applicant is currently operating indirectly or directly;

- 3.3 uttering threats in respect of the applicant's employees;
- 3.4 harassing applicant, applicant's directors and employees and from injuring applicant's directors and employees;
- 3.5 damaging or sabotaging applicant's assets (including any OB Trucks used by the applicant).'

Background

[4] This matter was urgently brought before the Court on 14 February 2025. The appellant, a company in the internet communications and technology sector, employed the first respondent as a Senior Stream Lead from 1 January 2024 until his dismissal on 16 October 2024. According to the employment contract signed by the first respondent, clauses 16.1 to 16.3 contained a restraint of trade, as follows:

'16.1 You undertake to the Company and to each of the Group Companies that whilst you are employed by the Company and for a period of twelve (12) months from the Termination Date, you will not, whether directly or indirectly:

- compete with the Company and/or any of its Subsidiaries or be interested in any business which trades in any field of activity which is substantially similar to any of the fields of activity referred to in clause below within any of the areas of restraint set out in clause 16.3 below. For this purpose, the Manager shall be deemed to be so "interested in a business", or "competing with the Company and/or any of its Subsidiaries" if he becomes engaged or interested, whether directly or indirectly, and whether as an employee, proprietor, partner, shareholder, agent, consultant, financier or otherwise, in any company, firm, business or undertaking which carries on business in any of the fields referred to in clause 16.2 below and in any of the areas of restraint set out in clause 16.3 below save for any investment of no more than 5 per cent of the shares of any company listed on a recognised stock exchange:
- persuade, induce, encourage or procure any employee of the Company and/or of any of the Group Companies, or any person who was an employee of the Company and/or any of the Group Companies at any time during a twelve (12) month period preceding the Termination Date, to become employed by or interested in any business which trades in any

field of activity which is substantially similar to any field of activity referred to in clause 16.2 below, or to terminate his employment with the Company or any of the Group Companies other than in the proper execution of his duties as an employee of the Company,

- 16.2 The fields of activity in respect of which the restraint applies will be in respect of the marketing, sale and/or distribution of corporate and promotional products as conducted by the Group as at the Termination Date.
- 16.3 The area of restraint referred to in this clause 16 shall be every province of the Republic of South Africa, every other territory in which the Company or any of the Group Companies carries on business at the Termination Date and any other territory which the Board has resolved the Group should enter within 6 months of the Termination Date.'

[5] The first respondent appeared before a disciplinary hearing facing seven charges of misconduct. After he was found guilty, the chairperson of the disciplinary hearing recommended his dismissal from the appellant. The first respondent was dismissed on 16 October 2024. Displeased with his dismissal, on 21 November 2024, he referred a dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). It is common cause that the first respondent abandoned his unfair dismissal claim, and as a result, the conciliation proceedings before the CCMA on 19 December 2024 did not proceed. At that time, the appellant had already issued a warning letter to the first respondent for contravention of the restraint of trade clauses, dated 26 November 2024.

[6] The appellant cites several incidents that led to the urgent application filed in the Labour Court, which commenced on 10 January 2024. The appellant's Chief Operations Officer, Mr Erwin Schmidt (Mr Schmidt), received information from one of the employees, Mr Sihle Ndou (Mr Ndou), that the first respondent had approached him to join a new business venture. Mr Ndou's response was that the first respondent should stop asking him to be involved in his business, as he was not interested. The first respondent admitted that he did contact Mr Ndou, for a different reason, though, which was to arrange with Mr Ndou to go and take photos for his friend, Ms Rethabile Kome, as he did not have a camera.

- [7] On 14 January 2024, another incident occurred when the appellant's Managing Director, Mr Themba Madima (Mr Madima), and Mr Schmidt learned from Mr Sean Everett (Mr Everett), who is contracted by the appellant's major customer and owns Oban Productions, that the first respondent had approached him for collaboration. The first respondent admitted to approaching Mr Everett for employment, as he was permitted by Mr Everett to let him know if he needed any assistance.
- [8] On 17 January 2025, an employee of the appellant, Mr Roly Ramashidja (Mr Ramashidja), informed Mr Schmidt that he teamed up with the first respondent and one Mr Lazarus Zondi (Mr Zondi), under the name of Optic Media, to deliver streaming services at the Central Gauteng Athletics (CGA) awards ceremony, the appellant's customer.
- [9] It was Mr Ramashidja who also mentioned the alleged threats made by the first respondent towards the appellant's employees and assets. According to Ramashidja, on their way to the CGA awards, the first respondent showed him a person who would assist in taking down Mr Schmidt and ensure that the OB truck belonging to the appellant wouldn't work. The appellant uses the OB truck as an outside broadcasting vehicle for conducting business activities. Mr Ramashidja also showed Mr Schmidt a WhatsApp message where the first respondent asked him to work with him and Mr Zondi to take the appellant down. In that message, the first respondent told Mr Ramashidja that he had all the big bosses from SuperSport Schools and SuperSport, the appellant's customers. The first respondent proffered a bare denial to these allegations.
- [10] On 1 February 2025, Messrs Schmidt and Madima observed the first respondent, accompanied by Mr Zondi and Dante, providing streaming services at a CGA athletic event. They took a photo as evidence of their observation as proof that the first respondent was indeed approaching the appellant's customers and doing work for them.
- [11] The Court *a quo* dismissed the appellant's claim and pertinently found that:

[24] On trade connections, the applicant relied exclusively on the first respondent's approach to Everett of Oban Productions, where the

undisputed facts are that the first respondent was seeking employment from Everett, which did not materialise. From the pleadings, Oban Productions is the applicant's customer. Nowhere is it stated, as it was submitted from the bench, that Oban Productions is the applicant's competitor.

[25] The closest the applicant has come to establishing any breach is the allegation relating to the first respondent's attempted poaching of its employee, Ndou. The first respondent has denied this. He said that Ndou and his brother are known for taking photos during his spare time and that because he did not have a camera, he contacted Ndou to arrange with his friend, Kome, to go and take pictures for him. Further, the message that Ndou sent to the first respondent does not prove that the first respondent wanted to poach him.

[26] Even if the first respondent was seen streaming for CGA awards, which is not in dispute, it would in my view be unreasonable to restrain the first respondent in the circumstances where the applicant woefully failed to show that the first respondent had access to confidential information and used his trade connections to his advantage or his new employer to the prejudice of the applicant. Further, the first respondent did not leave the employment voluntarily. It will be an injustice and unjustified limitation of an individual's right to enforce a restraint agreement against him when his ex-employer dismissed him. The applicant, having fired the first respondent, now expects him to starve by interdicting and restraining him from earning a living and from his occupation and trade.

[27] The first respondent was permanently employed for a period of less than 10 months at the time of dismissal. This is a short period and it would be unreasonable to restrain the first respondent for 12 months from the date of his dismissal. In my view, the fact that the first respondent was dismissed has disentitled the applicant from enforcing the restraint agreement. In other words, the applicant waived its right to enforce the restraint when the first respondent left because of dismissal.'

- [12] The appellant has raised several grounds of appeal, which will be addressed below.

Enforcing the restraint of trade against a dismissed employee

- [13] The appellant argues that the court *a quo* erred in finding that it was disentitled to enforce the restraint agreement because it waived that right by dismissing the first respondent from its employment. Clearly, the Court *a quo* deviated from the binding authority in *Reeves and Another v Marfield Insurance Brokers CC and Another*¹ (*Reeves*).

- [14] In *Reeves*, the Appellate Court was similarly confronted with the question of whether a restraint of trade agreement is enforceable where the termination of the employment contract is consequent to an unlawful or unfair dismissal of the employee. On a reading of the restraint covenant, the court held that:

‘In my view there is no ambiguity. The words “ceases to be employed” indicate an intention that the restraint is to operate once there is no longer an employment relationship between the employer and employee. The words that follow, ie “for any reason whatsoever”, make it clear that the circumstances in which the employment relationship comes to an end or the underlying cause of its termination are irrelevant to the operation of the restraint provision.’²

- [15] The Appellate court went on to state the following caveat to the above tenet:

‘Where the wrongful termination by an employer is fraudulent, eg the employee is hired and fired with the sole object of imposing a restraint upon him, or otherwise amounts to a wrongdoing on the part of the employer which is wilful, ie it involves bad faith on his part, a court would on that ground alone decline to enforce the restraint. Indeed, an express provision in terms of which one contracting party undertakes to condone or submit to the fraudulent conduct of the other will be regarded as *contra bonos mores* and so offensive to the interests of society as to render it illegal and hence void.

...’³

¹ 1996 (3) SA 766 (A).

² Ibid at 771I – 772B.

³ At 775B – D.

- [16] In the present case, the restraint of trade provisions refer to the “Termination Date” and nothing more. In essence, on the authority of *Reeves*, the restraint of trade agreement is enforceable despite the circumstances that led to the termination of the employment contract. It is not the first respondent’s argument that his dismissal was fraudulent, as it was solely effected for the purposes of enforcing the restraint of trade agreement. The appellant argues, correctly, that the first respondent was dismissed after pleading guilty to the charges brought against him and subsequently abandoned his unfair dismissal dispute at the CCMA.
- [17] It follows that, in the circumstances, the dismissal of the first respondent was irrelevant to the enforcement of the restraint of trade agreement. The finding by the court *a quo*, that, by dismissing the first respondent, the appellant waived its right to enforce the restraint of trade against him is a clear misdirection.

Necessary averments to show a protectable proprietary interest

- [18] The appellant argued that the court *a quo*’s finding that it failed to make the necessary averments to show that it has a protectable proprietary interest was incorrect. It was submitted that the appellant sought to protect its goodwill, reputation, the well-being of its employees, the integrity of its assets, and its existing contracts with its customers. The appellant stated in the founding affidavit that its most important customers are SuperSport, CGA, and Oban Productions, operating in the same field as the appellant. In addition, the appellant submitted that a service delivery agreement existed between the appellant and SuperSport.
- [19] In the founding affidavit, the deponent identified the appellant’s customers within the same industry, specifically mentioning SuperSport, CGA, and Oban Productions. The first respondent did not dispute these averments. Furthermore, the first respondent did not refute the averments that he was seen providing streaming services for CGA and approached Mr Everett of Oban Productions to do business with him.

[20] In fact, the first respondent argued that the appellant's goal in bringing the urgent application was to prevent him from practising his trade and being economically active.

[21] The first respondent's argument was that he did not violate the restraint of trade because he was not competing with the appellant. He explained that in his position with the appellant, he did not directly deal with the customers or build any relationship with them, nor did he have access to any confidential information that he could use against the appellant.

[22] The court *a quo* held as follows:

'Therefore, where it is shown that there is (1) confidential information and/or trade connection (2) to which the employee had access to and (3) which he could transmit to his new employer, the applicant would be entitled to the protection afforded by the restraint agreement. Whether the information is confidential or constitutes a trade secret is a factual enquiry, to be determined by considering whether the information is useful and not in the public knowledge, whether it is known only to a restricted number of persons and whether it is of economic value to the applicant.'

[23] The approach and focus of the court *a quo* was on protecting confidential information or matters that a competitor could use to gain a competitive advantage in establishing a protectable proprietary interest. Additionally, although the first respondent was observed streaming at the CGA event, there was no evidence that he had access to confidential information or used his trade connections to his benefit, as he was employed with the appellant for a very short period.

[24] It is crucial for a party enforcing a restraint of trade to establish a protectable interest. In *Basson v Chilwan and Others*⁴ (*Basson*), the court outlined the questions to consider when assessing the reasonableness of restraint of trade provisions as follows:

- (a) Is there an interest of the one party which is deserving of protection at the termination of the agreement?

⁴ 1993 (3) SA 742 (A).

- (b) Is such interest being prejudiced by the other party?
- (c) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?
- (d) Is there another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?

[25] In *Labour Court Manual*, the authors Prinsloo and Van Niekerk referred to the two categories that the protection of proprietary interest fall into as:

'The first is confidential information which is useful for the carrying on of the business and which could be used by a competitor, if it were to be disclosed to that competitor to gain a relative competitive advantage (sometimes referred to 'trade secrets'). The second is relationships with customers, potential customers, suppliers and others that make up what is sometimes referred to as the 'trade connection' of the business, this being an important aspect of its incorporeal property, known as goodwill.'⁵

[26] This Court in *Ball v Bambalela Bolts (Pty)Ltd and Another*⁶, dealing with the reasonableness of the restraint of trade, held that:

'In *Reddy v Siemens Telecommunications (Pty) Ltd*, it was held that the reasonableness of a restraint could be determined without becoming embroiled in the issue of onus. This could be done if the facts regarding reasonableness have been adequately explored in the evidence and if any disputes of fact are resolved in favour of the party sought to be restrained. If the facts, assessed as aforementioned, disclose that the restraint is reasonable then the party, seeking the restraint order, must succeed, but if those facts show that the restraint is unreasonable, then the party, sought to be restrained, must succeed. Resolving the disputes of fact in favour of the party sought to be restrained involves an application of the *Plascon-Evans* rule.'

⁵ C Prinsloo, A van Niekerk, 'Labour Court Manual', Juta at p 39.

⁶ (2013) 34 ILJ 2821 (LAC) at para 14.

- [27] The court in *Reddy v Siemens Telecommunications*⁷ (*Reddy*) further expounded that the enquiry into the reasonableness of a restraint is a value judgment that involves a consideration of two policy considerations, namely, the public interest, which requires that parties to a contract must comply with their contractual obligations (i.e. *pacta servanda sunt*) and the principle, that a citizen should be free to engage or follow a trade, occupation or profession of her choice.
- [28] The enquiry into reasonableness has been refined and elaborated on in cases such as *Reddy* and *Basson*. The enforceability of a restraint essentially hinges on the nature of the activity that is prevented, the duration of the restraint, and the area of operation of the restraint. In particular, the determination of reasonableness is, essentially, a balancing of interests that is to be undertaken at the time of enforcement and includes a consideration of '*the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests*'.⁸
- [29] In the present case, the first respondent conceded that his employment was subject to a restraint of trade agreement, but vehemently denies being in breach thereof. The first respondent argued that he had no relationship with the appellant's customers and could not compete with the appellant's business. However, he conceded that he interacted with the appellant's customers, which was prohibited by the restraint of trade agreement. By approaching the appellant's customers, including CGA and Oban Productions, about a business opportunity, the first respondent breached the restraint agreement directly.
- [30] A further breach is revealed when the first respondent urged employees of the appellant, Messrs Ramashidja and Zondi, to collaborate with him in providing streaming services at the CGA awards ceremony on 17 January 2025.
- [31] The appellant, in seeking to enforce the restraint of trade agreement, succeeded in proving the contract and its breach.

⁷ 2007 (2) SA 486 (SCA).

⁸ See: *Burmbuild (Pty) Ltd v Ndzama* [2013] 2 All SA 399 (ECG) at para 19.

Protection of employees and assets

[32] In the notice of motion, the appellant sought an order to prevent the respondent from threatening its employees and assets. In the founding affidavit, the appellant alleged that the respondent threatened to take down Schmidt and prevent the OB truck belonging to the appellant from operating. The court *a quo* determined that it lacked jurisdiction to grant such an order, as there was no longer an employment relationship between the appellant and the respondent. The court held that:

[28] Mr Van Graan submitted that even if I find against the applicant on the restraint, this Court should nevertheless interdict the first respondent from uttering threats against its employees, harassing the applicant and its directors and employees and damaging or sabotaging the applicant's assets. The applicant does not plead where this Court gets the jurisdiction from and the power to grant such an order. There is no employment relationship between the applicant and the first respondent. The application in this regard must fail for lack of jurisdiction. (Own emphasis)

[33] According to the appellant, section 77(3) of the Basic Conditions of Employment Act⁹ gives the Labour Court the same authority as the High Court to decide on restraint of trade matters. As a result, the Labour Court can address the unlawful threats made by the first respondent, which are related to the main claim. In this case, sections 151 and 158(1)(j) of the Labour Relations Act¹⁰ (LRA) do not stop the Labour Court from considering the related issues when it has jurisdiction over the main claim.

[34] Sections 151 and 158(1)(j) of the LRA provides that:

'151 Establishment and status of Labour Court

(1) The Labour Court is hereby established as a court of law and equity.

⁹ Act 75 of 1997.

¹⁰ Act 66 of 1995, as amended.

- (2) The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of South Africa has in relation to matters under its jurisdiction.
- (3) The Labour Court is a court of record.’

And

‘158 Powers of Labour Court

- (1) The Labour Court may –

...

- (j) deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law.’

[35] In *Groom v Daimler Fleet Management (Pty) Ltd*¹¹, this Court determined the issue of jurisdiction on ancillary matters as follows:

‘[61] Convenience is a key consideration. In terms of the common-law principle of *causae continentia*, for example, in order to avoid duplication of proceedings, or conflicting decisions in the same matter, or in order to dispose of cases more conveniently: ‘(a) more than one claim against different persons or in respect of different things in different jurisdictional areas may be joined in one process before one court if it could be said that together they really constituted one case in that the one began where the other ended’; and ‘(b) one indivisible obligation in respect of an indivisible thing which was situated in two different jurisdictional areas may be enforced in any of the areas concerned’.

[62] The jurisdiction of a High Court, and equally that of the Labour Court, may be extended by application of the principle of *causa continentia*. Those courts are also equally obliged in terms of the Constitution to

¹¹ (2021) 42 ILJ 2179 (LAC)

develop the common law, including the common law relating to jurisdiction in order to promote the spirit, purport and objects of the Bill of Rights.

[63] Section 151(2) of the LRA provides that '[t]he Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a division of the High Court of South Africa has in relation to matters under its jurisdiction'.

[64] In terms of s 158(1)(j) of the LRA the Labour Court has the power to 'deal with all matters necessary or incidental to performing its functions in terms of [the LRA] or any other law'.

[65] Effectiveness is another consideration in the exercise of incidental jurisdiction. Beside the fact that the court *a quo*'s obligation to give an effective judgment on the issue of the abandonment of the claim had been undermined by its finding on jurisdiction, it seems to create significant inconvenience if a litigant is expected to approach another court in respect of part of a matter, that is actually ancillary or incidental to the main claim pending before the Labour Court, or to deal with such matters piecemeal in different fora. The concession that the Labour Court did not have the jurisdiction to determine the issue raised in the conditional counter-application, despite the circumstances of its incidence, does not appear to have been correctly made.

[66] Once the court *a quo* was satisfied that it had jurisdiction in respect of the main claim, ie the unfair dismissal claim, and accordingly also in respect of the defence raised by the respondent (or liquidator) in terms of s 359(2)(a), it also had jurisdiction or the power to determine the conditional counter-application which was essentially interlinked and not merely ancillary to the issue raised by the defence, namely, whether the claim had been abandoned.'

[36] As stated above, for convenience and effectiveness, the court *a quo* was not prevented from considering ancillary matters related to the threats made to employees and assets, provided it had jurisdiction over the main claim. There

is no doubt that the court *a quo* had jurisdiction to assess the restraint of trade claim and should have decided on the interdict concerning the threats made. The claim for an interdict should not have been dismissed based on a lack of jurisdiction.

[37] The appellants made a case for the grant of the interdict. The first respondent proffered a bald denial to the serious allegations of sabotage, threats made to employees, and threats of damage to the appellant's assets levelled against him.

[38] It was for the above reasons that the order as referred to in paragraph 1 was granted.



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APPEARANCES:

For the Appellant:

Adv Van Graan SC

Instructed by AJ Stone Attorneys

For the First Respondent:

Mr Roestoff of Roestoff Attorneys