THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: 2025-144680

In the matter between:

G4S DEPOSITA (RF) (PTY) LTD **Applicant**

and

CELESTE HARMSE **Respondent**

Heard: **22 October 2025**

Delivered: **5 November 2025**

This judgment was handed down electronically by circulation to the parties by email. The date and time for hand-down is deemed to be 5 November 2025

<u>Summary</u>: Confidentiality obligation – fiduciary duty of employee relating to confidential information of employer considered – conduct of employee upon resigning breaching fiduciary duty relating to confidential information – employee having no reasonable / acceptable explanation for her conduct – employee attributing information when joining competitor – employer entitled to relief protecting confidential information

Costs – principles considered – exercise of discretion – conduct of employee considered – employee faced with indefensible conduct offering false explanation – employee failing to provide unequivocal undertaking – cost order between party and party scale C justified

JUDGMENT

SNYMAN, AJ

Introduction

[1] The current application came before me at the conclusion of a course of litigation embarked upon by the applicant against the respondent, when the respondent sought to resign from her employment with the applicant and then appropriate a substantial amount of the applicant's confidential information. Contrary to what is mostly the case in such situations, what we have in this case is not the enforcement of a pertinent restraint of trade obligation. Rather, it relates to the fiduciary duty owed by the respondent to the applicant as employee, by virtue of her contract of employment with the applicant. The application has been brought in terms of section 77(3) of the Basic Conditions of Employment Act (BCEA)[1].

[2] The matter started, in terms of the applicant's notice of motion, with an *ex parte* Anton Piller order and interim interdict under part A, pending the final relief sought under part B of the application. The application was originally brought on 22 August 2025, and in an order granted on 26 August 2025, the respondent was interdicted and restrained from using, distributing, copying, publishing or implementing the applicant's data, intellectual property, documentation and / or confidential information. A further order was also granted in terms of which the respondent was ordered to disclose and point out to the sheriff: (1) documents belonging to or emanating from the applicant; and (2) any electronic storage device, which would include any personal computer, cell phone, storage discs, hard disc drives, solid state drives, USB flash drives and any tablet. The sheriff was then authorised to seize, attach and remove all these items and to keep them in safe custody. A digital expert examination by computer experts, including any experts appointed by the respondent, of any documents and/or storage devices pointed out and seized in the search, was authorised. And lastly, the computer forensic expert(s)

[1] Act 75 of 1997 (as amended).

would be required to make a detailed inventory of the items and file an affidavit with the court setting out their actions and what documents, data or information was retrieved from the devices. The return date for all these interim orders was 22 October 2025.

[3] Where it came to the final relief sought under part B of the notice of motion, the application was opposed by the respondent, who filed an answering affidavit on 1 October 2025. However, and when the matter came before me on 22 October 2025 on the return date, the parties appeared to have achieved consensus that the applicant would in principle be entitled to the substantive relief sought in part B of the application, effectively meaning that the interim interdict against the respondent protecting the applicant's confidential information be made final. Urgency was not in issue between the parties, having been disposed of in the order of 26 August 2025. But what remained hotly contested was the issue of costs. The applicant persisted with a request for punitive costs against the respondent. The respondent argued that no costs order was appropriate.

[4] After hearing argument by both parties, having considered all the pleadings and heads of argument filed, and on 22 October 2025, I granted the following order:

1. The respondent is interdicted and restrained from using, distributing, copying, publishing or implementing the applicant's (or the applicant's clients) data, intellectual property, documentation and / or confidential information in any form or manner whatsoever.

2. The respondent is ordered to pay the costs of the application, which shall include the costs of part A of the application, on the party and party scale C.

3. Written reasons for this order will be provided on 5 November 2025.

[5] This judgment now constitutes the written reasons as contemplated by paragraph 3 of the order, above. I will commence by setting out the relevant background facts.

<u>The relevant background</u>

[6] In this instance, much of what the applicant complained of the respondent had done, was not really in dispute. What was in issue is whether the respondent, even on her own version, had a proper explanation for what she did, which conduct on face value appeared entirely irregular, inappropriate and highly questionable, especially considering the seniority of her position at the applicant and the fact that she was out to join a competitor upon leaving.

[7] The applicant is a cash and payments solutions enterprise which specialises in providing advanced automated cash management solutions to optimise the handling of cash and payments for its customers' businesses of all sizes. Its customer offerings are tailored to the requirements of each individual customer so as to reduce the risks, costs and inefficiencies associated with manual cash handling. The business of cash management services requires a very high degree of good faith and confidentiality between the applicant, its employees and its customers. The applicant's employees have access to confidential information relating to *inter alia* customer lists, client financial information, pricing and business strategies, as well as intellectual property and proprietary information relating to security features of devices, and the pricing for the material costs on in house developed devices and internal processes.

[8] The bulk of the confidential information of the applicant is contained in electronic files, folders, and shared drives used in the ordinary course of the applicant's business and which are housed in Google Drive for Business, which is the enterprise component of Google Workspace. This is a secure, business-grade Google Workspace service subscribed to and managed by the applicant. This repository of confidential information is only accessible to employees of the applicant. No third parties or the public have any access to this information. All this information is proprietary, highly confidential, and is owned and retained by the applicant.

[9] The respondent was employed by the applicant as the Head: Retail Cash Solutions, which is a high level and senior position. She had unfettered access to all of the applicant's confidential information on its systems. She commenced employment on 4 January 2010, in terms of a written contract of employment. This contract of employment, in clause 8, contained a

confidentiality undertaking. In terms of this undertaking, she undertook that during the course of her employment and upon termination thereof, not to use, for any purpose whatsoever, any material, manual, document or publication which is or has been used by the applicant in the performance of its business. Also, and upon termination of employment, she was required to return all documents, drawings, reports, manual, correspondence, customer lists, computer programmes and all other material and copies acquired by her during the course of her employment. The respondent was also bound by the applicant's business ethics policy which provided that employees should not make use of confidential information obtained through their employment, nor disclose it.

[10] On Monday, 4 August 2025, the respondent tendered her resignation. This resignation was however preceded by a number of pertinent actions on her part, which on face value smacked of impropriety. This is especially so considering that upon the termination of her employment with the applicant, she would immediately commence employment with Fidelity, a direct competitor of the applicant in the cash and payment solutions industry. These events are set out below.

[11] First, and two days earlier, on Saturday, 2 August 2025, the respondent entered the applicant's offices, together with an unidentified man and woman. They were observed on the applicant's closed-circuit television (CCTV) removing various items from her office, including a box of hardcopy files and documents. Next, and on Sunday, 3 August 2025, the respondent began downloading documents from the applicant's Google Drive repository of company information, starting from approximately 10h57 and until about 19h00. She resumed downloading files at approximately 06h00 on Monday, 4 August 2025. Approximately 1 083 documents were downloaded by her in this period.

[12] When the respondent then handed in her letter of resignation on 4 August 2025, the applicant sought to discuss this with her, asking her to reconsider it. During this discussion, she mentioned that she thought that the applicant would offer her the vacant sales director role, for which the applicant did consider her to be a strong candidate for appointment. She also mentioned

that she had cleared out her office as she thought she was not going to be permitted to tender her services during her notice period. But she did not explain what she had removed.

[13] The respondent was indeed placed on garden leave having submitted her letter of resignation, however this only happened some two weeks later, on 19 August 2025. In this two weeks' period preceding being placed on garden leave, the respondent did not once seek to do a handover to any relevant personnel of the applicant using any of the information / documents she had taken / downloaded. She did not even disclose to the applicant that she had downloaded all of this information. She also never offered to return the documents / information or to delete the same.

[14] The respondent was placed on garden leave on 19 August 2025 when the respondent learned she would be taking up employment with Fidelity. The applicant learned this when it proceeded to offer the respondent the vacant position of sales director, which it believed she would accept. However, and on 14 August 2025, the respondent rejected the sales director position and expressed a clear and final intention to leave the applicant's employ and join Fidelity. It is then that the applicant was prompted to investigate the respondent's movements, and it then discovered all the conduct on her part set out above.

[15] In the light of the reasonable belief held by the applicant that the respondent, having downloaded the information / documents, would retain these documents on personal devices or in digital storage, for her own personal use or use by third parties, especially a competitor like Fidelity where the respondent would take up employment, the applicant decided to take urgent action. This prompted the applicant to bring the urgent *ex parte* application on 26 August 2025 as referred to above. The order obtained on that date was executed on 27 August 2025. The execution of the order was carried out by the sheriff and was recorded by an independent observer. The observer's affidavit confirms that the sheriff located and seized a number of items including: (1) approximately 17 workbooks; (2) worksheets including SOP contracts; (3) commission policies; (4) national sales meetings, notes and

competition prize worksheets; (5) customer member list files; and (6) several flash drives and three CDs containing digital information.

[16] When the order was executed and the search conducted, the respondent was less than forthcoming with the information that she had in her possession. It was only belatedly, in the course of the search, that the respondent produced an external drive labelled '*WD Elements*', which the applicant established had been plugged into her laptop to copy information. This drive was found to contain a vast amount of the applicant's information. If the respondent always intended to return any information she had, it is unclear why she did not present this drive to the applicant at the commencement of the search. Instead, she attempted to disguise her possession of this information.

[17] To put matters into proper perspective, over the two days prior to the respondent's resignation, the respondent made 1 083 downloads of documents. This is opposed to her normal downloads which was usually about 150 downloads per month. This is clearly a massive and extraordinary increase in downloads. And to compound the issue, these downloads were all made over the weekend immediately preceding her resignation. The respondent does not dispute having made all these downloads in these two days.

[18] It further appeared that the respondent proceeded to download all this information on external storage devices. There would be absolutely no need for her to do so in the ordinary course of her duties, as all information she would ever need was stored and readily accessible on the Google Storage Drive. There could also be no reason for her to store the information privately. As touched on above, it was established that the respondent downloaded the bulk of the information to a private device, being the external USB device labelled "*WD Elements*" which was connected to her laptop at 17h46 on 3 August 2025.

[19] Further anomalies bear mention. First, the respondent's company cell phone, upon it being returned by her, had been reset to factory settings and as a result, was wiped of its data when she returned it. Also, and between 20 and 21 August 2025, when initial checks were conducted on the respondent's laptop to verify her downloads and browser histories, it was discovered that

through checks of her 'Downloads' folder on her C-drive and her browser history in her 'Google Chrome' application, that her logs had been deleted for the relevant periods in question. Lastly, the respondent had logged in to the Google Drive using a Microsoft browser (not the usual Google browser) when she conducted the downloads, apparently to avoid her online activity being tracked.

[20] In defending the matter, and as touched on earlier, the respondent never effectively challenged the above facts. She admitted having made the downloads. She also admitted that she made more downloads than would normally be the case. But she sought to offer a number of explanations why she did this.

[21] But before dealing with these explanations, the respondent sought to contend that after the Anton Piller order and the interim relief had been granted, there was simply no need to have pursued this matter further, because she had provided an undertaking to the applicant that would dispose of the relief it sought, and that all the information she may have had, had been taken away and / or destroyed. Or as the respondent says, what is done is done and cannot be undone, but things need not continue.

[22] The problem however is that the purported undertaking the respondent said she provided, is in reality no undertaking at all. According to the respondent, the undertaking is contained in a with prejudice letter dated 19 September 2025 sent by her attorneys to the applicant's attorneys. However, and properly considered, this letter does not contain an undertaking in the true sense, but rather an offer in full and final settlement. The undertaking forming the subject matter of the offer is also not the relief sought by the applicant in part B of the notice of motion, but is linked to two caveats. The letter records that the respondent undertakes not to, from her side, unreasonably use, distribute, copy, publish or otherwise exploit any data, intellectual property or confidential information belonging to the applicant, in any form or manner that may constitute unlawful competition. It is also proposed as a component of the whole settlement offer that each party its own costs. The nature of this undertaking will be dealt with later in this judgment.

[23] The respondent says that she never intended to retain or use any confidential information of the applicant and would have conveyed this to the applicant during an exit interview and handover, had such an opportunity been afforded to her. She contends that mere possession of the documents by her does not equate to any wrongdoing, and there exists no evidence that these documents were or would be used for any other reason than the respondent finalizing her work and doing a proper handover. According to the respondent, she would immediately have destroyed or concealed any alleged incriminating material if her intended modus operandi was mala fide. And finally, she explains that her access to company documents, and even the downloads she made as set out above, was authorised and consistent with her duties, took place whilst she was still employed, and related to her working from home, as she routinely did.

[24] Finally, and according to the respondent, the true motive behind this application is not the protection of confidential information, but retaliation for her decision to resign and take up employment with Fidelity. The entire proceedings, as far as the respondent is concerned, is bullying tactics to prejudice the respondent. She explains that she was a mere salaried employee, a single mother, and the primary caregiver to her daughter and aging mother, without the financial means to oppose the applicant. She states that the applicant has repeatedly asserted its commercial strength and capacity to litigate this matter, simply to cause her as much harm as possible.

[25] The above being the pertinent facts in this matter, I must now decide whether, on these facts, the applicant is justified in pursing relief under part B of the notice of motion to finality, and further, to seek punitive costs against the respondent in doing so. Answering these questions, I turn to next.

<u>Analysis</u>

[26] I must confess that I find the conduct of the respondent immediately preceding her resignation to be perplexing. Clearly, she knew well beforehand that she would be leaving and joining a direct competitor, being Fidelity, which state of affairs is inconsistent with any need on her part to then download the amount of information that she did. I am also convinced that her position as Head: Retail Cash Solutions at the applicant had something to do with her managing to secure employment at Fidelity, and she certainly wanted to bolster her

employment there with useful confidential information in tow. She never took the Court into her confidence to say exactly how she came to be employed at Fidelity and what she would be doing there. All this considered, her bulk copying of information over the weekend before she tendered her resignation in itself speaks volumes, and as a matter of common sense, points to the fact that she clearly intended to use this information in her employment at Fidelity.

[27] What must stand out is the sheer volume of the extracting of information perpetrated by the respondent. As set out above, she extracted in excess of 1 000 documents in two days, where she would normally extract 150 documents per month. And all this happens over a weekend, with the bulk of it being throughout the entire day on Sunday 3 August 2025, knowing her resignation would come on Monday. On her own version, she believed she would not be required by the applicant to work out her notice once she resigned, and this situation would of course include blocking her access to the applicant's systems. So, the respondent sought to extract all she wanted and needed before her access privileges were revoked in the normal course. There can be nothing *bona fide* in this conduct, and despite her protestations to the contrary, her intentions in doing so are in my view obvious and likely pre-planned. I am quite satisfied that the respondent intended to extract all this information so she could use it in her new employment at Fidelity.

[28] One must also consider that when the respondent then submitted her resignation on 4 August 2025, the applicant sought to retain her services, by offering her the vacant sales director position she had been interested in. Surprisingly, she rejected this offer, which one would think showed her value to the applicant. What this shows is that when she decided to resign, she made up her mind to leave, which surely makes the bulk download of information immediately before pulling the trigger inexplicable.

[29] When the applicant was placed on garden leave on 19 August 2025, she clearly knew that she would not be required to render any services from then and up to the point of her final termination of employment when her notice expired. Yet she did not offer to do any handover, nor did she offer to return any of the information she knew she still had in her possession. She in fact suggested to the applicant she had no information. When the applicant

executed its Anton Piller order, the respondent was less than forthcoming in disclosing what information she had in her possession. Her conduct in only belatedly disclosing the WD Elements drive is particularly concerning. All said, the respondent was simply not forthright, and considering what I have said above, her lack of openness was in pursuit of her own interests.

[30] Considering what the applicant was confronted with when faced with all the aforesaid undisputed conduct of the respondent, and knowing that the respondent would be joining Fidelity, it is my view that it was entirely justified in accepting that the respondent was conducting herself in an untoward manner and acting in bad faith. As such, it was certainly justified in approaching this Court, seeking the relief as set out in the notice of motion. With the applicant having established what is a proper prima facie case, the duty now shifted to the respondent to provide a plausible and acceptable explanation for her conduct.[2]

[31] However, the explanations offered by the respondent for her conduct are palpably implausible and inherently lacking in credibility. First and foremost, there can be absolutely no plausible reason for her to download such a wealth of information, as she had always unfettered access to all of it on the applicant's systems. In fact, all the information is kept on the secure system and employees are given access to it, so that no downloading is needed. Further, the respondent sought to access the system in a clandestine manner (using a Microsoft account instead of the Google account) to attempt to conceal the download. Finally, she never disclosed to the applicant, even when being finally placed on garden leave, that she downloaded the information or offered to delete and / or return it. As a general proposition, her explanations can comfortably be rejected, and the version of the applicant

[2] In *Federal Cold Storage Co Ltd v Angehrn and Piel* 1910 TS 1347 at 1352 the Court held that: '*… the burden of proving to be honest what admittedly on its face looked dishonest rested upon the respondents themselves, not upon the appellants. Once the appellants had proved a prima facie case of misconduct on the part of the respondents in taking, in violation of their duty, a secret profit of the kind described, the dismissal stood prima facie justified, the burden of proof was shifted, and it lay upon the respondents, as it does upon all agents in a fiduciary position who deal with their principals, to prove the righteousness of the transaction. If they failed to discharge that burden satisfactorily, then the prima facie case against them must prevail and their guilt, justifying dismissal, must be taken to be established. …*'. See also *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2455 (LAC) at para 34; *Aluminium City (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2006) 27 ILJ 2567 (LC) at para 20.

accepted, on the basis of the following *dictum* in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*[3]:

> 'Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where, however, a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the Court may adjudicate the matter on the basis of the facts asserted by the applicant.'

[32] The respondent explained she wanted to use the information to do a handover. This explanation cannot be true, considering the fact that when it became clear to her that there would be no handover done by her as a result of all the events in the two weeks since her resignation and the fact that she was placed on garden leave for the remainder of her notice, she never disclosed the information that she had taken or offer to return or delete it, as no handover was required. And as said, she was less than forthright about what information she had, in the course of the execution of the Anton Piller order. But I must say that as a matter of common sense and logic, I find it difficult to understand how a mass download of information and copying the same to external drives, over the weekend before resigning, could have anything to do with a handover. I believe this contention to be palpably false.

[33] But worst of all, the respondent was unable to even explain any she downloaded the volume of information she had done over the weekend immediately preceding her resignation. Despite glibly conceding it was 'more than normal', she offers no justification for it. All that the respondent offered was a bald statement that there was nothing to indicate that she was acting outside the scope of her duties or that she intended to use the information for some ulterior purpose. This bald contradiction cannot serve to negate the case made out by the applicant. As held in *Thebe Ya Bophelo Healthcare*

[3] 2005 (2) SA 359 (CC) at para 53.

Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another[4]:

> '… the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected …'

[34] So, what information did the respondent take? On the common cause facts, there can be no doubt that it is confidential information, proprietary to the applicant, and not in the public domain. Taking a leaf out of the playbook relating to restraints of trade, where confidential information of an employer is considered to be a protectable interest, I refer to what this Court said *Dot Activ (Pty) Ltd v Daubinet and Another*[5], where the Court described confidential information as being the following:

> 'Confidential information would be: (a) Information received by an employee about business opportunities available to an employer; (b) information that is useful or potentially useful to a competitor, who would find value in it; (c) Information relating to proposals, marketing or submissions made to procure business; (d) information relating to price and/or pricing arrangements, not generally available to third parties; (e) information that has actual economic value to the person seeking to protect it; (f) customer information, details and particulars; (g) information the employee is contractually, regulatory or statutory required to keep confidential; (h) Information relating to the specifications of a product, or a process of manufacture, either of which has been arrived at by the expenditure of skill and industry which is kept confidential; and (i) information relating to know-how, technology or method that is unique and peculiar to a business. Importantly, the information summarized above must not be public knowledge or public property or in the public domain. In short, the confidential information must be objectively worthy of protection and have value.'[6]

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[4] 2009 (3) SA 187 (W) para 19.

[5] (2023) 44 ILJ 785 (LC) at para 40.

[6] See also *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (2008) 29 ILJ 1665 (N) at para 33; *Jonsson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC) at paras 46 – 49; *David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (LC) at para 21; *Esquire*

The information appropriated by the respondent *in casu* ticks most of the aforesaid boxes. There can be no doubt that all the information she appropriated was confidential to the extent that it must qualify for protection.

[35] Once it is so that the respondent had access to such confidential information, can it be said it would be in breach of her obligations of good faith towards the applicant in terms of her contract of employment, if she appropriated it, considering she was not subject to a restraint of trade per se? In my view, undoubtedly so. Despite what he respondent's employment contract actually contains *in casu*, the Court *Sappi Novoboard (Pty) Ltd v Bolleurs*[7] had the following to say where it comes to the duty of good faith an employee has towards an employer:

> '… It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully … The relationship between employer and employee has been described as a confidential one … The duty which an employee owes his employer is a fiduciary one 'which involves an obligation not to work against his master's interests' …'

[36] Also applying these principles of good faith and fiduciary duties specifically to the employment relationship, the Court in *Ganes and Another v Telecom Namibia Ltd*[8] held as follows:

> 'As an employee of the respondent and in the absence of an agreement to the contrary the first appellant owed the respondent a duty of good faith. This duty entailed that he was obliged not to work against the respondent's interests; not to place himself in a position where his interests conflicted with those of the respondent … '

The Labour Appeal Court in *Bonfiglioli SA (Pty) Ltd v Panaino*[9] applied the above *ratio* in *Ganes supra* as follows:

System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another (2011) 32 ILJ 601 (LC) at para 29; *Experian SA (Pty) Ltd v Haynes and Another* (2013) 34 ILJ 529 (GSJ) at para 19.
[7] (1998) 19 ILJ 784 (LAC) at para 7.
[8] (2004) 25 ILJ 995 (SCA) at para 25. See also *Volvo (Southern Africa) (Pty) Ltd v Yssel* (2009) 30 ILJ 2333 (SCA) at paras 16 – 17; *Stoop and Another v Rand Water* (2014) 35 ILJ 1391 (LC) at para 99.
[9] (2015) 36 ILJ 947 (LAC) at para 26.

> '… at common law, the employee owes the employer a duty of good faith. In *Ganes & another v Telecom Namibia Ltd*, it was said that the duty of good faith entails that an employee is obliged not to work against the interests of his/her employer and not to place himself/herself in a position where his/her interests conflict with those of the employer. In *Council for Scientific & Industrial Research v Fijen*, it was stated that:
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> 'It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitled the "innocent party" to cancel the agreement. …'

[37] A final apposite reference would be to the judgment in *National Union of Metalworkers of SA on Behalf of Nganezi and Others v Dunlop Mixing & Technical Services (Pty) Ltd and Others (Casual Workers Advice Office as Amicus Curiae)*[10], where the Court held as follows:

> 'So despite the possibly confusing references to trust, confidence, loyalty and good faith in our case law it is clear that where contracting parties 'are bound to promote the interest entrusted to their keeping ... [t]hey cannot take any advantage to themselves out of the business for which they have been appointed, nor derive any benefit therefrom, beyond such commission and charges as the law allows in the particular instance'. This essentially amounts to the duties that Idensohn identifies as distinctive of fiduciary duties: *(a)* that fiduciary duties require a unilateral obligation to act in the beneficiaries' interest; *(b)* the primary fiduciary obligations are only two — no profit and no conflict of interest; and *(c)* fiduciary remedies are strict, with no intent required …'

[38] The respondent was, as said, employed by the applicant as Head: Retail Cash Solutions. This is clearly a senior position which carries with it a high level of trust and confidence. For her to have conducted herself as she did, when finding new employment with a competitor, is an untenable proposition, and simply unacceptable. It was in direct violation of a clear fiduciary duty she owed to the applicant as her employer. It is not even necessary for the applicant to establish a *mala fide* intention on her part.

[10] (2019) 40 ILJ 1957 (CC) at para 61.

[39] Despite the aforesaid, the respondent had adopted the view that the undertaking she sought to provide on 19 September 2025 made it unnecessary for the applicant to continue to seek relief under part B of the notice of motion. I simply cannot agree with this proposition, as the undertaking the respondent seeks to rely upon is in reality no undertaking at all. This is because the undertaking comes with two important caveats, as it is linked to '*reasonable*' and '*unlawful competition*'. What the respondent is thus offering is that she will not utilize any confidential information of the applicant unless she considers it unreasonable to do so or where she believes it is not in unlawful competition to the applicant. This is entirely dependent on her good faith or personal views, which the facts in this case have shown is at best questionable. The undertaking, in order to have the effect the respondent contended it should have, needed to be unconditional and in fact tantamount to a tender of the relief sought in part B of the notice of motion. It was certainly far from that.

[40] But even if there was an undertaking of sorts, I consider the applicant's refusal to accept it to be entirely reasonable. Considering what had already transpired to the point when the undertaking was ultimately provided, the applicant simply cannot be criticized for having no trust in any promise made by the respondent at all and insisting that the matter rather proceed to Court. As held in *Dot Activ supra*:[11]

> 'I appreciate and accept that there is no obligation on an employer such as the applicant to have to accept undertakings provided by an already errant employee that has acted in a manner which the applicant considers to be breach of the restraint. These undertakings often ring hollow, are often made after prejudice has already accrued, and are ordinarily unpoliceable. It has been made clear that an employer cannot sit by and cross its fingers and hope that the employee would act honourably in complying with undertakings where the employee has already shown he or she cannot be trusted. …'

[41] And lastly, the respondent suggested that because she is no longer employed, the duty on her to keep the information of the applicant confidential has somehow expired along with the termination of her employment. A definitive

[11] Id at para 59.

answer to this can be found in *Van Castricum v Theunissen and Another*[12], where it was said:

> '… The duty to preserve confidential information is not merely limited to the existence of the contractual relationship of employer and employee, but extends to the period after determination of such contractual relationship …'

[42] In summary, the applicant has shown that it has a clear right to the relief sought in the notice of motion. The respondent has acted in direct and flagrant violation of her confidentiality obligations and her duty of good faith under her contract of employment. She simply has no plausible or acceptable explanation for her conduct, and I am convinced it was for nefarious purposes. It is also true that the applicant has no alternative remedy open to it in order to prevent what would be obvious harm should its confidential information be utilised by the respondent or any third party (such as her new employer) in the course of conducting their business. The applicant has satisfied the requirements for the interdict it seeks.[13] The following *dictum* in *Telefund Raisers CC v Isaacs and Others*[14] is apposite:

> '… As I have said, there can be no doubt that the applicant has at all material times regarded what is recorded in its customer lists as confidential, and has believed it to be so. In my view, that belief was not an unreasonable one in the circumstances. The release of the contents of the lists to a trade rival such as the fourth respondent would, in the applicant's belief, be injurious to the applicant and advantageous to the rival. That belief, too, is, to my mind, reasonable. The customer lists took time and effort to compile …'

<u>Conclusion</u>

[43] Therefore, based on all the reasons set out above, I conclude that the applicant's application for relief under part B of the notice of motion must succeed. The applicant has demonstrated a proper clear right to the relief sought, and the considerations of prejudice clearly favour it, in the sense that it

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[12] 1993 (2) SA 726 (T) at 736B-C.

[13] As the applicant is seeking final interdictory relief, the applicant must satisfy three essential requirements, being: (a) the existence of a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy – see *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20.

[14] 1998 (1) SA 521 (C) at 531G-H. See also *Van Castricum* (*supra*) at 731F-J.

could suffer irremediable prejudice should its confidential information not be protected. And lastly, the applicant in reality has no alternative remedy available to it to properly protect its interests.

Costs

[44] This then leaves only the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Reference is made to what the Constitutional Court said with regard to costs in employment disputes as expressed in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[15], namely that costs are not ordinarily awarded in employment disputes. In exercising the judicial discretion in this context, the same Court re-affirmed the principle set in *Zungu supra* and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.*'[16] And in *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*[17] the Court held:

> 'In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in s 162, and the constitutional and statutory imperatives that underpin it …'

[45] What is clear is that it is not true that costs can never be awarded in employment law disputes before this Court. What is required is proper consideration of the dictates of fairness to both parties, followed by an exposition of reasoning why, despite the general principle in employment law disputes that costs do not follow the result, the Court has nonetheless decided

[15] (2018) 39 ILJ 523 (CC) at para 25.
[16] *Long v South African Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) at para 30.
[17] (2021) 42 *ILJ* 2371 (CC) at para 35. See also *Booi v Amathole District Municipality and Others* (2022) 43 *ILJ* 91 (CC) at para 60.

that it was appropriate to exercise its discretion in favour of making an award of costs.[18]

[46] In my view, the case *in casu* is unfortunately one which I believe justifies a departure from the any general principle that costs do not follow the result. All said, when the common cause and undeniable facts in this case are considered, as well as the palpably false explanations (or no explanations at all) offered by the respondent for her conduct, her case was, truthfully described, hopeless. Her attempted reliance on an undertaking which was in reality no undertaking at all, exacerbates matters. Truth be told, and once the Anton Piller order was executed, she should never have opposed this case, as there was simply no proper legal basis to do so. In *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*[19] the Court had the following to say:

> 'Whether a case is hopeless has two aspects. It is hopeless if it is advanced on a basis that is legally untenable. It is also hopeless if it is advanced in the absence of any credible evidence to support it. These are categories that have long been recognised in our law and practice. A case is legally hopeless if it could be the subject of a successful exception. It is factually hopeless if the evidence available and potentially available after discovery and other steps directed at procuring evidence will not sustain the cause of action on which the claim is based. …'

[47] The respondent's conduct in this case in my view resorts comfortably within the aforesaid parameters of being hopeless, for the want of a better description. Her particular position of trust and confidence renders her conduct inexcusable. If she simply resigned and left, there would be no issue. But she resigned and deliberately sought to appropriate a substantial amount of the applicant's confidential information to take with her to use at her new employer, which was a direct competitor of the applicant. She should have known better. All said, I believe the respondent's opposition in this case was

[18] As said in *SA Custodial Management* (*supra*) at para 34: '*Do the principles I have enunciated dictate that costs can never be ordered against a party in labour matters? I think it is clear from this court's jurisprudence that the answer to this question is a resounding 'no'. This court has previously affirmed the principle that costs are discretionary to the court adjudicating a matter. That applies no differently to labour matters …'.*

[19] 2013 (2) SA 213 (SCA) at para 35.

always contrived, without any hope of succeeding, and deserving of censure. Hence a costs order against her, all considered, is justified and fair. Considering the complexities that arose in this case, especially relating to the execution of the Anton Piller order, a party and party costs order on scale C is justified. But I do not believe a punitive costs order, as asked for the applicant, is justified, and I will therefore not award punitive costs.

[48] It is for all the reasons as set out above that I made the order that I did, as reflected in paragraph 4 of this judgment, *supra*.

S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate A Redding SC

Instructed by: ENS Inc Attorneys

For the Respondent: Advocate L G Curlewis

Instructed by: Clarke & Van Eck Attorneys