



- (1) Reportable: No
(2) Of interest to other Judges: No

Signature

20 April 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: 2025-235294

In the matter between:

DIDI WATERPROOFING SERVICES (PTY) LTD

Applicant

and

WILLIAM STEVEN ELS

First Respondent

MARCELL ENGINEERING (PTY) LTD

Second Respondent

Heard: 26 February 2026

Delivered: 20 April 2026

Summary: An application to enforce restraint of trade and confidentiality undertakings. The restraint clause is vague, and enforcing it would be contrary to public policy. No credible evidence that the employee was exposed to confidential information.

JUDGMENT

GANDIDZE, J

Introduction

- [1] The applicant, Didi Waterproofing (Pty) Ltd, is a roofing and waterproofing contractor operating in the City of Cape Town Metropolitan Municipality (Cape Metro) and surrounding areas since 2008. It services residential, commercial and industrial properties, undertaking, *inter alia*, painting, roofing, asbestos removal, asbestos encapsulation, waterproofing roofs, gutters, walls, showers, cellars, pools, door and window frames, balconies, dunn walls and skylights. The first respondent, William Steven Els (Els), was employed by the applicant as a site manager, effective 19 November 2024. He resigned less than a year later, on 23 September 2025. Upon leaving the applicant, he started a business that, on WhatsApp and Facebook, advertises, *inter alia*, waterproofing services under the name Marcell Engineering (Pty) Ltd (Marcell), the second respondent. Notably, Marcell was registered in May 2015, with Els as the sole director of the second respondent.
- [2] The present application was intended to interdict and restrain Els from breaching the provisions of the employment contract that Els signed, identified as:
- 2.1 clause 22 which states that *'the employee undertakes not to be engaged in the establishing of a new business, be it direct or indirect, or as a shareholder, partner, member of a Close Corporation, director of a Company or in any other capacity, within 1 (one) year after termination of this Agreement in the area known as the Municipal district of the workplace of the Employee'*.
- 2.2 clause 26, which addresses avoiding conflicts of interest while employed by the applicant.
- 2.3 clause 27, which addresses the protection of the applicant's confidential information during and after termination of the employment contract.
- 2.4 clause 28, which addresses the misuse of employer information during the period of employment.
- [3] The applicant also sought an order interdicting and restraining Els and Marcell (the respondents) from conducting or trading within the geographical area of

the Cape Town Metro until 23 September 2026, or for such period as the Court may deem fit.

- [4] The applicant also sought an order that Els resign as a director of Marcell, or, alternatively, that he be interdicted from participating in Marcell's management, operations, and business within the Cape Town Metro until 23 September 2026.
- [5] Before addressing the merits of the application, it is necessary to consider two preliminary issues: the alleged late filing of the answering affidavit and the question of urgency. The other highly contested issue, namely whether the applicant sought to make out a case in the replying affidavit, becomes academic given the conclusions reached in this judgment.

Late filing of the answering affidavit

- [6] The applicant takes issue with the answering affidavit, which was filed on 20 January 2026, six weeks late. The applicant sets out the chronology (which is dealt with under urgency) and submits that there were unexplained periods of delay and that the respondents' explanation for the delays is inadequate. Ultimately, the applicant submits that condonation for the late filing of the answering affidavit must be refused, in which case the application must be determined as unopposed.
- [7] In response, the respondents explained what they did after receiving the application, complained that they were given insufficient time to file an answering affidavit, given the time they had to consult their attorneys, and stated that the delay in filing the answering affidavit was due to attempts to settle the dispute. The respondents also relied on case authorities to the effect that litigants should first attempt to avoid litigation, which is costly and often unnecessary.
- [8] The preliminary point should never have been raised, given Rule 36 of the Rules Regulating the Conduct of the Proceedings of the Labour Court¹

¹ Published: GN 4775, G. 50608 of 3 May 2024. Commencement: 17 July 2024 - GN 5038, G. 50929 of 12 July 2024.

(Labour Court Rules), which provides that when an answering or replying affidavit is filed late, a condonation application is not required unless the party upon whom the affidavit is served late files, within 10 days, a notice of objection to the late filing. Failure to file the notice of objection within 10 days results in the right to object lapsing. The applicant did not file the notice of objection, with the consequence that its right to object to the late filing lapsed. The answering affidavit is properly before the court.

Urgency

- [9] The application was brought as urgent, with the applicant contending that restraint applications are inherently urgent because the restraint is only for a limited period, and that any demonstrated proprietary interests require urgent protection. The respondents contested the urgency, arguing that the applicant took more than a month to approach the court after first becoming aware of the alleged breach.
- [10] For the purpose of determining urgency, the court accepts the applicant's version that it approached Els in October 2025 regarding the alleged breach, and that the allegation in the founding affidavit that Els was approached in November 2025 was clearly an inadvertent drafting error. I say this because the October 2025 WhatsApp exchange is annexed to the founding affidavit.
- [11] The court also accepts the applicant's account that it did not need to approach the court in October 2025 because Els undertook not to advertise 'waterproofing'. I also accept that the parties re-engaged in November 2025, but I consider it necessary to reproduce some of the exchanges. One reads:

Steven afternoon. I'm gonna get straight to the point. If you were retrenched and tried to make a living I have no cobbles. You resigned and goes straight into competition with my water/ weather proofing. I'm not gonna sugarcoat ****. You signed the legal doc with the restraint of trade in any and everything related to my trade. Either you refrain from your doings as such or I will go the legal route or a stern warning I will call on the dogs I've been holding back for so long to protect you. This is not a threat. I'm just not

protecting you anymore for the ****you caused. So now the ball is in your court as to how this will play out. (sic)

- [12] Els responded, stating, *inter alia*, that '*I don't know [what] you expect a person to do in this economy*', that they had a conversation in which it was agreed that the respondents could do waterproofing but not offer the service to the applicant's customers, and that they would not talk to employees, both of which Els stated he had adhered to. The WhatsApp also records this:

Once upon a time you were hungry to make something of yourself aswell, I just hope the person you did what you had to, to create a business didn't try to stop you like you've done to me, this country is an absolute ****hole. And I am out here just to try and make a living, make something of myself.

Instead of perhaps helping each other and showing support you've wanted nothing but my downfall. (sic)

- [13] In yet another response, Els stated that he would not post anything further until everything '*is settled and understood*'.
- [14] Two days later, Els received a cease-and-desist letter from the applicant's attorneys, alleging that he had started a new business that was competing with the applicant and offering him the option to provide an undertaking by 24 November 2025 to cease operations, failing which the court would be approached for an interdict and a damages claim would be brought.
- [15] On 25 November 2025, Els gave the letter to his attorneys. On 26 November 2025, his attorneys indicated they were taking instructions. On the same day, the applicant's attorneys advised that, as no undertaking had been given, they had received instructions to bring the present application. Counsel was briefed on 26 November 2025, and the application was finalised and launched on 2 December 2025.
- [16] The court is satisfied that the applicant acted promptly in approaching this court after failing to obtain the undertaking sought from Els in late November 2025.

- [17] Notwithstanding the above finding, it is also necessary to refer to the letter that Els' attorneys wrote to the applicant's attorneys on 10 December 2025, raising several issues, *inter alia*, that the matter was not urgent; that there were no protectable interests, hence the restraint was unreasonable and unenforceable; that Els was rendering different services from those rendered by the applicant; that the applicant's Constitutional rights were being infringed; that there was no evidence that clients may be solicited or that the applicant's confidential information may be used; and that, in any event, Els was not privy to the applicant's confidential information. The letter also offered an undertaking that the respondents would not solicit or render services to the applicant's clients.
- [18] The letter did not resolve the dispute. Several other settlement offers were made and rejected. The final attempt was to give the respondents until 12 January 2026 to provide the undertaking, which Els alleges would have prevented him from conducting any business in the area specified in the restraint provision. The undertaking was not provided, and an answering affidavit was filed on 21 January 2026. The relevance of the information in this paragraph will become apparent later.
- [19] But having acted swiftly to approach the court with its application, in my view, a dispute does not cease to be urgent merely because the application is filed. A party that files an urgent application cannot simply fold its hands after filing it. It must do everything necessary to ensure the application is heard urgently. The respondents had 7 days, calculated from 2 December 2025, to file an answering affidavit. When the answering affidavit was not received by 11 December 2025, the due date, the applicant could have asked for the matter to be set down for hearing on an unopposed basis. Instead, it was content to engage the respondents in correspondence, and yet argues that the respondents cannot rely on attempts to settle the dispute as a valid reason for filing the answering affidavit late. For more than a month, the applicant did nothing to set the matter down for a hearing on an unopposed basis. By the time the application was argued at the end of February 2026, this was almost

halfway through the restraint period. These delays prove that the matter was not as urgent as the applicant would have the court believe.

[20] Yet another reason the matter is not urgent is that an applicant must allege and show that it cannot obtain substantial redress in due course. In the November 2025 cease-and-desist letter, the applicant threatened to bring this application and to file a damages claim. However, in this application, the applicant claims it would face insurmountable challenges in pursuing a damages claim. It can obtain substantial redress in due course through a damages claim, as Els was informed in November 2025. The court will return to this issue when it addresses whether the applicant has a suitable alternative remedy.

[21] The application would fail on urgency for the reasons given above, but for finality, the Court will dispose of it on its merits.

Brief synopsis of the applicable legal principles

[22] In *Magna Alloys and Research (SA) (Pty) Ltd*², the court stated that an agreement in restraint of trade is valid and enforceable, unless it is shown to be unreasonable and contrary to public policy. Therefore, a party seeking to enforce a restraint need only invoke the provision and show a breach, after which the onus shifts to the person sought to be restrained to prove that the restraint cannot be enforced because it is unreasonable and contrary to public policy.³ In *Beedle v Slo-Jo Innovations Hub (Pty) Ltd*⁴, the Court stated that the onus of proving that the restraint provisions are unreasonable lies with the employee.

[23] In *Reddy v Siemens Telecommunications (Pty) Ltd*⁵, the court stated that the two principal considerations to be balanced when determining whether to

² 1984 (4) SA 874 (A).

³ See also *Basson v Chilwan & others* [1993] ZASCA 61; 1993 (3) SA 742 (A), *Experian South Africa (Pty) Ltd v Heyns and Another* 2013 (1) SA 135 (GSJ) para 14.

⁴ (2023) 44 ILJ 2493 (LAC) para 34 and 35.

⁵ (2007) 28 ILJ 317 (SCA).

enforce a restraint of trade are the principle of *pacta sunt servanda*, which requires parties to comply with their contractual obligations, and the section 22 Constitutional rights to engage freely in trade, commerce or a chosen profession. The Court further stated that unreasonable restrictions on section 22 Constitutional rights would be contrary to public policy.⁶

[24] Whether a restraint is unreasonable is determined by (i) whether there is a protectable interest deserving of protection, (ii) whether the protectable interest is threatened or prejudiced by the other party, (iii) if so, weighing the protectable interest against a party's right to be economically active and productive, and (iv) having regard to public policy considerations which have nothing to do with the relationship of the parties, to determine whether the restraint should be enforced or rejected. Some case authorities have added a fifth question, namely, whether the restraint goes further than necessary to protect the relevant interest.

[25] It is against these principles that the application will be considered

The restraint and alleged breach

[26] Although it was alleged that four clauses of the employment contract were being breached, the only provisions relevant to the present application are those dealing with starting a new business after termination of employment and the confidentiality undertaking, which subsists beyond termination of the employment relationship. The provisions regarding avoiding conflicts of interest and misuse of the employer's information apply during employment, not after termination.

[27] The restraint provision prohibits Els from establishing a new business after he leaves the applicant's employment. It is not disputed that after Els left the applicant, Marcell, which had been registered in 2015 but was dormant, began trading and offered, *inter alia*, services similar to those of the applicant. The court accepts that Marcell became a competitor of the applicant.

⁶ See *Labourmet (Pty) Ltd v Jankielsohn and Another* [2017] 5 BLLR 466 (LAC) at para 41 and *Barkhuizen v Napier* 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 15.

- [28] The question is whether the restraint provision prohibits Els from starting a business that competes with the applicant. The answer is that it does not, which explains Mr de Kock's urging the court to read the word 'competing' into the restraint provision. The invitation or request is declined because it would amount to creating a new contract for the parties. The applicant drafted a vague restraint provision and cannot seek the court's assistance in crafting a more sensible one.
- [29] Mr de Kock's submission that the court can read the word 'competition' into the restraint provision because it has the power to grant limited relief rather than the relief sought has no merit. Adding the word 'competing' would broaden, not limit, the scope of the restraint. This is very different from limiting the geographical area or duration of a restraint, which this court has the power to do.
- [30] There is merit in Mr Van der Merwe's submission, with reference to *Divine Inspiration Trading 130 (Pty) Ltd v Aveng Greenaker-LTA (Pty) Ltd*⁷, that the court cannot entertain the new relief of restraining the respondents from conducting a competing new business when this is not the relief sought in the papers, but is raised for the first time in argument. The applicant's case must stand or fall on the case it made in its papers. The heads of argument are not intended to amend the relief sought, in the absence of a proper application to amend the notice of motion.
- [31] The fact that Els agreed that the restraint provision is fair, reasonable and necessary will not save the applicant's case. Provisions contrary to public policy will not be enforced, even if the employee agreed to them.⁸ Additionally, whether a restraint is fair, reasonable and necessary can be determined only at the time the restraint provision is sought to be enforced, not by what was agreed at the time of entry into the agreement.
- [32] It follows that the discussion held before Els left the applicant, during which certain undertakings were given, did not render an unenforceable restraint

⁷ 2016 JDR 0988 (GJ).

⁸ *Magna Alloys* (*supra* at 905B - C).

enforceable. The application was brought under the written restraint provision, not a verbal one.

[33] Similarly, Els's undertakings in October and November 2025 not to advertise waterproofing services do not alter the fact that the restraint provision does not refer to a competing business. Consequently, Els was free to compete with the applicant after he resigned from the applicant's employment.

[34] A troubling feature of this case is that the applicant failed to disclose all relevant facts to the court, in the hope that they would never come to light. In fact, it appears that this was the reason the applicant vigorously raised the late filing of the answering affidavit as an issue, so that its contents could not be taken into account in determining the application.

[35] The applicant did not disclose the discussions held after Els resigned, during which Els stated that he intended to start a business. The only dispute was whether the discussion concerned the rendering of waterproofing services (according to the applicant) or the rendering of services to the applicant's customers (according to Els). The fact is that the applicant knew Els would start a business, yet did not disclose this in its papers.

[36] Yet other relevant facts the applicant sought to withhold from the court were that he offered to sell the bakkie to Els, wished Els well in his business endeavours, and that he had a friendship with Els and Els's father, and that they had a WhatsApp group. All these facts were highly relevant to the issues the court was required to decide, and were intentionally omitted, as they would have defeated the applicant's case that it was unaware that Els intended to start a business upon leaving the applicant. The applicant cannot now claim entitlement to an interdict prohibiting Els from starting a competing business when this was never raised as an issue before the current application was launched. In any event, the restraint provision does not prohibit starting a competing business. It prohibits starting a business, an issue that will be addressed next.

[37] Even though the finding above is dispositive of the alleged breach of the restraint provision and must lead to the conclusion that the applicant is not

entitled to an interdict prohibiting Els from running Marcell's business, there is another reason why the application was bound to fail, an issue addressed next.

Restraint contrary to public policy

- [38] In oral argument, Mr de Kock submitted that the restraint provision prohibits Els from starting a business but permits him to join any existing business, even if that business is a competitor of the applicant. The question is which protectable interests would be harmed by a new business established by Els but not by Els joining a competitor? Such a restraint would be unenforceable and contrary to public policy, as it seeks to prevent Els from being a businessman and to keep him an employee. The applicant also alleged that it intended to appoint Els as Sales Manager. This is the real reason the restraint application was launched: the applicant did not want Els to resign, as evidenced by the WhatsApp message sent to Els stating that if he had been retrenched, things would be different. On those facts, there is no protectable interest.
- [39] The respondents submitted that the relief sought in the notice of motion, namely that they be interdicted and restrained from conducting business within the geographical area of the Cape Metro until 23 September 2026, is unconstitutional because it renders them economically incapacitated. The submission has merit. Restricting respondents from conducting any business, even if that business does not compete with the applicant, means the restraint is not aimed at protecting any proprietary interests but rather at preventing Els from earning a living. In *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another*⁹, the court stated that a court will only enforce a restraint of trade if an applicant demonstrates that there is a recognisable proprietary interest.
- [40] It follows that the restraint provision cannot be enforced because it does not protect any proprietary interests and is aimed at restricting Els's right to earn a living. The restraint provision is contrary to public policy.

⁹ 1991 (2) SA 482 (T).

Confidentiality

- [41] The applicant also sought to enforce the confidentiality undertaking to which Els agreed. It was submitted that a reasonable inference must be drawn that, as the sole director of Marcell, Els would utilise the applicant's confidential information for Marcell's benefit, thereby breaching the confidentiality provision.
- [42] According to the applicant, during his employment with it, Els was exposed to and privy to the 'inner workings' and day-to-day operations of its business, as well as the specific processes and techniques used by the applicant in providing services. It was also alleged that Els had access to confidential business information, including customer details, the services provided, and the prices charged to customers. It was also said that Els had access to the applicant's pricing structure for services, including supplier information.
- [43] Explaining how Els became exposed to the confidential information, all site managers attended daily morning meetings where projects, prices and client details (including cell numbers) were discussed. All invoices were posted in the WhatsApp group, and the site managers were members. Site managers had company debit cards, which were used to purchase materials from suppliers. Dulux was the sole credit facility supplier, and site managers bought from it on account, thereby gaining insight into the applicant's purchasing and supplier arrangements. The inspection reports shared in the WhatsApp group included the pricing methodology, and all internal operational processes were discussed in the group.
- [44] It is also the applicant's case that the applicant intended to promote Els to the position of sales manager, effective from 1 January 2026, and that, in anticipation of the promotion, the applicant invested substantial time and resources in training Els for the role, including practical experience by being allowed to liaise with clients, prepare quotations and reports, and conduct site inspections. The training included specialised and confidential know-how of the applicant's operations and the industry, insight into dealing with clients and suppliers, and the financial side of the applicant's operations. Els had

insight into almost all aspects of the applicant's business, including its business model, rates, customers, and clients. The applicant had trusted and put faith in Els and was now being prejudiced by his conduct.

- [45] It was also submitted that Els retained knowledge of the applicant's operations and will focus on marketing to the applicant's clients and offering services to them at slightly reduced rates, at the applicant's expense, even though the applicant created the client base by properly servicing and maintaining the clients. The submission is that this is springboarding on know-how and connections, creating unhealthy and unfair competition. It was submitted that the respondents are misusing the applicant's years of effort in building a business, drawing on well-deserved experience and confidential information. The submission was also that knowledge of clients and contacts is valuable information obtained through a cumbersome process.
- [46] In response, relying on *Hirt & Carter (Pty) Ltd v Mansfield and Another*¹⁰, Els submitted that the applicant failed to prove that he was privy to the business know-how and confidential information, that the information was still in his possession, or that he was able to use it to the applicant's disadvantage. The question posed was how Els could use confidential information which he did not possess. It was also submitted that the applicant failed to put forward facts showing that Els was introduced to specific processes and techniques.
- [47] It is established that confidential information capable of protection is that which is applicable in trade or industry, that is, it must be useful; not be public knowledge or property; and (b) it must be known only to a restricted number of people or a closed circle, and (c) be of economic value to the person seeking to protect it.
- [48] There is a factual dispute as to whether Els was exposed to the applicant's confidential information. When final relief is sought, and a factual dispute arises on the affidavits before a motion court, a final order can be granted only if the facts averred by the applicant, which the respondent has admitted, together with the facts alleged by the respondent, justify such an order. The

¹⁰ 2008 (3) SA 512 (D).

exception is where the respondent proffers bare denials or presents a version that is far-fetched, untenable and fanciful. This is in accordance with the *Plascon Evans* rule.¹¹

- [49] In the court's assessment of the versions, Els's version that he was never exposed to the applicant's confidential information must be preferred because it is not far-fetched, untenable and fanciful. Additionally, the applicant's case that Els had access to confidential information is unpersuasive for several reasons.
- [50] The specific processes and techniques the applicant alleged Els was exposed to were not identified. The decision in *Bonnet and another v Schofield*¹², which the applicant relied upon, does not assist its case. That case involved a sail training instructor, and the court held that there were no special techniques, methods, or secrets to protect in a sailing instructor's work. The same applies to the manager of a site where, *inter alia*, waterproofing services are rendered. Els's version, that YouTube has videos, for example, on how to do waterproofing, was not disputed. There are no applicant processes or techniques to be protected.
- [51] Els's version that ordinary workers did the manual work, not him, was also not gainsaid. The question is whether these ordinary workers were also exposed to the processes and techniques that the applicant claims should be protected..
- [52] The information alleged to be confidential includes prices charged to customers and by suppliers. Els admitted that he provided the information needed to prepare quotations for each project, but denied knowing the prices charged to customers, stating that this information had been removed from the job cards he had been handed as the site manager. Despite admitting that prices were removed from the job cards, the applicant called on Els to produce proof that he did not keep copies of the job cards. Els's version that

¹¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H - 635C.

¹² 1989 (2) SA 156 (D)

he returned all job cards and did not keep copies is accepted because it is not fanciful, untenable or far-fetched.

[53] Insofar as it is alleged that Els knows the applicant's customers and will seek to render services to them at reduced prices, the submission fails when one has regard to the fact that Els sought to attract clients by advertising on WhatsApp and on Facebook pages. There was no evidence placed before the court that he attempted to solicit any of the applicant's customers. This is aside from the fact that nothing prevented Els from soliciting the applicant's customers. What he charges these customers is Els's prerogative, as his version that he did not know what prices were charged to the applicant's customers was accepted. What the applicant means by a pricing methodology, given the services it renders, has not been explained.

[54] There was no suggestion that the applicant had customer lists or that Els had access to them. The evidence was that Els would obtain the contact information for the customer at the site where he would be working, and that his personal phone number was used on the odd occasion when there were issues with the work cellphone. Any customer who chose to keep Els' personal contact number, which he used on the odd occasion, was free to do so, and Els cannot be blamed. In any event, the applicant's own case is that the true art of a successful business is servicing and maintaining clients. If the applicant has serviced its clients well, it has nothing to worry about.

[55] The applicant claimed it trained Els, a version he denied. His version was that he was exposed to the work in 2015 while employed by the applicant as a driver. The applicant failed to disclose that Els was an employee in 2015, contending that this was irrelevant to the application, yet then claimed that he gained experience in the applicant's operations during the first period of employment. The two versions are irreconcilable. Even if Els was trained, a contention he denies, that does not demonstrate that he was given access to confidential information. The applicant's case that it intended to promote Els is further evidence that, until the promotion, Els was not exposed to any of the applicant's strategic, financial, or sensitive business information.

- [56] The applicant's own version was that project information was posted on a notice board. The court fails to see how information posted on a notice board can ever be considered confidential, given that everyone with access to that room can see it.
- [57] The applicant alleges that the services it offers constitute confidential information. The proposition only needs to be stated to see how the applicant is clutching at straws.
- [58] The applicant's claims that Els had insight into its business model, had access to the applicant's specialised and confidential know-how and retained knowledge of its operations make no sense without further elaboration. An employee's knowledge and skill are the property of the employee, and not that of the employer.
- [59] As regards the relationship with suppliers, Els's account that the administrative staff placed orders with suppliers and that site managers purchased only small items on account cannot be rejected. If Dulux is a supplier to the applicant, it is difficult to regard this as confidential information. Dulux sells products to anyone who requires them, including the second respondent.
- [60] The applicant has not made out a case that Els had access to its confidential information, which is protected. It also did not allege any breach of the confidentiality provision. The case is that an inference must be drawn that the clause has been breached. This is unnecessary. If, in due course, the applicant obtains evidence that Els had access to its confidential information and breached the confidentiality provision, it may approach the court in the ordinary course with a damages claim. It will be for the court hearing that application to determine what confidential information, if any, was abused by Els and to order appropriate relief.
- [61] The inquiry into weighing the parties' interests becomes unnecessary where an applicant has not demonstrated a protectable interest.

[62] The above findings are dispositive of the matter. However, because the applicant sought a final interdict, the requirements will be addressed for completeness.

Requirements for an interdict

[63] The applicant cited the decision in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*¹³, which concerns interim interdicts. Where an applicant seeks to enforce a restraint provision until the term has expired, the relief sought is final, not interim. Accordingly, the applicant must demonstrate a clear right, harm suffered or reasonably apprehended, and the absence of an adequate, suitable remedy.¹⁴ The balance of convenience is not a factor when final relief is sought.

[64] As regards a clear right, the applicant has not proved the existence of a restraint that prohibits Els from competing with the applicant, and must therefore fail on that ground. The applicant has a contractual right in respect of its confidential information, but in the absence of credible evidence that Els had access to the alleged confidential information, the appropriate course of action is to bring a breach claim in due course if Els breaches it.

[65] As regards irreparable harm and the absence of an alternative remedy, these issues become academic in light of the finding that the restraint provision cannot be enforced for the reasons given. As regards a breach of the confidentiality clause, if this materialises, the respondent can file a breach-of-contract claim in due course.

[66] Taking all of the above into account, the court exercises its discretion not to grant the relief sought because the applicant has not satisfied any of the requirements for final relief.

Costs

¹³ 2008 (5) SA 339 (SCA).

¹⁴ *Setlogelo v Setlogelo* 1914 AD 221; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

- [67] Both parties sought costs on a punitive scale. The applicant sought costs against the respondent, contending that there was a flagrant breach of the restraint provision, followed by an undertaking not to breach the provision, and then another breach. The applicant also referred to the delay in filing an answer, which it considers obstructive behaviour.
- [68] The respondents sought costs, regarding the application as an abuse of the court's processes.
- [69] I agree with the respondents. The restraint provision does not prevent Els from starting a competing business after he left the applicant. The applicant would have known this before launching the current application. The applicant's case shifted from not rendering waterproofing services to seeking an order prohibiting Els from running any business, thereby preventing him from earning a living. That the application was an abuse of court processes is evident from the applicant's submission that Els could work for a competitor but was not permitted to establish his own business. As I have found, that amounted to saying Els must remain an employee and must not become an entrepreneur for a year after leaving the applicant. The applicant was angered that, after leaving the applicant, Els became his own boss at age 31 rather than an employee. The applicant, which had legal advice, ought to have realised that no court would enforce a restraint provision with that effect. An order in accordance with the requirements of law and fairness is that the applicant pay the respondents' costs on a party-and-party scale.
- [70] To compound matters, the applicant placed a great deal of information before the court regarding the late filing of an answering affidavit, when condonation was not required. The application, which the applicant pursued at a leisurely pace, was also not urgent, and this judgment, which dealt with the merits of the application, was prepared at the same leisurely pace, as there was no urgency.
- [71] In the result, the following order is made:

Order

1. The application was not urgent.
2. The application is dismissed .
3. The applicant is ordered to pay the respondent's costs.

T. Gandidze
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv C de Kock
Instructed by:	CK Attorneys
For the Respondent:	Advocate Van der Merwe
Instructed by:	Dunster Attorneys