



(1) Reportable Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: 2026-056545

In the matter between

YOULESHA NARAINSAMY

Applicant

and

ANSTEM MEDICAL (PTY) LTD

Respondent

Heard: 15 April 2026

Delivered: 20 April 2026

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 20 April 2026.

JUDGMENT

SAUNDERS, AJ

Introduction

[1] This is an opposed urgent application seeking the declaration of unenforceability of a confidentiality and restraint clause stemming from an

employment contract governing the relationship between the applicant and her erstwhile employer, the respondent. The applicant also seeks punitive costs if the application is opposed.

- [2] This application, unusually, is brought by the erstwhile employee, seeking to set aside the restraint of trade clause on the basis that it is unenforceable and unreasonable. The clause reads as follows:

19. Confidentiality & restraint of trade

- 19.1 In accepting employment with the employer, the employee acknowledges that during the course of his/her employment or other association with the employer, the employee may develop a close and personal relationship with the clients of the employer, and that the employee shall, in the course of his/her duties, have access to confidential information of the employer, including, but not limited to, confidential information the employer, including, but not limited to, confidential information in relation to financial and marketing operations, customer data base, technical information, the employers terms conditions and methods of conducting its business, trade secrets, names of clients or other client information, methods of operation, information regarding systems, technical know-how and financial information (hereafter 'confidential information')
- 19.2 The employee shall not, during the tenure of the existing employment contract and for an "indefinite period" after termination of the existing employment contract for any reasons whatsoever and in any role that he/she may assume thereafter whatsoever, disclose to or discuss any confidential information with any person other than the employer.
- 19.3 The employee further undertakes not to be directly or indirectly, interested in, carry on, engaged in or concerned with any business, company, firm, partnership, close corporation, trust, undertaking or concern, either as an employee or in any other concern, either as an employee or in any other capacity of whatsoever nature, which carries on any business which competes in any way with the business conducted by the Company
- 19.4 The employee undertakes further not to, in any way, persuade solicit, encourage or procure the services of any employee of the Company,

or in any manner persuade any employee of the Company to terminate his/ her contract with the Company."

- [3] The applicant does not distinguish between the restraint clause and the confidentiality clause and seeks that the clause be set aside in totality.

Background

- [4] The applicant was dismissed by the respondent in June 2025, having been employed since November 2021 in various capacities. At the time of her dismissal, she was employed as a territory manager. No new contracts have been entered into during the sustenance of the employment relationship, save for the original contract of employment relevant to this dispute.
- [5] In September 2025, the applicant took up employment with a competitor of the respondent. On 19 November 2025 the respondent launched an application in this Court seeking to enforce the restraint of trade clause contained in the applicant's contract of employment ("the first application"). It was set down for hearing on 27 February 2026. In November 2025 the applicant's employment with her new employer was terminated on terms which were not disclosed in the first application and are not disclosed in this application. The answering affidavit in the first application was filed on 7 December 2025 and the notice of withdrawal by the applicant's erstwhile employer was filed on 17 February 2026. No replying affidavit was filed in the first application, and the applicant raises a variety of complaints about this fact, coupled with complaints pertaining to a confidential affidavit which was not filed at time.
- [6] On 27 February 2026 the applicant persisted with the position that the matter should be adjudicated as the order would have a practical effect and serve an actual purpose. Submissions were made at the hearing of this application that argument was advanced on 27 February 2026 about whether the dispute was moot. No court order from 27 February 2026 has been uploaded onto caselines and counsel for both parties do not recall that a specific order regarding mootness was made. Both recall that the erstwhile employer's notice of withdrawal was given effect. This order has not been appealed.

- [7] The applicant now approaches this Court on an urgent basis for a declaratory order that the restraint clause; which on its face contains neither a geographical limitation nor any stipulated duration; is unenforceable.
- [8] At the time of deposing to the founding papers in this application the applicant was unemployed. At the time of deposing to the replying papers, the applicant appears to have accepted a role as an intern with an unidentified employer and in an unidentified role. There is no further indication as to whether this could constitute a breach of the agreement or not. The respondent has given no indication that it intends to enforce the restraint on this basis or any other. But the application is opposed and on this basis the applicant seeks punitive costs.

The argument

- [9] The applicant argues that the restraint is against public policy because it contravenes the Constitution in disallowing the applicant from working in her chosen profession, despite her qualifications and her disability. She suffers financial prejudice which will impact her quality of life. The geographic limitations force the applicant to live in a specific area (as set out in the restricted tender from the first application); and constitutes modernised slavery. There is no interest which warrants protection and the so-called interest does not weigh qualitatively and quantitatively against the applicant's right to be economically active. The restraint is against public policy.
- [10] The second leg of the applicant's argument is that there is no extant restraint of trade clause operating against the applicant. The applicant signed a restraint of trade in her position of sales representative and not territory manager. The restraint clause does not specifically reference the role of territory manager and the restraint is therefore inoperative.
- [11] The applicant also argues that the restraint seeks to restrict competition and that there is no confidential information and no protectable interest.

The law

- [12] A restraint of trade agreement, like any other agreement, is on its face valid and enforceable. As the Constitutional Court emphasised in *Barkhuizen v Napier*¹ public policy, as informed by the Constitution of the Republic of South Africa, 1996, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. The sanctity of contract remains a foundational principle of our law. Courts are slow to strike down or declare invalid terms to which parties have agreed and will do so only where compelling reasons rooted in public policy demand it. The judgment sets out the test for application, which reads as follows²:

The first question involves the weighing-up of two considerations. On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda* which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values which must now inform all laws, including the common law principles of contract.

- [13] The judgment continues to state that:

"It follows in my judgment that the first inquiry must be directed at the objective terms of the contract. If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation of the contracting parties.³

¹ 2007 (5) SA 323 (CC)

² *Barkhuizen* *ibid* at para 57.

³ *Barkhuizen* (id fn 2) at para 59.

- [14] There is nothing in the papers which suggests that the applicant did not sign the employment contract and the restraint of trade agreement freely and voluntarily in line with the constitutional values of freedom and dignity.
- [15] In terms of the first leg of the test as set out above, the wording of the restraint clause must be considered. There is nothing to preclude parties to a restraint of trade agreement from agreeing to any terms they wish, regardless as to how broad such terms may be, including a restraint which operates indefinitely and has worldwide application. *Barkhuizen v Napier* recognises that individuals have the right to enter into the contracts they wish to govern their relationships. Objectively, there is nothing against the terms of the clause as it stands. The fact that a confidentiality clause operates for an indefinite period is unremarkable. Clauses of this nature are enforced on a daily basis in this Court. In respect of the restraint of trade clause, while unusually wide, it may nonetheless be enforceable if an erstwhile employer can set out facts in response to an unreasonableness attack. On the face of it, and on an objective assessment of the terms, the clause is not inconsistent with public policy.
- [16] This then gives rise to the second leg of the enquiry as set out in *Barkhuizen*. The terms must be considered against the relative situation of the contracting parties.
- [17] The law relating to restraints of trade is a particular application of this broader contractual principle. It is well established that a restraint of trade is *prima facie* valid and enforceable unless and until the party seeking to avoid it proves that its enforcement would be unreasonable and therefore contrary to public policy.⁴ The question of reasonableness does not arise in the abstract. It is engaged only when enforcement is actually sought.⁵
- [18] When that question does arise, the Court applies the well-known four-fold test formulated by the Appellate Division in *Basson v Chilwan and Others*⁶:

⁴ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)

⁵ *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) at paragraph 46.

⁶ 1993 (3) SA 742 (A) (Headnote).

1. Is there an interest of the one party which is deserving of protection at the termination of the agreement?
2. Is such interest being prejudiced by the other party?
3. If so, does such interest weigh up qualitatively and quantitatively against the interests of the latter party that the latter should not be economically inactive and unproductive?
4. 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?"

[19] This test, which has been consistently applied in this Court and in the High Court, requires a careful, fact-specific, and context-sensitive enquiry. It cannot be undertaken in a vacuum or on the basis of a hypothetical future dispute.

[20] Nienaber JA's words, in *CTP Ltd and others v Argus Holdings Ltd and another*,⁷ neatly apply this general approach to a contract in restraint of trade:

"Three points need to be made. One, the words in the contract must not be interpreted in the abstract and out of context (cf *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C). Two, a restraint which in general terms may be unduly wide or imprecise can be trimmed to fit the common understanding and perceptions of the parties in the light of the circumstances prevailing at the time of its enforcement (cf *Magna Alloys and Research (SA)(Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 896A-E, 898D). Three, a conclusion of invalidity will only be reached as a last resort (cf *Haviland Estates (Pty) Ltd and Another v McMaster* 1969 (2) SA 312 (A) at 337H; *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 819E-J)."

[21] In the present matter there is no live dispute. The respondent has withdrawn the first application and has not threatened any further steps to enforce the restraint. The applicant is not currently employed in any capacity that could constitute a breach. Although she mentions an internship in her replying affidavit, she has furnished no details of its nature, duration, or whether it bears any relationship to the respondent's business. In the absence of any actual or threatened breach, there is simply no factual matrix against which

⁷ 1995 (4) SA 774 (A) at 787E-G.

the Court can measure the reasonableness of the clause in terms of the *Barkhuizen* assessment or against which it could apply the *Basson* test. To grant the declarator sought would amount to an advisory opinion on a hypothetical future dispute.

[22] To apply the *dictum* of *CTP Ltd*, this Court could trim a restraint clause which is unduly wide (as proposed by the applicant) but it must be done at the time of its enforcement and by applying the facts present at that time to the test established in *Basson*. In this matter the respondent does not seek to enforce the restraint and the Court has not been given any facts against which the considerations of *Basson* can be applied in order to determine the reasonableness of the restraint.

[23] The applicant has attempted to rely on the facts as set out in the first application to justify the setting aside of the restraint clause or the reduction of the duration of the restraint. That application has been disposed of and those facts are irrelevant to this application. Enforcement in the future has the potential to be wholly different to the enforcement sought in the first application, and different facts are likely to be relevant to enforcement with a different employer. Reliance on facts specific to that breach and that enforcement is misplaced.

[24] In the matter of *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another*⁸ the court held:

'It amounts to this: if a restraint is so worded that according to its terms it can become operative in eventuality A and in eventuality B, and it appears that it will operate reasonably in eventuality A but unreasonably in eventuality B, then, even although it is eventuality A that actually materialises, it is still unenforceable. I can perceive no principle of logic or justice in such an approach. In my view it loses sight, once again, of what seems to me to be the decisive question in cases of this kind, namely the dictates of public policy as at the time when the Court is asked to enforce the restraint. Why, if the fact before the Court is A, and an order to enforce the restraint on that basis

⁸ 1979 (3) SA 1092 (T) at 1108.

would not be contrary to public policy, should the Court refuse to enforce it, simply because the agreement also happened to provide for eventuality B, which has turned out to be purely academic? In cases of restraint of trade public policy requires the Court to consider the effect of the order it is asked to issue, but to my mind neither public policy, nor any other principle of law, requires the Court to ignore the concrete facts before it and to pronounce *in abstracto* on the validity of the restraint clause as at the time of its creation, speculating in the process upon all sorts of possibilities which it knows never eventuated.

- [25] Finally, the applicant's desire for a clean declaration that the clause is unenforceable must be weighed against the respondent's right not to have its contractual bargain declared invalid in circumstances where it has already elected not to enforce it. Public policy favours the enforcement of contracts that parties have freely concluded unless there is a clear and present basis for finding them unreasonable. That basis has not been established in this matter.

No restraint

- [26] The applicant argues that there is no restraint of trade agreement on the basis that the agreement entered into at the time that she assumed the role of sales representative was not updated or re-negotiated at the time at which she was promoted to the role of territory manager. This is incorrect in law. In the matter of *Slo Jo Innovation (Pty) Ltd v Beedle and Another*⁹ the Court dealt with a similar argument and held:

- [44] In *Profibre Products (Pty) Ltd v Govindsami*, the applicant sought to enforce the restraint provisions as contained in the contract of employment between itself and the respondent. The respondent was employed on 15 December 2005 and promoted in 2011 to the position he held until his resignation seven years later. From the facts, it appears that the parties did not conclude a new contract of employment at the time of the respondent's promotion in 2011. The respondent contended that he was not bound by any restraint because when he was promoted in 2011, the restraint covenants (and

⁹ (2023) 44 ILJ 839 (LC) at paragraph 44.

indeed the entire employment contract concluded in 2005) were no longer binding. The Court held that –

‘There is manifestly no merit in this submission. The contract of employment signed by the respondent at the commencement of his employment remained intact and enforceable until the respondent terminated the contract by way of his resignation. There is simply no conceptual basis on which it could be otherwise. The respondent continued to reap the benefits of the contract after his promotion in 2011, by way of remuneration and other benefits. There is no reason why he should not continue to be bound by the obligations imposed on him by the contract, including the restraint’.

- [27] There is nothing unusual in parties concluding a restraint of trade agreement at the outset of the employment relationship. There is similarly nothing unusual or inherently wrong with an employer pre-empting a long and fruitful relationship with an employee and designing a restraint which foresees the need to protect itself across a wider area and a broader base than the employee works at the commencement of the relationship. In the absence of a further agreement or a revision to the existing agreement the original restraint clause will survive any promotions which the employee enjoys. This matter is no different. The restraint clause has survived the promotion to territory manager and remains alive.

Urgency

- [28] The issue of urgency warrants mention. Ordinarily, the urgency of an application should be determined at the outset and if deemed not urgent, it should be struck from the roll on that basis. Urgent court exists to protect parties from genuine and imminent harm that cannot be adequately addressed in the ordinary course. In *Boomerang Trade CC t/a Border Sheet Metals v Groenewald and Another*¹⁰ the Court stated that:

“Proceedings for the enforcement of a restraint of trade agreement are usually, by their very nature, urgent. They invariably seek to interdict ongoing

¹⁰ (EL 2300/10, ECD 1938/12) [2012] ZAECELLC 18 (18 September 2012) at para 36.

unlawful action in respect of which an applicant continues to suffer financial losses which are notoriously difficult to quantify, or to recover by way of action.”

- [29] This dispute is different. This is not a true restraint of trade application, despite the use of Rule 39 of the Rules Regulating the Conduct of the Proceedings of the Labour Court by the applicant. The applicant is not presently employed in a competing capacity, and the internship to which she refers has not been shown to engage the restraint in any way. There is accordingly no immediate prejudice that would justify the matter being entertained outside the ordinary course. The respondent is no longer seeking to interdict ongoing unlawful action. The applicant is not entitled to “jump the queue” simply because she wishes to obtain certainty about a clause that is not presently being invoked against her and may never be invoked against her.
- [30] Be that as it may, the applicant has been to court on a previous occasion and now seeks the intervention of this Court on the same facts again. While the dispute is not urgent and should fail on this basis alone, it is helpful to set out the basis upon which it is also meritless, to obviate the need for a different court to be seized with the dispute in the ordinary course.

Jurisdiction

- [31] A further difficulty arises from the procedural route chosen by the applicant. The application has been brought under the Labour Relations Act¹¹ (LRA). Restraint of trade disputes are fundamentally contractual in nature and are more appropriately pursued under the common law principles of contract in the High Court or, where relevant, the Basic Conditions of Employment Act¹² (BCEA), in particular section 77(3), which confers concurrent jurisdiction on this Court in respect of matters concerning contracts of employment. The reliance on the LRA as the sole basis for relief raises a real question as to the proper foundation for this Court’s jurisdiction in the present context.

¹¹ Act 66 of 1995.

¹² Act 75 of 1997.

[32] In the matter of *Abrahams v Drake and Scull Facilities Management (SA) Pty Ltd*¹³ the court dealt with a matter in which the relief sought was not specifically pleaded or founded in section 77(3). It held that:

[32] Mr Donen also submitted that the applicant has not specifically located her claim in s 77(3) of the Basic Conditions of Employment Act. That section provides that:

“The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.”

[33] That section makes it abundantly clear, once again in plain language, that this court does have jurisdiction to hear and determine a matter such as the one before me. It clearly concerns a contract of employment: the respondent has breached its terms by amending it unilaterally, and the applicant seeks specific performance of the contract. Maybe the applicant would have done better, through her attorney, to spell it out; but the fact that she doesn't allege in so many words that this court has jurisdiction in terms of s 77(3) of the BCEA does not deprive the court of that jurisdiction.’

[33] This position was upheld more recently in the matter of *Makgoka v Silverstar Casino*¹⁴. On this basis, although reliance has erroneously been placed on the LRA, it does not deprive the court of jurisdiction.

Costs

[34] This court has jurisdiction by virtue of section 77 (3) of the BCEA and not the provisions of the LRA. In the matter of *WACO Africa (Pty) Ltd v Ismail Ahmed and others*¹⁵ the court set out the correct test for costs. The test is as follows:

[114] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*, the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair

¹³ (2012) 33 ILJ 1093 (LC) at paras 32 and 33.

¹⁴ (J310/210 [2023] ZALCJHB 135 (21 April 2023).

¹⁵ Unreported Judgment 109219-2024, Labour Court Johannesburg, delivered on 11 December 2024.

balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[115] However, the LAC has held that when this Court exercises its jurisdiction under section 77(3) of the Basic Conditions of Employment Act, as it does in this instance, the rule established by section 162 of the Labour Relations Act to the effect that costs do not follow the result and must be determined by reference to the requirements of the law and fairness, does not apply. The rule to be applied in proceedings such as the present is that costs follow the result, save in exceptional circumstances.”

[35] The applicant sets out that her attorney is acting on a *pro bono* basis. But for this fact, costs would follow in favour of the respondent.

[36] In the premise the following order is made:

Order

1. The application is dismissed.
2. There is no order as to costs.

S. Saunders

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv KC Pillay

Instructed by: JPM Attorneys

For the Respondent: Adv C Goosen

Instructed by: Horn Attorneys

LABOUR COURT