LABOUR COURT

THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG

Reportable

Case number: J 299/2016

In the matter between:

LABOURNET (PTY) LTD **Applicant**

and

DYLLAN JANKIELSOHN **First Respondent**

SEESA LTD **Second Respondent**

Heard: 3 March 2016

Delivered: 1 April 2016

Summary: Urgent application to enforce restraint of trade undertakings in contract of employment. Reasonableness of restraint assessed. Period of three years not justified and unreasonable. Application dismissed.

JUDGMENT

PRINSLOO J.

Introduction:

[1] The Applicant filed an urgent application seeking to interdict and restrain the First Respondent ('Jankielsohn') from *inter alia* directly or indirectly competing with the business of the Applicant for a period of three years, calculated from 1 March 2016, in the Free State and Northern Cape provinces.

[2] The Applicant also seeks to interdict and restrain the Second Respondent ('SEESA') from employing Jankielsohn or in any way be associated with him in breach of the restraint of trade covenant.

[3] Jankielsohn opposes the application and SEESA filed a notice to state that it would abide by the Court's decision.

[4] The Applicant sought an interim interdict, immediately binding upon the Respondents, pending the return date. The relief the Applicant seeks is however final in nature and in view thereof that Jankielsohn's opposing papers and the Applicant's reply thereto are before Court, the matter could be decided finally.

[5] Jankielsohn resigned from the Applicant's employ on 26 January 2016, effective 26 February 2016. The urgent application seeking to enforce a restraint of trade covenant was filed on 16 February 2016 and enrolled for hearing on 25 February 2016 when it was postponed by agreement between the parties to 3 March 2016.

[6] Jankielsohn takes issue with urgency and submitted that the matter is not urgent, alternatively, the Applicant created or contributed to the urgency.

[7] In my view the matter is urgent and will be decided as such.

Material facts

[8] The Applicant conducts business as a human capital consulting service to employers throughout South Africa. The Applicant explained that, in a 'nut shell', the services rendered include on site consulting, advice, expert assistance, documents and policies, process preparation and implementation, assurance of compliance, dealings with third parties, trade unions and

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employees, disciplinary issues, incapacity and operational issues and disputes, training, employment law dispute resolution and general advice relating to industrial relations, human resources, skills and equity, payroll outsourcing and management, labour law, recruitment and occupational health and safety ('the services').

[9] The services are provided to employer entities, ranging from small employers with only a handful of employees to large employers with thousands of employees and the entities range from companies, close corporations, sole proprietors, trusts and other undertakings.

[10] The Applicant provides the services to approximately 4000 employers at 14 main branches throughout South Africa. In the industrial relations, human resources and labour law advice disciplines the Applicant concludes a fixed term service and retainer agreement with the client in terms whereof the services are rendered to the client on the basis of a fixed monthly retainer fee.

[11] The Applicant's services are provided by specialist consultants and clients are allocated to consultants, who are expected to render the service to the client on a day to day basis and to maintain a relationship with the clients. The Applicant emphasized that the maintenance of a proper and close relationship with the clients is crucial to its business and the consultants are compelled to have regular contact visits with clients in accordance with the principle that '*clients must be like friends, as friends do not cancel service agreements.'*

[12] The Applicant's case is that the services rendered to its clients are highly specialized and technical in nature and for this reason only consultants that meet a minimum entry requirement relating to profile and qualification, are recruited. The consultants are trained by the Applicant in respect of its policies, procedures, rules and *modus operandae* to enhance and promote the services provided to clients. According to the Applicant the conservative value of the training is R 70 000, 00.

[13] It is further the Applicant's case that the industry concerned is very specialized and highly competitive and it is the type of industry where the person of the consultant providing the services to the client can be decisive in maintaining business and relationships, provided such consultant is skilled, experienced

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and able to manage the client's needs. A limited number of competitors compete for a limited market share and a close relationship with the Applicant's clients are at all times required, in keeping with '*clients must be like friends, as friends do not cancel service agreements.'*

[14] On its own version, the Applicant is the market leader in the industry and its consultants are also seen as such. It is the Applicant's reputation and service it provides via its particular knowledge base, structure and consultant corps that attracts customers.

[15] Jankielsohn was employed by the Applicant on 13 October 2014 as an entry level trainee consultant and he was stationed at the Applicant's Bloemfontein branch. At the time of his resignation in January 2016 he was an industrial relations consultant and he earned R 10 000,00 per month.

[16] The Applicant's case is that it skills and equips a consultant and in essence hands a portion of its client base to a consultant to service and there is a real risk that the consultant may procure such a client for his own account and business, in competition and to the detriment of the Applicant.

[17] The knowledge the consultant has of the clients he or she services, the client requirements, the nature of the client's workforce and operations and the close relationship with the clients are only obtained because of the consultant's employment with the Applicant.

[18] The Applicant submitted that it has a substantial and protectable interest, which gave rise to its restraint of trade covenant with its employees.

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<u>The urgent application</u>

[19] The Applicant approached the Court on an urgent basis to enforce the terms of the restraint of trade agreement, as contained in clauses 13 and 14 of the contract of employment concluded between the Applicant and Jankielsohn.

[20] Clause 13 recorded *inter alia* that Jankielsohn should keep confidential and not disclose any of the Applicant's trade secrets, confidential documentation, technical know-how and data, systems, methods, software, processes, client lists, programmes, marketing and financial information to any person other than persons employed or authorised by the Applicant.

[21] Clause 14 recorded *inter alia* that, Jankielsohn should not transact with, solicit the custom of, deal with or provide any services to a client of the Applicant in competition with the business of the Applicant, should not be interested in or employed by any business that rendered any services in competition with the Applicant for a period of three years from date of termination of employment and in the Free State and Northern Cape.

[22] In the notice of motion the Applicant seeks to interdict Jankielsohn for a period of three years calculated from 1 March 2016 in the Free State and the Northern Cape from directly or indirectly:

1. Competing with the business of the Applicant;

2. Soliciting and or accepting any business or custom from any of the Applicant's existing customers or clients and in any manner dealing with any existing customers;

3. Being employed with any business or entity or person, which conducts business which is similar to or competes with that of the Applicant, and specifically SEESA.

[23] The Applicant submitted that it has a protectable interest, that it would suffer irreparable harm should Jankielsohn be permitted to act in breach of the restraint of trade and that the restraint is enforceable.

[24] Jankielsohn opposed the application for reasons I will deal with herein *infra.*

<u>The applicable legal principles</u>

[25] The general principles applicable to restraint agreements are well-established. In *Massmart Holdings v Vieira and another*[1] the Court recently summarised them as follows:

> "[4] Restraint agreements are enforceable unless they are unreasonable (see *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)). In general terms, a restraint will be unreasonable if it does not protect some proprietary interest of the party seeking to enforce a restraint. In other words, a restraint cannot operate only to eliminate competition. The party seeking to

[1] Unreported Labour Court case J1945-15.

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enforce a restraint need only invoke the restraint agreement and prove a breach of the agreement, nothing more. The party seeking to avoid the restraint bears the onus to establish, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable (see 2013 (1) SA 135; *Magna Alloys and Research (SA) (Pty) Ltd* supra; *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D)).

[5] One of the most influential statements of the law in regard to the determination of the reasonableness or otherwise of a restraint of trade agreement is that in *Basson v Chilwan and others* 1993 SA 742 (A). In that judgment, the court established the following test:

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 weighs 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?"

[26] In *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and another*[2] the position with regard to restraints of trade in our law, having considered the position before and after the constitutional dispensation, has been summarised as follows:

"1. Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work.

2. Insofar as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case.

3. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time the enforcement is sought.

[2] *(*2011) 32 ILJ 601 (LC).

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4. Where the onus lies in a particular case is a consequence of the substantive law on the issue.
5. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.
6. A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint:

6.1. The first is that the public interest required that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*.

6.2. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions."

Analysis

[27] In view of the *dicta* referred to *supra*, the point of departure is that restraint of trade agreements are valid. Whether a restraint of trade clause will be enforceable, is another question that requires an assessment of the reasonableness thereof.

[28] In *Jonsson Workwear v Williamson and another*[3] *(Jonsson)* the Court summarised the factors to be considered and held that:

> "In simple terms therefore, and what needs to be considered in determining whether or not the enforcement of a restraint of trade would be reasonable, are five issues, being *(a)* the existence of a protectable interest, *(b)* the breach of such protectable interest, *(c)* a quantitative and qualitative weigh off the respective interests of the parties, *(d)* general considerations of public interest, and *(e)* whether the restraint goes further than necessary to protect the relevant interest. All these considerations need to determined as a whole, as part of a value judgment to be exercised, in order to finally conclude whether or not the restraint should be enforced".

[29] The first consideration is whether there is an interest that requires protection.

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[3] (2014) 35 ILJ 712 (LC).

Protectable interest

[30] The Applicant submitted that it has a protectable interest as Jankielsohn, through his employment and association with the business of the Applicant obtained particular knowledge of pricing, *modus operandae* and specifications of the services supplied by the Applicant, as well as particulars of the Applicant's clients and their requirements. Jankielsohn was privy to all the strategies, documentation and process utilized by the Applicant to procure new clients and to service existing clients.

[31] In respect of SEESA, the Applicant submitted that SEESA provides the same services as those normally provided by the Applicant and Jankielsohn will in future utilize the information regarding services, operations and client base to the advantage of SEESA and to the detriment of the Applicant.

[32] In summary, the Applicant stated that its protectable interest is the confidential information about the Applicant's business and customers the Respondent had access to and the relationship that he had with the customers he was tasked to service.

[33] The Applicant's protectable interest seems to be standing on two legs namely confidential information about the Applicant's business and customers and customer relationship.

[34] I will deal with the confidential information and customer relationships separately.

Confidential information

[35] In *Experian SA (Pty) Ltd v Haynes and another*[4] the issue of confidential information was considered and the Court held:

> "It is trite that the law enjoins confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a closed circle; and be of economic value to the person seeking to protect it."

[4] (2013) 34 ILJ 529 (GSJ).

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[36] In *Jonnson* this Court found that:

> "What thus must now be done, as part of the value judgment to be exercised in this matter, is to determine whether there is a case made out on the proper accepted facts as to whether the information the first respondent had access to whilst employed with the applicant would fall within the parameters of what could be classified as confidential information in terms of the above authorities, and also whether this information would be of benefit to the second respondent as employer of the first respondent."

[37] The confidential information about the business and customers are described *inter alia* as the strategies, documentation and process utilized by the Applicant to procure new clients and to service existing clients, pricing, *modus operandae* and specifications of the services supplied by the Applicant, as well as particulars of the Applicant's clients and their requirements.

[38] In opposing this application, Jankielsohn disputed a number of material averments.

[39] Firstly, Jankielsohn specifically denied that the services he was expected to perform are of a specialized nature as it merely entailed the application of the process set out in the Labour Relations Act[5] ('the Act') and can be done by any legal practitioner or any other person having regard to the provisions of the Act. He explained that the services he provided merely entailed an application of the process set out by the LRA and are the same as the service that any other entity that provides labour services could provide. He further explained that when he studied towards his LLB degree he studied this field of the law.

[40] According to the Jankielsohn the *modus operandae* etc cannot be confidential and cannot constitute a protectable interest as it entails an application of the LRA and the processes prescribed therein.

[41] Jankielsohn further stated that the information he needed to perform his duties is readily available on the internet. This is denied by the Applicant.

[42] The Applicant's version is that it has spent more than a decade to build up a knowledge base, which is maintained at some expense. Further it subscribes

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[5] Act 66 of 1996.

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to LexisNexis, which is accessed by password and whatever Jankielsohn had access to at the Applicant, is far better than what is in general available on the internet.

[43] Whether the Applicant's LexisNexis is password protected, LexisNexis is available to any individual prepared to pay the subscription fee and it cannot be said or regarded as confidential and not in the public knowledge. The Applicant has not explained why the knowledge base is confidential and the mere fact that it is better than what the Jankielsohn could access elsewhere, does not make it confidential.

[44] In *David Crouch Marketing CC v du Plessis*[6] this Court also dealt with the issue of confidential information and said that where a former employer wishes to rely on or enforce a restraint of trade agreement in order to protect secrets and confidential information, it must show that the information, know-how, technology or method is unique and peculiar to its business and that such information is not public property or that it falls within the public's knowledge. In other words, the former employer must show that the interest that it has in the information it seeks to protect, is indeed worthy of protection. Not all information obtained by the employee during the course of his employment will be secret or confidential. The Court then held that:

> "The applicant in its founding affidavit also submits that its modus operandi and products as well as its services are indeed confidential and worthy of protection. The applicant again does not elaborate or give any details as to why these products, modus operandi and services are worthy of protection. Why these aspects are so unique is not clear from the founding affidavit. I am again in agreement with the submission advanced on behalf of the respondent that, without elaborating on the details of the applicant's alleged unique *modus operandi*, products and services, it must be accepted that the applicant has no unique modus operandi, products or services that are worthy of protection."

[45] *In casu* the Applicant failed to put convincing evidence before this Court to firstly show what the strategies, documentation, *modus operandae*, specifications of the services supplied by the Applicant etc are that are regarded as confidential, why it is regarded as confidential and why it would be useful to SEESA. The Applicant made bold and unsubstantiated allegations in

[6] (2009) 30 ILJ 1828 (LC).

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this regard and has failed to convince me that there is indeed confidential information that requires protection. The mere fact that SEESA operates in the same industry or is regarded as competition, does not automatically mean that the Applicant's strategies, documentation etc would be useful to them.

Customer relations

[46] The Applicant's case is also that the customers Jankielsohn had access to and the relationship that he had with the customers he was tasked to service, constitutes a protectable interest.

[47] In *Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and another*[7] the Court in considering the question whether there was indeed a protectable interest held that:

> "As I pointed out in *Esquire Technologies*, a restraint is valid if there is a proprietary interest which justifies protection. Those interests are usually in the nature of trade secrets, know-how, pricing or customer connections. Therefore, a restraint would be an enforceable restriction on the activities of an employee who (for example) had access to the company's customers and could use his/her relations with the company's customers to the advantage of a competitor and to the detriment of the company."

[48] A customer connection is a protectable interest and should be protected if it could be used and *in casu* it would mean that Jankielsohn could use it to the advantage of SEESA and to the Applicant's detriment.

[49] The Applicant's case is that through his position as consultant, there is an existing relationship with the Applicant's clients and some clients may want to continue with the relationship with Jankielsohn at an alternative employer and this would mean an actual loss of business for the Applicant. Furthermore, Jankielsohn will seek to procure new clients for his own benefit and that of his new employer in competition with the Applicant and the easiest place to procure new clients would be from the Applicant's client base, Jankielsohn had

[7] (2012) 33 ILJ 629 (LC).

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access to. This will save SEESA time, money and effort to search for clients and to build up relationships with clients.

[50] The Applicant's case is further that the relationship between Jankielsohn and the clients he was tasked to service is one of utmost trust and he in fact carries the clients he serviced in his pockets. As such he can easily influence and convince clients to do business with him and SEESA, rather than the Applicant and once Jankielsohn starts working for SEESA, the Applicant will lose clients to SEESA.

[51] Jankielsohn's case is that he was too busy to render the services required that he did not have time to conduct meetings with clients to build relationships and any relationship he had with a client, was purely professional. He explained that the Applicant has about 500 clients in the Bloemfontein office and he does not have particular knowledge of all the clients he serviced as such knowledge was not required to render the services he was instructed to render.

[52] Jankielsohn explained that there were 6 industrial relations consultants and no specific group of clients were allocated to any one consultant, as clients were allocated by the managers. He explained that the consultants did not always work with the same clients but all the consultants worked with all the clients. This is disputed and conceded to some extent by the Applicant. The Applicant conceded that the manager would maintain an overall responsibility for the entire client base serviced by the team of which Jankilesohn was part of, but disputed that Jankielsohn was not allocated a client base.

[53] Jankielsohn denied that he was expected to maintain a relationship with the clients and stated that he was merely required to perform the duties he was instructed to and in some instances, the clients were not even present when the duties were performed and he never met them. He further explained that the Applicant has a marketing and recruitment department that is responsible for the recruiting of new clients. This is denied by the Applicant, but conceded that in the Free State there is a person responsible for marketing.

[54] In respect of the Applicant's claim that there is a real risk that Jankielsohn could procure its existing clients or new clients he recruited for the Applicant, Jankielsohn stated that he has never recruited a single client for the Applicant,

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nor has any client of the Applicant ever asked for Jankielsohn specifically to render their required service. He further denied that he has any incentive to recruit clients for SEESA and that the recruitment of clients is not part of his job description and he would not be involved in recruiting clients for SEESA. In any event, SEESA has its own established clientele.

[55] There was no convincing evidence placed before me to show that Jankielsohn had a special relationship with some clients, only unsubstantiated allegations that *he has the clients in his pocket* are made.

[56] If the Applicant has a protectable interest, it would be its customer connections. However, I am not convinced on the facts before me, that *in casu* this is indeed a protectable interest.

Breach of the protectable interest

[57] If I am wrong and even if the Applicant indeed has a protectable interest, that is not the end of the enquiry.

[58] It has to be determined whether or not, even if the Applicant is found to have a protectable interest, it has been shown that the Jankielsohn's employment with SEESA would infringe on such protectable interest. This is a factual question, based on what Jankielsohn would actually do at SEESA and what possible risks the Applicant would be exposed to if he is allowed to remain employed by SEESA.

[59] The Applicant's case is that the restraint agreement is breached by the fact that Jankielsohn took up employment with SEESA, which is prohibited in terms of the restraint agreement, as SEESA is a direct competitor.

[60] I accept that as SEESA is a direct competitor of the Applicant, Jankielsohn's employment with SEESA would *prima facie* be a breach of the restraint of trade agreement and would infringe the protectable interest. However, this would always be subject to the determination of the existence of actual infringement on the facts.

[61] Jankielsohn's case is that he took up employment with SEESA because he would not have to work such extensive overtime hours and the remuneration was better. The Applicant offered him a better job, but the offer was not put in

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writing and was subject to him first completing further training. The offer of a better job is denied by the Applicant. Be that as it may, Jankielsohn subsequently accepted employment with SEESA and it appears that his main consideration was better remuneration.

[62] There is simply no evidence before me to show that the employment of Jankielsohn was solicited by SEESA with a view to procure confidential information of the Applicant or with the motive to lure the Applicant's existing clients.

[63] In fact, the evidence before me is that SEESA is an established business that has its own clientele, Jankielsohn has no intention to recruit clients for SEESA and the reason he left the Applicant, relates to his personal considerations of better remuneration and less overtime work. I cannot find that there is an ulterior motive. Jankielsohn has simply remained in the industry he started out in, with another employer for better remuneration.

[64] The Applicant has not made one factual allegation that Jankielsohn indeed infringed the restraint agreement and I am mindful of the fact that it is sufficient for the Applicant to show that he could do so. However, on the facts before me, I am not convinced that this is indeed the case or that there will be an infringement on the Applicant's protectable interest.

[65] This is supported by the fact that Jankielsohn indeed provided a written undertaking to the Applicant not to "*'interfere, contact, 'poach', incite or impose, to any degree whatsoever with any of Labournet's clients."*

[66] The Applicant rejected this undertaking as it *"does not believe that the first respondent would not solicit the custom of the client he serviced at the applicant, once employed by SEESA."*

[67] The Applicant's disbelief is however not sufficient to convince this Court that there was indeed or there will be a breach of the protectable interest.

<u>A quantitative and qualitative weigh off the respective interests of the parties</u>

[68] The question is how does the Applicant's interests weigh up qualitatively and quantitatively against Jankielsohn's interests to be economically active and productive. In my view this consideration goes hand in hand with a

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consideration of the public interest that requires parties to comply with their contractual obligations and that allows all persons to be productive and to be permitted to engage in trade and commerce or professions.

[69] In *Reddy v Siemens Telecommunications (Pty) Ltd*[8] the Supreme Court of Appeal upheld a 12-month restraint against an employee who had joined a competitor (Ericsson). The Court restated the following principles:

> "1. A Court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom in forming the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life.
>
> 2. In applying these two principal considerations, the particular interest must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest."

[70] In applying the two aforesaid principal considerations, the particular interest must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. I already found that the Applicant does not have an interest that deserves protection, but I am mindful of the possibility that I might be wrong on this.

[71] Jankielsohn took issue with the fact that the Applicant went to lengths to explain to this Court how extensive its business operations are, how many thousand clients it has and how many employees it employs, yet in the same breath seeks to convince this Court that a single low level employee can

[8] 2007 (2) SA 406 (SCA).

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prejudice its entire enormous business and can cause harm that would justify a restraint that could leave him unemployed.

[72] Jankielsohn denied that the services he rendered were highly technical and specialized but were merely an application of the process set out by the LRA and are the same as the services that any other entity that provides labour services could provide.

[73] The Applicant accepted that it was feasible that anyone could provide the services the Applicant provides, but stated that a client requiring an industrial relations service consultant or a competitor looking to employ such consultant would employ Jankielsohn because and for the specific reason that he was employed and trained by Labournet.

[74] It is Jankielsohn's case that he was employed at the lowest possible level in the Applicant's business structure and in accordance with the Applicant's system indicating competencies for consultants, he was only competent to handle 'blue collar misconduct', which is a very low competency. The Applicant accepted that Jankielsohn has not completed all his training modules, but insisted that the nature of the training he received, made him so valuable to a competitor that such competitor would not hesitate to employ him.

[75] Jankielsohn's case must be viewed in light of what the Applicant pleaded specifically namely that '*the applicant principally markets on a word of mouth and sales for service basis – in short referrals. It is the applicant's reputation and service it provides via its particular knowledge base, structure and consultant corps that attracts customers."*

[76] The Applicant's own version is that it is the market leader, it has a huge operation and its reputation is the main attraction for clients.

[77] It is the Applicant's case that because of the training it provided and the mere fact that it employed Jankielsohn, any client requiring an industrial relations service consultant or a competitor looking to employ such consultant would employ Jankielsohn because he was employed and trained by Labournet. In my view the Applicant is taking it too far and attaches far too much value on the training it provides and the consequences of being employed by Labournet.

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[78] The Respondent disputes the reasonableness of the restraint agreement with respect to period and area.

[79] The Applicant's case is that the restraint agreement is reasonable as it only seeks to enforce it in the area Jankielsohn actively worked, despite the fact that it is a national undertaking. On the other hand, Jankielsohn's case is that he indeed provided a written undertaking not to *'interfere, contact, 'poach', incite or impose, to any degree wahasoever with any of Labournet's clients."*

[80] This is not accepted by the Applicant as it *"does not believe that the first respondent would not solicit the custom of the client he serviced at the applicant, once employed by SEESA. Whilst the first respondent may now have the best intention, it cannot be expected that the applicant must rely on hope and good faith that this will last."* Jankielsohn submitted that the Applicant is acting *mala fide* where it refuses to accept an undertaking but seeks an order that would deny him employment and an offer within his field with better remuneration. The Applicant expects him to uproot and move to another province, which would not be financially possible. Jankielsohn further stated that this is unreasonable as he was employed at a low level and is denied the opportunity to progress financially. Furthermore, he was employed for about a year and a half, yet the Applicant seeks to enforce a restraint for three years.

[81] Mr Olivier on behalf of Jankielsohn submitted that Jankielsohn is held hostage by the Applicant as he cannot leave the Free State, but may not take up better employment for a period of three years. He further submitted that it is evident from the Applicant's papers that SEESA is the Applicant's fiercest competitor and to enforce a restraint such as the one the Applicant seeks to do, is done with the sole purpose of stifling competition and that is against public policy.

[82] In my view there is merit in Mr Olivier's argument.

[83] The Applicant submitted that Jankielsohn agreed to the restraint, he was warned that it would be enforced should he continue with his employment with SEESA and had he just adhered to the clear warnings given to him, he would still have a career with the Applicant. The Applicant stated specifically that it was still willing to keep Jankielsohn, if he retracts his resignation and stays

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with the Applicant, failing which he must be responsible for the consequences, which could include unemployment or relocating to another province.

[84] The Applicant's restraint agreement is akin to checking into the Hotel California[9] where once you have checked in 'you can check out any time you like but you can never leave.'

[85] In respect of period, the Applicant presents no justification for why a period of three years should be enforced and stated that it could do no more than to refer to the fact that the period of three years had been enforced by this Court previously and the Applicant referred to one instance, namely case number J78/16, where the Court enforced a restraint for that period. I have granted the order in case number J78/2016 and have to state that it is not comparable with this case for a number of reasons. Firstly, in case J78/16 the respondent (former employee) actively solicited business from the Applicant's clients, which caused the clients to terminate their agreements with the Applicant to support the former employee's business in competition with the Applicant and proof to that effect was placed before Court. *In casu* that is not the case. Secondly, the matter was unopposed and I granted a rule *nisi* with a return date to allow the respondent the opportunity to show cause on the return date, why the interim order should not be made final and by the time this application was argued, the order was still interim and there was a possibility that on the return date the Court would not enforce the restraint for a period of three years. Each case has to be decided on its own merits.

[86] There is simply no justification to enforce a restraint of trade for a period of three years and the period of three years is unreasonable.

[87] A quantitative and qualitative weigh off in this matter favours Jankielsohn's interests to be economically active and productive as opposed to the Applicant's interest.

[88] I conclude that the Applicant has no protectable interest, the employment of Jankielsohn at SEESA does not infringe any protectable interest the Applicant may have in any event, and the quantitative and qualitative weigh off favour

LABOUR COURT

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[9] "Hotel California" by The Eagles 1976.

Jankielshon. To enforce the restraint of trade in these circumstances would not only be unreasonable, but will stifle competition.

[89] The Applicant failed to demonstrate a clear right in this matter and the enquiry should go no further.

Costs

[90] The Court has a broad discretion to make orders for costs according to the requirements of the law and fairness. The requirement of law has been interpreted to mean that the costs would follow the result.

[91] Both parties argued for costs and I can see no reason why costs should not follow the result.

Order

[92] In the premises, I make the following order:

92.1 The application is dismissed with costs.

C.Prinsloo,J

Judge of the Labour Court

LABOUR COURT

<u>Appearances:</u>

For the Applicant : Mr R J C Orton, Snyman Attorneys

For the First Respondent: Advocate J L Olivier

Instructed by : Rossouws Attorneys

LABOUR COURT