THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no. J 4062 / 18

In the matter between:

JURGENS STEPHANUS BEKKER t/a

JURGENS BEKKER ATTORNEYS **Applicant**

and

CARIEN VAN GREUNEN **First Respondent**

DI SIENA ATTORNEYS **Second Respondent**

Heard: **7 December 2018**

Delivered: **14 December 2018**

Summary: **Restraint of trade – principles stated – application of principles to matter – issue of protectable interest and infringement of such interest considered**

Restraint of trade – terms of restraint agreement considered – employer using standard template to formulate restraint – does not detract from validity of restraint concluded – employee could have only bound herself to employer in terms of restraint

Restraint of trade – matter only concerns trade connections in the form of protection of client base – protectable interest on the basis of trade connections shown

Urgency – principles relating to urgency in restraint applications considered – urgency shown – application to be considered as one of urgency

Interdict – requirements of interdict satisfied – interdict upheld – application granted – restraint enforced

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JUDGMENT- REASONS

SNYMAN, AJ

Introduction

[1] The applicant has sought to enforce a restraint of trade covenant against the first respondent, in the form of an interdict. The second respondent has been joined in the application only on the basis of having an interest in the matter, as a result of being associated with the first respondent. The first respondent has opposed the application on a number of grounds, including urgency, which I will deal with below.

[2] When this application was originally brought by the applicant, the conduct of the first respondent sought to be interdicted, was far broader than what the applicant ultimately moved when the matter came before me for determination. For example, the applicant also sought to interdict the first respondent from using a certain cellular telephone number and confidential information. But then finally, all that remained was the applicant seeking to interdict the first respondent from soliciting its clients.

[3] The matter first came before me on Wednesday 5 December 2018, but was stood down to Friday 7 December 2018 for the applicant to consider the first respondent's answering affidavit, which it contended it had not received, and to file a replying affidavit. When the matter reconvened on 7 December 2018,

the applicant provided me with what it labelled a 'with prejudice' offer, which it had also presented to the first respondent. In terms of this this offer, the applicant abandoned all the relief it sought against the first respondent, save only for, as I have touched on above, insulating its client base from the first respondent. The first respondent refused to accept this offer.

[4] There is also another preliminary issue I need to address. Both the founding affidavit and the answering affidavit contains a plethora of personal attacks, insults and accusations, as between the applicant and the first respondent. These kind of allegations have no place in deciding a restraint of trade application. I indicated to the parties that I will have no regard to the content of the founding affidavit and answering affidavit where it comes to such content. To illustrate it simply by way of two examples, whether the applicant is rude and arrogant and the first respondent's husband having a drinking problem and being an embarrassment to the practice, has no relevance in deciding whether or not to enforce a restraint against the first respondent.

[5] After hearing argument from both parties on 7 December 2018, I made an order in the following terms:

1. The application is heard as one urgency.

2. The first respondent is interdicted and restrained until 9 October 2019 and directly or indirectly, either for her own account or as a representative or agent of any third party from persuading, inducing, encouraging or procuring any of the applicant's clients to cease to procure services from the applicant, including by accepting approaches from such clients.

3. The order in terms of paragraph 2 of this order shall not apply to any of the clients listed on annexure "A" of this order, as signed and dated.

4. Save for paragraph 5 of this order, there is no order as to costs.

5. The first respondent shall pay the applicant's costs for the appearance on 7 December 2018, as well as the replying affidavit, which shall include the costs of two counsel.

6. Written reasons for this order will be provided on 14 December 2018.'

This judgment now constitutes the written reasons as contemplated in paragraph 6 of my order, above.

[6] Because the issue of urgency was very much in dispute, the applicant would thus have to satisfy the requirements of urgency so as to convince this Court to entertain the matter outside the ordinary course. Further, the applicant seeks final relief, and thus the applicant must satisfy three essential requisites to succeed, being (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[1]

Urgency

[7] According to the first respondent, the applicant has failed to establish urgency, even on its own version. The first respondent complains that the applicant procrastinated and that any urgency in this matter is self-created. I will decide the issue of urgency by first setting out the relevant factual matrix relating to urgency.

[8] The first respondent resigned on 9 October 2018, with immediate effect. Despite not working for the remainder of October 2018, she was paid her full salary for October 2018.

[9] In the founding affidavit, the applicant refers to an exodus of clients formerly serviced by the first respondent, as from 11 October 2018. On 11 October 2018, Mr Estima, who had 13(thirteen) matters with the applicant, terminated his mandate, as did Mr Marques who had 2(two) matters, and Mr Neofytou who had one matter. There was nothing in these mandate terminations and associated correspondence, at the time, that gave an indication that these clients would be taking their business to the first respondent.

[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20. In particular, and where it comes to restraint applications, see *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another* (2011) 32 ILJ 601 (LC) at para 38 – 40; *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 26; *Experian SA (Pty) Ltd v Haynes and Another* (2013) 34 ILJ 529 (GSJ) at para 59; *Jonsson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC) at para 54; *FMW Admin Services CC v Stander and Others* (2015) 36 ILJ 1051 (LC) at para 1.

[10] What followed were further mandate terminations on 12 October 2018 by Ms Zagorski, Mrs Rosslee (five matters) and Mr Buys. Again, there was no indication at the time, that gave an indication that these clients would be serviced, going forward, by the first respondent.

[11] On 13 October 2018, Mr Makhathini terminated his mandate, followed by Mr Nkosi (two matters) on 16 October 2018, and Mr Coutinho (ten matters), Mrs Devarajoo on 18 October 2018, Mr Hollander on 24 October 2018 and Mr Gardiner (seven matters) on 26 October 2018. Yet again, there was no actual and direct link between these mandate terminations and the first respondent, at the time.

[12] The actual confirmation of the possible involvement of the first respondent in these mandate terminations came on 26 October 2018, when the applicant was informed by a colleague, Nicola Le Roux, that the first respondent was now acting on behalf of Mr Estima and that she had become associated with the second respondent. The applicant was sent proof of this in the form of an e-mail by the first respondent written in the course of litigation on behalf of this client.

[13] According to the first respondent, the above chronology meant that the applicant must have appreciated by 11 October 2018 already that the first respondent had contravened her restraint of trade. The first respondent also referred to a statement in the founding affidavit where the applicant had enquired on 11 October 2018 from Mr Estima's mother where her son would be obtaining legal services in future, and he was told they were 'waiting for Carien' (first respondent), in further support of this argument that the applicant must have known much earlier of the first respondent's violation of the restraint.

[14] But what the first respondent in my view fails to consider is that, as said above, there was no actual nexus between the clients leaving the applicant and the first respondent, at the time. It was suspicious, sure, but cases cannot be brought on suspicion. Added to this, Mr Estima in fact represented himself in Court on 12 October 2018 which does not constitute a breach of the restraint by the first respondent at the time, even though it may be

contemplated in future. The point is contemplated or possible breach, is not breach.

[15] The applicant has also explained that after the discussion with Mrs Estima on 11 October 2018, he tried to telephonically contact the first respondent to establish her intentions, but to no avail, and she was ignoring him.

[16] I therefore accept that the first proper occasion when the applicant actually had sufficient cause to accept that the first respondent was in contravention of her restraint of trade was on 26 October 2018, and any urgency must be decided based on that as the applicable date.

[17] Having received this information, the applicant attempted to contact the second respondent telephonically, again without success. A letter of demand was then sent to the first respondent on 29 October 2018, demanding that the first respondent provide an undertaking by 30 October 2018 that she will comply with her restraint of trade. The first respondent's attorneys answered on 30 October 2018, denying breach of the restraint of trade. The applicant then engaged attorneys, hoping that a letter of demand from separate attorneys acting for it may bring the first respondent to other insights. The applicant's current attorneys wrote a letter of demand on 1 November 2018, addressed to the first respondent's attorneys, demanding an undertaking to comply with the restraint of trade by 2 November 2018. No further response was received from the first respondent to this demand.

[18] On 8 November 2018, the second respondent answered in writing, confirming that the first respondent was not employed by the second respondent, but a consultant to the firm. The first respondent was thus clearly associated with the second respondent.

[19] The current application was then brought on 19 November 2018, roughly two weeks later. It must however be considered that around the same time, other litigation in the High Court between the applicant and the first respondent arose, to interdict other unlawful conduct by the first respondent and other former employees of the applicant. This application was heard on 27 November 2018 under case number 42125 / 18. This also entailed the

preparation of an urgent application, which was done in the course of the week of 5 to 12 November 2018. The current application was prepared next.

[20] The Court dealt with urgency, specifically in the context of restraints of trade, in the judgment of *Vumatel (Pty) Ltd v Majra and Others*[2] and said:

> 'I accept that restraints of trade have an inherent quality of urgency. This position comes from the following dictum in *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff & another* where the court held: 'I accept that breaches of *restraints of trade have an inherent quality of urgency*.'

The Court however added the following:[3]

> '… An urgent restraint of trade application is still nothing else but an urgent application, just like any other urgent application where final relief is sought. The ordinary requirements applicable to such urgent applications must still find application. The fact that one is dealing with a restraint of trade is not some kind of license that in itself establishes urgency, to the exclusion of all other considerations.'

[21] The ordinary requirements relating to urgent applications in general was summarized in *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[4] as follows: (a) the applicant has to set out explicitly the circumstances which renders the matter urgent with full and proper particularity; (b) the applicant must set out the reasons why the applicant cannot be afforded substantial redress at a hearing in due course; (c) where an applicant seeks final relief, the court must be even more circumspect when deciding whether or not urgency has been established; (d) urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity; (e) the possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing must be considered; and (f) the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency.

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[2] (2018) 39 ILJ 2771 (LC) at para 4.
[3] Id at para 5. See also *Ecolab (Pty) Ltd v Thoabala and Another* (2017) 38 ILJ 2741 (LC) at para 20.
[4] (2016) 37 ILJ 2840 (LC) at paras 20 – 26, and all the authorities cited there.

[22] Applying the above principles to the factual matrix summarized above, I am satisfied that the applicant has not unduly procrastinated. Although the applicant had cause to be suspicious about a dozen clients terminating their mandates within days after the first respondent resigned, I repeat what I had said earlier to the effect that suspicion is not sufficient proof of contravention of the restraint. More was needed, and that more came in the form of written proof on 26 October 2018. The applicant in my view cannot be legitimately criticized for not bringing the application immediately after 11 or 12 October 2018, or at any point prior to 26 October 2018.

[23] Next, it is in fact acceptable for the applicant to first try and secure an undertaking to comply with the restraint before resorting to litigation. In *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another*[5] it was held:

> 'In my view, litigants should be encouraged in any attempt to avoid litigation, rather than rushing to court as a first option. Litigation is costly and often unnecessary. …'

The attempts by the applicant from 26 October 2018 of seeking to telephonically contact the first and second respondents, and then send letters of demand on 29 October and 1 November 2018, all to secure an undertaking to comply with the restraint of trade, properly accounts for the time taken in this matter until 2 November 2018 (the expiry of the final deadline).

[24] It is true that it took some two weeks after 2 November 2018 for the applicant to launch the urgent application. In this respect, the applicant may be open to criticism. One would have liked to see the application brought within a week from that date. But it must be considered that there was other urgent substantive litigation that arose between the same parties at the same time, in the High Court, that had to be dealt with. It was therefore not as if the applicant sat back and did nothing for the whole two weeks. Even if the applicant's explanation for the two week period can be seen to be thin, it is not an entirely undue delay, and would at least be one of those borderline cases of urgency

[5] (2012) 33 ILJ 629 (LC) at para 22. See also *Vumatel* (*supra*) at para 24.

where the inherent urgent quality of restraints of trade would carry the day. As said in *Vumatel*:[6]

> 'I venture to suggest that the inherent quality of urgency in restraint applications would only save the day where it comes to urgency in those borderline cases where a matter teeters on the edge of being considered urgent, or not urgent. This would of course be in the discretion of the presiding judge to decide …'

[25] This leaves the requirement of the applicant's ability to obtain proper substantive redress in due course, for consideration. In the case of a restraint of trade, there is a unique aspect to this consideration. Usually, restraints are for a limited period, and considering the undeniable realities of litigating in the ordinary course, by the time a hearing date is available, the restraint may well have long since expired. This may, as part and parcel of all the other requirements of urgency, provide justification for the restraint being heard urgently, for as long as the restraint period has not expired, as substantive redress would not be able to be obtained in the ordinary course. As long as there is no undue failure by the applicant in bringing the matter in the first place, this would be an important consideration working in favour of the matter being decided urgently. In *Vumatel*, the Court described it as follows:[7]

> 'In the case of restraints of trade, to what extent the applicant's failure contributes to the inability to obtain substantial redress in due course is an especially important consideration where it comes to urgency. This is because the clock starts ticking as soon as the employee leaves employment. It follows that as soon as the employer realises that there is a possible violation of the restraint, it must act promptly. If the employer does so, it would be able to successfully argue that the possibility of the restraint period expiring before the matter can be heard in the ordinary course is not due to its own doing. This kind of consideration would be why this requirement is inextricably linked with the other requirements of urgency in the case of restraints …'

[26] Overall considered, I am convinced that the applicant's application satisfies the requirements of urgency. There was no undue delay from the time when it

[6] (*supra*) at para 6.
[7] Id at para 23.

became competent to bring the application, until when it was in fact brought. The applicant first tried to secure an undertaking, which is an acceptable course of action. There was other intervening litigation, which affected the applicant's ability to bring this application earlier. And overall, the inability to obtain substantial redress in due course and the inherent quality of urgency in the case of restraints, should in this particular case save the day for the applicant where it comes to urgency. It is thus competent to decide this matter on the basis of urgency as contemplated by Rule 8.[8]

The issue of the restraint agreement

[27] The first respondent, on the basis of what she described as an *in limine* defence to the applicant's application, firstly contended that the restraint of trade was invalid, as a result of what she described as deficiencies in the restraint of trade agreement itself. I am however of the view, for the reasons elaborated on below, that this was nothing more than pure opportunism on the part of the first respondent to escape a restraint trade she in fact agreed to.

[28] The first respondent was employed by the applicant in terms of a written contract of employment signed between the parties on 7 December 2016. The first respondent had however been employed by the applicant long before that, starting employment as a candidate attorney about a decade earlier. It must therefore be taken into account that as an existing and long standing employee, there was no cause or reason for her to have signed such a new contract of employment, and could have only have done so voluntarily and willingly. In terms of this written contract of employment, in particular clause 16.3, the following was recorded:

> 'The employee acknowledges and agrees that the separate restraint of trade agreement, attached hereto as Appendix "C", entered into between the parties, forms part of this agreement.'

[29] The applicant and the first respondent then indeed signed such an appendix "C". The document is on face value a proper restraint of trade agreement. But

[8] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 *ILJ* 112 (LC) at para 18.

the first respondent then seeks to take apart this document piece by piece. She is critical of the numerous references to the phrase 'company' used throughout the document when referring to her employer, which according to her deprives the applicant of *locus standi* because he is not a company but a sole proprietor. In simple terms, the first respondent contends the restraint is invalid because it is designed for a company and not a sole proprietor such as the applicant, who is in fact her employer in his personal capacity.

[30] What is clear to me is that indeed the applicant used some or other template when seeking to formulate the restraint of trade agreement. But this cannot render the restraint of trade to be *per se* invalid. As advocate Whitcutt correctly submitted, there never was any 'company' that employed the first respondent. At the time when signing the contract of employment and with it the restraint of trade document, there was never any doubt that the first respondent was employed by the applicant and that he was her employer for all intents and purposes, including the restraint of trade. There would be no cause or reason for the first respondent to sign a restraint of trade on behalf of some or other unknown 'company'. By this time, the parties had a long standing employment relationship, and were fully familiar with one another.

[31] There can be little doubt that the only parties to the employment contract and with it the restraint of trade covenant is the applicant and the first respondent. There is no one else that can be involved in it, and no one else on whose behalf the first respondent could have committed herself to a restraint of trade. The proprietary interest at stake in this case also can only belong to the applicant.

[32] When interpreting the restraint document, the following principles in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[9] must be applied, where the Court said:

> '… Interpretation is the process of attributing meaning to the words used in a document … having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light

[9] 2012 (4) SA 593 (SCA) at para 18.

> of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. …'

[33] Having referred with approval to the above *dictum* in *Endumeni Municipality,* the Court in *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk*[10] added the following:

> '…. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.

[34] It may well be that the use of the phrase 'company' refers to a corporate entity and would not include a sole proprietor such as the applicant. But to merely consider this phrase in isolation without considering the entire document and how it came into being is not appropriate. The document came into being as part and parcel of an employment contract, between the applicant as employer and the first respondent as employee, in the context of an already existing employment relationship. The restraint document still refers to the first respondent as the employee that provides a restraint covenant in favour of the "company', which then logically considered can only be the applicant. Finally, and as touched on above, there is simply no other third party to which the first respondent could have bound herself to by way of such restraint.

[35] Another important factor is that the restraint document is in effect incorporated into the employment contract, making the purpose clear, being that the first

[10] 2014 (2) SA 494 (SCA) at para 12.

respondent was required to provide a restraint of trade covenant to the applicant as part of her employment conditions. Using the words in *Endumeni Municipality*, this is the most sensible meaning to be attached to the provision.

[36] Insofar as it may be argued that there is a contradiction, considering the employment contract refers to the applicant as 'employer', and the restraint refers to 'company', the proper approach would be to reconcile the two provisions so as to give proper effect to what was intended by the conclusion of the restraint agreement. For this reason as well, the restraint must be considered to be in favour of the 'employer', which without doubt is the applicant. As was held in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[11]:

> 'The proper approach to the construction of a legal instrument requires consideration of the document taken as a whole. Effect must be given to every clause in the instrument and, if two clauses appear to be contradictory, the proper approach is to reconcile them so as to do justice to the intention of the framers of the document. …'

[37] In the circumstances, the first respondent is clearly bound by a restraint of trade covenant concluded with the applicant, on the terms as set out in appendix "C" to the employment contract, which she signed. It forms an integral part of the employment contract and the obligations of the first respondent in terms thereof. The first respondent's defence in this regard thus falls to be rejected.

<u>The relevant facts</u>

[38] Because the applicant is seeking final relief in motion proceedings, any factual dispute must be resolved in line with the normal principles established in *Plascon Evans Paints v Van Riebeeck Paints*[12]. In summary, these principles entail that the facts as stated by the first respondent together with the admitted or facts that are not denied in the applicant's founding affidavit constitute the factual basis for making a determination, unless the dispute of fact is not real or genuine or the denials in the respondent's version are bald or not

[11] (2008) 29 ILJ 2461 (CC) at para 90.
[12] 1984 (3) SA 623 (A) at 634E-635C.

creditworthy, or the first respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable, that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.[13] Admitted facts include facts that, though not formally admitted, simply cannot be denied.[14] As stated in *Ball v Bambalela Bolts (Pty) Ltd and Another*[15]:

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

[39] I will only summarize the factual matrix relevant to the issue of trade connections, which, as will be discussed below, is the only live issue remaining in this matter.

[40] The applicant conducts the business of an attorneys' practice, established in 1998, and currently employing some 13(thirteen) admitted attorneys and 20(twenty) support staff, across three branches. The applicant's wife also works in the practice as an attorney.

[41] The first respondent, as touched on above, started with the practice some 11(eleven) years ago as a candidate attorney. She ended up in the family law practice at the applicant, working with the applicant's wife. The first respondent

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[13] See *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 26 – 27; *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another* 2009 (3) SA 187 (W) para 19; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) para 38; *SA Football Association v Mangope* (2013) 34 *ILJ* 311 (LAC) at para 12.

[14] *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another* (2016) 37 ILJ 902 (LAC) at para 16.

[15] (2013) 34 ILJ 2821 (LAC) at para 14.

was responsible for developing that practice and ended up being the head of that practice. She exclusively managed and operated that practice, on behalf of the applicant.

[42] The applicant has provided some detail in the founding affidavit, indicating how its practice is structured and operates, and what is required of its attorneys. It is not necessary to repeat all of these details. Suffice it to say, and in short, all attorneys were allocated clients to service, and were required to maintain a close working relationship with such clients and be readily contactable. The clients deal directly with the allocated attorney, and a relationship of trust with the clients is an imperative. None of these contentions were seriously disputed by the first respondent.

[43] The applicant described the first respondent as 'a prominent and formidable family law attorney'. She took over the family law practice from the applicant's wife, and proceeded to build up the practice whilst employed by the applicant and being remunerated for it. The clients in the practice included existing clients in other fields of practice of the applicant that needed assistance on family law matters. Other clients came from referrals based on the good name and reputation associated with the practice. In the end, and at the time of her termination of employment, the first respondent was in effect the face of the family law practice of the applicant, and managed it without much intervention and interference from the applicant. She was fully trusted in this regard.

[44] Family law matters often involve an in-depth understanding of a client's personal circumstances. This often results in what can be described as an intimate relationship of trust and confidence between the attorney and the client, quite akin to that of friendship. The client becomes very susceptible to influence by the attorney, especially where it comes to decision making where it comes to the litigation attended to by the attorney.

[45] The first respondent, as touched on above, resigned on 9 October 2011. Two days later, and as from 11 October 2018, an exodus of clients from the applicant's family law practice started. At that time, and which I have dealt with above, it could not be established that this was attributable to the first respondent and any efforts on her part. But it has now turned out that this was indeed the case, and these clients indeed wanted the first respondent ot

represent them. These clients are all identified in the facts relating to urgency, summarized above.

[46] In the answering affidavit, the first respondent has now conceded that she is representing Estima, Zagorski, Gardiner, Coutinho, Rosslee, Nkosi, Neofytou, Hollander, Buys, and Devarajoo. These were all clients of the applicant's family law practice identified by the applicant, previously serviced by the first respondent, and who terminated their mandates shortly after the first respondent left. These clients thus followed the first respondent to her own family law practice at the second respondent.

[47] The question to answer now simply is whether the aforesaid constitutes a breach of the restraint of trade, and if so, whether is it would be reasonable to enforce the restraint in the current circumstances.

The issue of a clear right

[48] In deciding whether the applicant has a clear right to the relief it seeks, it is necessary to first set out the applicable legal principles. Restraints of trade are valid and binding, and as a matter of principle enforceable, unless the enforcement thereof is considered to be unreasonable.[16] A restraint of trade does not infringe on the constitutional right to free economic activity.[17]

[49] Whether the enforcement of the restraint of trade would be reasonable is dependent upon deciding the following questions set out in *Basson v Chilwan and Others*[18]: (a) Does the one party have an interest that deserves protection after termination of the agreement?; (b) If so, is that interest threatened by the other party?; (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?; and (d) Is there an aspect of public policy having

[16] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891B-C; *Reddy v Siemens Telecommunications* (2007) 28 ILJ 317 (SCA) at paras 14; *Labournet (Pty) Ltd v Jankielsohn and Another* (2017) 38 ILJ 1302 (LAC) at para 39; *Ball v Bambalela Bolts (Pty) Ltd and Another* (2013) 34 ILJ 2821 (LAC) at para 13; *Esquire* (*supra*) at para 26; *SPP Pumps (SA) (Pty) Ltd v Stoop and Another* (2015) 36 ILJ 1134 (LC) at para 26; *Shoprite Checkers (Pty) Ltd v Jordaan and Another* (2013) 34 ILJ 2105 (LC) at para 20.

[17] *Reddy (supra)* at paras 15 – 16. See also *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) where the Court said: 'The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions'.

[18] 1993 (3) SA 742 (A) at 767G-H.

nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Following the judgment in Basson, a further enquiry has been added, which can be called a question (e), being whether the restraint goes further than necessary to protect the relevant interest?[19] The above approach of answering these five questions in deciding whether the enforcement of a restraint of trade would be reasonable is now trite and has been consistently applied in this Court and the Labour Appeal Court.[20] Answering each of these questions is a determination on the facts of that particular case, applying, as held in *Ball*[21], the following approach:

> '… the determination of reasonableness is, essentially, a balancing of interests that is to be undertaken at the time of enforcement and includes a consideration of 'the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests'

[50] The protectable interest of an applicant in a restraint of trade can be found in one or both of two considerations, being confidential information (trade secrets), or trade connections.[22] In *Labournet (Pty) Ltd v Jankielsohn and Another*[23] the Court held:

> '… A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The list of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. …'

[51] The matter *in casu*, as I have already dealt with above, and because of the 'with prejudice' tender made by the applicant, has nothing to do with confidential information. The applicant does not seek to prevent the first

[19] *Jonsson* (*supra*) at para 44; *Medtronic (Africa) (Pty) Ltd v Van Wyk and Another* (2016) 37 ILJ 1165 (LC) at para 15; *Esquire* (*supra*) at paras 50 – 51.
[20] *Labournet* (*supra*) at para 42; *Jonsson (supra*) at para 44; *Medtronic* (*supra*) at paras 14 – 15; *Vox Telecommunications (Pty) Ltd v Steyn and Another* (2016) 37 ILJ 1255 (LC) at paras 28 – 29; *Shoprite Checkers* (*supra*) at paras 23 – 24; *Benchmark Signs Incorporated v Muller and another* [2016] JOL 36587 (LC) at para 15.
[21] (*supra*) at para 17. See also *Labournet* (*supra*) at para 40.
[22] *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (2008) 29 *ILJ* 1665 (N) at para 32; *Basson (supra) at* 769 G – H; *Bonnet and Another v Schofield* 1989 (2) SA 156 (D) at 160B-C; *Hirt and Carter (Pty) Ltd v Mansfield and Another* (2008) 29 ILJ 1075 (D) at para 37; *Esquire* (*supra*) at para 27; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502E-F; *Medtronic* (*supra*) at para 16 – 17; *FMW (supra)* at para 36; *Vox* (*supra*) at para 30.
[23] (2017) 38 ILJ 1302 (LAC) at para 41.

respondent from conducting her own competing business and family law practice, and utilizing all her skill, experience and expertise she accrued whilst employed at the applicant. The applicant similarly does not seek to prevent the first respondent from obtaining her own clients for her practice. The applicant has also dropped its case of the first respondent being prohibited from using any precedents, templates or other confidential information she had access to whilst employed by the applicant, as well as using a certain cellular telephone number.

[52] All that the applicant is seeking is that the first respondent stay away from its clients in the family law practice, which clients are only those clients that were already clients of the applicant at the time of termination of employment of the first respondent. Thus, this whole matter turns on these trade connections.

[53] Trade connections for the purposes of successful enforcement of a restraint of trade is where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he or she leaves employment and becomes employed by or associated with a competitor, the employee could easily or readily induce the customers to follow the employee to the new business.[24] Whether the employee has this ability is dependent upon the duties of the employee, the employee's particular personality and skill, the frequency and duration of contact between the employee and the customer, the nature of the relationship between the employee and the customer and in particular whether the relationship carried with it a notion of trust and confidence, the knowledge of the employee of the particular requirements of the customer, how competitive the rival businesses are, and the nature of the product or services at stake.[25] In sum, what must be asked is whether the employee in a position to act to the detriment of the erstwhile employer where it comes to these customers?[26]

[54] There can be little doubt that the nature of the relationship between the first respondent and the clients she serviced was that of trust and confidence. She

[24] See *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D-F; *FMW* (*supra*) at paras 46 – 48; *Esquire* (*supra*) at paras 31 – 32; *Experian* (*supra*) at para 18; *LR Plastics (Pty) Ltd v Pelser* [2006] JOL 17855 (D) at para 26.
[25] *Caravantruck* (*supra*) at 541F-I; *FMW (supra)* at para 45; *Aquatan (Pty) Ltd v Jansen van Vuuren and Another* (2017) 38 ILJ 2730 (LC) at para 24; *Medtronic* (*supra*) at para 17.
[26] *Continuous Oxygen (supra)* at para 42; *Medtronic* (*supra*) at para 30; *Vox* (*supra*) at para 31.

was required to have regular and close contact with the clients, and established a close relationship with them even at a personal level. She was in a very strong position to influence these clients and solicit their custom. In my view, it was virtually inevitable that if she suggested to such clients, whether directly or indirectly, that they follow her to a new practice, they would do so. The facts in this case prove that this is exactly what happened. In *Rawlins and Another v Caravantruck (Pty) Ltd*[27] the Court said:

> 'The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business (Joubert General Principles of the Law of Contract at 149). Heydon The Restraint of Trade Doctrine (1971) at 108, quoting an American case, says that the ''customer contact' depends on the notion that –
> ''the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket'.
>
> In *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires
> 'such personal knowledge of and influence over the customers of his employer . . . as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection . . .'.
>
> This statement has been applied in our Courts (for example, by Eksteen J in *Recycling Industries (Pty) Ltd v Mohammed and Another* 1981 (3) SA 250 (E) at 256C-F). Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left *(Heydon (op cit* at

[27] 1993 (1) SA 537 (A) at 541D-I.

108-120); and see also *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (C) at 307G-H and 314C and G).'

[55] The clients of an attorneys practice is one of the core assets of the practice, for the want of a better description. Without clients, there is no business. In fact, and because an attorneys' practice does not retail or manufacture goods, when clients depart there is nothing left. Protecting the client base is thus essential to protecting the business. I can see now reason why an attorneys' practice should be treated different to any other service providing concern in this regard. In *Hirt and Carter (Pty) Ltd v Mansfield and Another*[28] it was held that:

> '… Customer goodwill and trade connections have long been regarded as proprietary interests worthy of protection.'

[56] It may well be that the procuring, establishment and then maintaining a client base, to a large extent depends on the skill, acumen, and personal attributes of a particular attorney. Very often, and for this reason, such an attorney will consider these clients to be his or her own clients. But this kind of reasoning is misdirected. An attorney working in and employed by a particular practice, and who is remunerated by that practice, deploys this skill, acumen and personality for and on behalf that practice. If that attorney then concludes a restraint of trade in favour of the practice, his or her employer would be entitled to hold the attorney to it. In *Rawlins*[29] the Court said:

> 'Even though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense "his customers", he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before. Where this occurs, what I call the customer goodwill which is created or enhanced, is at least in part an asset of the employer. As such it becomes a trade connection of the employer which is capable of protection by means of a restraint of trade clause. …'

[28] (2008) 29 ILJ 1075 (D) at para 37.
[29] (*supra*) at 542F-I.

[57] A similar sentiment was applied in *Den Braven SA (Pty) Ltd v Pillay and Another*[30], and the following *dictum* from the judgment is apposite *in casu*:

> '… Mr Pillay's simple response in his affidavit is to say that he is an excellent salesman. No doubt that is true and it is equally true that he is entitled to take his qualities and skills as a salesman to another employer. However, to the extent that the applicant has built up a trade connection with its customers in KwaZulu-Natal through the efforts of Mr Pillay over the eight years of his employment it is entitled to protect itself against being deprived of that connection by Mr Pillay's activities on behalf of a competitor.'

The Court in *Den Braven* concluded:[31]

> 'Mr Pillay specifically admits that he built up a relationship with customers of the applicant and nowhere suggests that their purchasing decisions are influenced only by price as opposed to that relationship. … It is not in my view necessary for an applicant in this situation to winnow the wheat of trade connections and customer contact from the chaff of other factors that may influence purchasing decisions. It suffices for the applicant to show that trade connections through customer contact exist and can be exploited by the former employee if employed by a competitor. The applicant in this case has discharged that onus.'

[58] In *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another*[32], this Court applied these same principles as follows:

> '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.'

The Court concluded:[33]

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[30] 2008 (6) SA 229 (D) at para 15.
[31] (*supra*) at para 17
[32] (2011) 32 ILJ 601 (LC) at para 27. See also the *ratio* in *Continuous Oxygen* (*supra*) at paras 34 – 36.
[33] (*supra*) at paras 31 – 32.

> 'A protectable customer or supplier relationship exists where an employee has personal knowledge of, and influence over, the customers (or suppliers) of his employer so as to enable him, if the competition were allowed, to take advantage of his former employer's trade connections. …
>
> A customer connection exists where a customer belongs to the employer and the employee obtains influence over the customer by virtue of his employment.'

[59] Specifically in the context of a service providing relationship, and in particular labour law consulting services (which is comparable to legal services) the Court in *FMW Admin Services CC v Stander and Others*[34] held as follows:

> '… It is clear that the respondents, as labour consultants employed by the applicant for some time, had a close working relationship with the applicant's clients. The nature of the task of a labour consultant is professional service and advice, which further ingratiates such consultant with a client. I accept that the relationship is equally one of trust and confidence. In this respect as well, the labour consultant is the face of the applicant's service to its clients. In my view, it would be relatively easy for the respondents as labour consultants to exercise some influence over the clients they serviced and so convince such clients rather to transact with them than the applicant. The applicant is entitled to, and has a legitimate interest in protecting its client base.'

[60] In my view, the applicant has succeeded in showing that it had a proper protectable interest in the form of trade connections, being the family law practice client base. This client base is the property of the applicant, and it is entitled to protect it by way of the restraint of trade. It does not matter that the client base may have been built up largely due to the efforts of the first respondent, as she did this in the course of the discharge of her duties with the applicant, which she had in fact ben tasked to do.

[61] The next question to be answered is whether the first respondent breached the restraint. In this regard, the first respondent has stated that clients left the applicant's practice of their own accord, and this had nothing to do with her efforts or conduct. I have difficulty in accepting this proposition. It simply has to

[34] (2015) 36 ILJ 1051 (LC) at para 45.

be more than pure coincidence that 12(twelve) clients directly serviced by the first respondent would all spontaneously and within days of the resignation of the first respondent decide of their own accord to leave the applicant's practice. She must have, at the very least, told them she is leaving. In this regard, the Court in *TWK Agriculture Ltd v Wagner and Another*[35] held:

> '… It may also be true that those clients might not have required much inducement to cease doing business with the applicant after it closed the office where the respondents were employed. However, it is apparent that the vast majority of the approximately 70 forms revoking the applicant's mandate and appointing the new brokerages appear to have been signed on 1 July 2015, the day after the respondents were retrenched. It seems highly improbable that this simultaneous mass cancellation immediately after the respondents' services were terminated would have occurred without active canvassing by the respondents. Secondly, the fact that such a large number of cancellations were effected initially provides little reassurance that if the respondents are not restrained at this point they will not redouble their efforts thereafter to obtain more of the applicant's existing business.'

[62] I also consider what is in my view constitutes a material contradiction in the version of the first respondent. She suggested on the one hand that the clients left because of the fact that they could not tolerate the behaviour of the applicant any longer. But in the answering affidavit, the first respondent states that the 12(twelve) clients specifically referred to by the applicant, never even met the applicant. It thus simply cannot be true that the clients left because of the conduct of the applicant if they never even met him. Considering the responsibility afforded to the first respondent to manage and run the family law practice with as little intervention as possible, it is unlikely that any conduct of the applicant would be the cause of the clients leaving. I believe the clients left because the first respondent left, and to follow her.

[63] The first respondent produced e-mails from the various clients in support of the contention that she had nothing to do with the termination of their mandates with the applicant. The identical nature of these e-mails is not lost on me. They all state, verbatim, that the first respondent did not 'solicit or persuade or entice or procure' the termination of the applicant's mandate. The

[35] [2015] ZALCCT 50 (12 August 2015) at para 11.

language used is that normally used by an attorney writing correspondence, and it unlikely that a client would write such an e-mail using such language, especially not all of them. But what is fatal is that none of these mere e-mails are supported by confirmatory affidavits, and the answering affidavit by the first respondent referring to this is thus nothing more than inadmissible hearsay. There was no explanation emanating from the first respondent why she failed to simply have provide such confirmatory affidavits, especially considering that she was at the time representing these clients as their attorney. I have no doubt that it was the first respondent who provided this version for the clients concerned, because she was instrumental in them leaving the applicant's practice.

[64] The first respondent also suggested that the applicant had a meeting with clients in the family law practice and indicated to those clients that they were free to go to the first respondent if they wanted. I cannot accept this contention. It is highly unlikely that the applicant would simply, just because the first respondent resigned, call / contact all the clients associated with the family law practice that contributed a significant amount to the revenue of the applicant's practice, and simply spontaneously inform them that they could follow the first respondent wherever she may be going. If this was the case, I would have expected a reference to it in the actual mandate terminations submitted by the clients in the period of 11 to 26 October 2018. It surely would have been the simplest thing in the world to say, in the mandate termination, that the applicant should please transfer the files to the first respondent as he advised was possible. But more importantly, there were no confirmatory affidavits provided by any of the clients concerned to substantiate this allegation, and once again this contention was in the end an unsupported contention which was nothing more than inadmissible hearsay.

[65] But notwithstanding the above, it does not matter if the clients themselves decided to terminate the mandate of the applicant and take their cases to the first respondent, or that this was due to the efforts of the first respondent. The fact is that the first respondent, by virtue of her restraint of trade, was not allowed to accept such instructions from these clients, no matter what. She was compelled to turn the clients away. If the clients did not want to return to the applicant, they could go anywhere else, and were not compelled to remain

with the applicant if they did not want to. It is however likely that if clients knew they could not take their cases to the first respondent, they would remain with the applicant as the existing practice attending to their matters. But because the first respondent immediately accepted the approach, the applicant was deprived of this opportunity to keep the clients, to its detriment. In this regard, the Court in *Experian SA (Pty) Ltd v Haynes and Another*[36] said:

> 'An argument was also advanced on behalf of the first respondent that Jacqui Jooste and Pieter Buitendag contacted first respondent and not the other way round and that, accordingly, he cannot be said to have attempted to solicit these clients. This argument is devoid of merit: it has been held that it makes no difference whether or not an employee contacts the customers of his ex-employer or whether such customers contact him. Both forms of conduct amount to solicitation of the customers of the ex-employer which is impermissible during the restraint period. …'

[66] It must also be considered that if the first respondent did not work for the applicant and did not service the clients in the family law practice of the applicant, they would never have known the first respondent, would never have establish a close working relationship and relationship of trust with her, and would not have referred their litigation to her. This is something completely different to the first respondent being an independent third party competing attorney, of which there are many. The first respondent had the complete inside track, so to speak, which put her apart from any other family law competitor where it came to the applicant's client base.

[67] The first respondent, as consultant at the second respondent, in effect immediately started her own family law practice directly off the back of the applicant's family law practice she left and the client base built up there. This is exactly the kind of mischief the restraint of trade sought to prevent. If the first respondent would simply be allowed to escape by saying it was not her, but the clients themselves, would defeat this primary objective of the restraint. In this regard, the following *dictum* in *Lifeguards Africa (Pty) Ltd v Raubenheimer*[37] would be applicable:

[36] (2013) 34 ILJ 529 (GSJ) at para 52.
[37] (2006) 27 ILJ 2521 (D) para 41.

> '… It therefore follows that, in my judgment, the defendant unlawfully breached the undertaking which amounted to a covenant in restraint of trade that he would not be competing with his erstwhile employer. And, further, that, in competing directly with the plaintiff in the contracts obtained from the above-mentioned institutions, the defendant took advantage of trade connections of the plaintiff which constituted protectable interests. …'

[68] Finally, the seniority of the first respondent is also a relevant consideration.[38] The more senior the employee, the more likely it is that the employee would be entrenched with what can legitimately be considered to be a protectable interest relating to trade connections.[39] Seniority is not just the level of the employee in the organization of the erstwhile employer, but also includes factors such as the influence, knowledge, expertise, nature of duties, relationships and even the particular person of the employee. All these factors, in my view, clearly bestow on the first respondent in this case such a level of seniority, that would entitle the applicant to protection by virtue of the restraint.

[69] Overall considered, the case *in casu* has many similarities with the judgment in *LR Plastics (Pty) Ltd v Pelser*[40]. After a comprehensive analyses of the authorities relating to trade connections, the Court held:[41]

> '… In my view, on the uncontested evidence of the applicant, coupled with the respondent's own allegations in his answering affidavit, the respondent not only built a significant customer base or customer goodwill for the applicant which became part of its assets, but he also established such a close relationship with them that he was able to influence or induce them to follow him to a new business. …'

The Court then dealt with the issue as to when these trade connections would qualify for legal protection, and said the following:[42]

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[38] See *Dickinson* (*supra*) at para 38; *Stewart Wrightson (Pty) Ltd v Minnitt* 1979 (3) SA 399 (C) at 404B-C; *Random Logic (Pty) Ltd t/a Nashua*, *Cape Town v Dempster* (2009) 30 ILJ 1762 (C) at para 32; *Experian* (*supra*) at para 43; *Jonsson (supra)* at para 51.
[39] See *David Crouch* (*supra*) at para 21.
[40] [2006] JOL 17855 (D).
[41] Page 33 of the judgment.
[42] Page 35 of the judgment.

> '*In casu*, the applicant does not seek to interdict the use of respondent's personal skills, experience or knowledge; and nor does it seek to interdict the continuation of any personal relationships of, or belonging to, the respondent. The relief sought is directed against the protection of its own trade connections acquired during the term of respondent's employment with it. Although the success of a sales representative depends to a large extent on his personality and skills … the protectable interest is constituted by the use to which those skills and personality are put; and not by the skills and/or personality *per se* ….'

The Court concluded:[43]

> '… it is, in my view, disingenuous for the respondent to conclude from those facts that his relationship with the customers does not constitute a proprietary interest of the applicant capable of protection. On his own evidence, he generated a turnover of a figure in excess of R7,2 million from those customers for the applicant. On his own admission, he possesses the necessary skills, experience and personality of a successful sales representative for the applicant, which attributes were put to the considerable advantage of the applicant.'

[70] The first respondent has stated that she left because of the applicant's abusive behaviour. She complains that he is arrogant, rude and used foul language. Her case in this regard is that because she had what she called 'very good reason' to leave the employ of the applicant, this should on some basis excuse her from her restraint. This case is misdirected. Whether or not the restraint is enforceable exists independently from the manner in which the employment relationship came to an end, and in particular, whether the employer was in some or other way the cause of it.[44] In *Reeves and Another v Marfield Insurance Brokers CC and Another*[45] it was held:

> 'The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after

[43] Page 36 of the judgment.
[44] See *Bonfiglioli SA (Pty) Ltd v Panaino* (2015) 36 ILJ 947 (LAC) at para 2*4; Benchmark Signs (supra)* at para 17; *TWK* (*supra*) at para 13.
[45] 1996 (3) SA 766 (A) at 772F-G.

> the employment relationship has come to an end. The need for the protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs in consequence of a breach by the employer'.

[71] In sum, I am therefore satisfied that the applicant has a proper protectable interest where it comes to protecting its family law client base from possible interference by a former senior attorney such as the first respondent. The first respondent is the position of having the kind of relationship with clients that would enable her to convince the clients to take their business away from the applicant, and moving it to her. Her personal attributes were applied in favour of the applicant for which she was paid by the applicant.[46] As a matter of undeniable fact, and immediately upon the first respondent leaving, several of the clients she serviced left and joined her elsewhere. The applicant has thus demonstrated a clear right to the relief sought.

Other considerations

[72] Where it comes to the quantitative and qualitative weigh off to be conducted, the scope and period of the restraint is relevant. A shorter restraint and properly limited geographical area (if applicable) would mitigate in favour of enforcement, whilst an unduly long and broad restraint would mitigate against it.[47] It must also be considered whether the employee was possessed of the skills, expertise, qualifications and experience before joining the employer, as it could be seen as unfair in the weigh off to prevent the employee from earning a living under such circumstances.[48] In *Vumatel*, the Court said:[49]

> '…The nature of the industry is also an important consideration. The more specialized the industry is, the more the weigh off will favour the employer, as it limits the scope of the restraint and leaves much more avenues open to the employee to procure gainful employment in other industries. …'

[46] See *LR Plastics (supra)* at page 55.
[47] *Labournet* (*supra*) at para 43; *Continuous Oxygen* (*supra*) at para 47.
[48] *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* (2007) 28 ILJ 145 (SCA) at para 8; *Labournet* (*supra*) at paras 43 - 44; *Jonsson (supra)* at para 51.
[49] (*supra*) at para 39.

[73] In this case, and because of the with prejudice proposal made by the applicant, there is nothing standing in the way of the first respondent pursuing her chosen occupation as an attorney specializing in family law. She remains entitled to compete with the applicant and may even open a competing practice right next door to the applicant, so to speak. The first respondent can thus utilize all the skill and experience she obtained in the course of her employment at the applicant, for her own benefit. She can retain and use whatever precedents she obtained whilst practising. All she is required to do is to stay away from the clients. This limited enforcement of the restraint weighs in favour of the applicant.

[74] But the applicant limited the weigh off even further. It afforded the first respondent the concession that she may retain those clients she was already representing by the time this application was brought, which was contained in a list which was annexure "A" to the offer. This was in my view accommodating and reasonable conduct by the applicant, and should have been more seriously considered by the first respondent. It is another factor that tilts the weigh off in favour of the applicant.

[75] The applicant has pointed out that the loss in fee income so far, due to clients lost to the first respondent, is R3 million per year. This is the kind of actual prejudice that would also justify the enforcement of the restraint.[50] The restraint period is also not unreasonably long, and falls within the parameters of what I would consider to be an acceptable period in line with most authorities, in circumstances such as those in this matter.

[76] The applicant only wishes to insulate the remaining client base of its family law practice, which the first respondent was solely in charge of, from this same risk caused by a directly competing first respondent, and further actual loss of clients to the first respondent. I am satisfied that this is a legitimate concern, which does not go further than needed to protect the applicant's legitimate

[50] Compare *Labournet* (*supra*) at para 64.

protectable interest, and would not serve to simply stifle competition.[51] In *TWK*, the Court said:[52]

> 'As mentioned, the applicant seeks to prevent the respondents from re-launching independent careers as insurance brokers by exploiting the applicant's trade connections. The applicant does not seek to prevent them from pursuing those careers by soliciting insurance business from other potential clients within the ambit of the applicant's geographical sphere of operation. Granting the relief would not require the respondents to abandon their work as insurance brokers, but merely not to engage with the applicant's clients for a defined period. It would curtail their ability to use the applicant's client base as a foundation for their future business. They may feel aggrieved that they had personally cultivated those clients during their employment with the applicant, but that did not make those clients 'theirs'. On this basis the applicant's interest in enforcing the restraint outweigh those of the respondents in not enforcing it …'

[77] The applicant has no alternative remedy available to it in this instance. A future damages claim based on breach of contract would be cold comfort for clients lost, and would be difficult to prove in any event, considering the unpredictable nature of litigation. It much more appropriate to take the first respondent completely out of the equation, and if clients still leave, then it can be said this was not due to the relationship with the first respondent but for some other reason. An interdict is the only way this can be achieved. As held in *Esquire*:[53]

> 'As I have stated above, the alternative remedy of a damages claim is cold comfort to an applicant that seeks to enforce a legitimate restraint of trade covenant. By the time a damages claim is heard, the horse had bolted and the harm is done. That harm is very difficult to repair. I am satisfied that, where a restraint of trade is enforceable, the alternative remedy of a damages claim in due course is more apparent than real …'

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[51] *North Safety Products (Africa) (Pty) Ltd v Nicolay* (2007) 28 *ILJ* 350 (C) at 353H-I; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 507A-B; *Labournet* (*supra*) at paras 41 and 62; *FMW* (*supra*) at para 43.
[52] (*supra*) at para 12
[53] (*supra*) at para 40. See also *TWK* (*supra*) at para 15.

[78] The applicant has thus satisfied all the other requirements necessary for the final relief it seeks to be granted. In short, the weight off favours the applicant, it faces real prejudice if relief is not granted (it has already suffered actual prejudice) and there is no suitable alternative remedy available.

Conclusion

[79] In summary, the applicant has demonstrated the existence of a clear right, in that the applicant has a legitimate and proper restraint of trade agreement in place with the first respondent, susceptible to being enforced, where it comes to trade connections. The applicant has also established that the first respondent is indeed infringing on such protectable interest. The weighing off of interests favour the applicant and there is no intervening issue of public interest. Finally, the applicant demonstrated the existence of an injury both committed, and reasonably apprehended, and has no proper alternative remedy available to it.

[80] Since the applicant has only sought relief in the form of the with prejudice offer, I am satisfied that the applicant is entitled to the relief sought therein. I shall therefore grant an order in line with the content of this with prejudice proposal.

[81] This then leaves only the issue of costs. This Court has a wide discretion where it comes to the issue of costs, considering the provisions of section 162 of the LRA. It must of course be considered that the applicant was ultimately successful. It must however also be considered that the applicant initially brought the application on a far broader basis than that which was moved in the end, and sought relief more wide-ranging than that which is contained in the with prejudice proposal it finally settled on. It was not unreasonable for the first respondent to have defended herself where it came to such wide ranging relief. I also consider that both parties engaged in unnecessary personal attacks on one another, coupled with some mud-slinging. For these reasons, I would have exercised by discretion by making no order as to costs.

[82] But I cannot turn a blind eye to the fact that the with prejudice offer had been made by the applicant before this matter was argued, in terms of which the applicant approached the matter on a far more reasonable basis, considering

the interests of the first respondent herself. This offer came about only after the first appearance in this matter, and the answering affidavit having been filed, and was open for consideration by the first respondent before this matter returned to Court. The first respondent however simply declined this offer, and would have been well advised to have rather accepted it, especially considering the compromise that the first respondent may keep those clients of the applicant already lost. From this point on, I am of the view that the further opposition of the matter by the first respondent was not reasonable. The first respondent should thus be ordered to pay the costs of the applicant for the appearance on 7 December 2018, and the filing of the replying affidavit, which followed after the with prejudice offer, and I so order.

[83] It is for all the reasons as set out above that I made the order that I did in paragraph 5 of this judgment, *supra*.

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S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate C Whitcutt SC together with Advocate P Bosman

Instructed by: Wright Rose Innes Attorneys

For the First Respondent: Advocate W Pocock

Instructed by: Fluxmans Attorneys