**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO. 40018/2017**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

DATE 15/12/2017 SIGNATURE

In the application between:

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| **OAKHURST INSURANCE COMPANY LIMITED** | **FIRST APPLICANT** |
| **AFRICAN INDEPENDENT BROKERS (PTY) LTD** | **SECOND APPLICANT** |
| **AND** | |
| **B-SURE AFRICA INSURANCE BROKERS (PTY) LTD** | **FIRST RESPONDENT** |
| **COLIN DOLLER** | **SECOND RESPONDENT** |
| **RAMON WALDECK** | **THIRD RESPONDENT** |

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**J U D G M E N T**

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**MAIER-FRAWLEY AJ:**

Introduction

1. This is an opposed urgent application in which the applicants seek an order 'that the first respondent and any of its subsidiaries be interdicted...to terminate the employment of the second and third respondents,' and ancillary relief. The second and third respondents, who are ex-employees of the second applicant and present employees of the first respondent ('respondent company'), are alleged to be joined to these proceedings only as 'interested parties,' with no formal relief being sought against them.

2. On 3 November 2015 and under case number 43481/2014, this court (per Modiba AJ, as she then was) made a settlement agreement[1] concluded between the first applicant and the respondent company, an order of court. [2] ('the court order') In terms of the settlement agreement,[3] the court order is also in favour of and enforceable by the second applicant.

3. In terms of clause 3 of the settlement agreement, the parties *inter alia* agreed to respect the restraint of trade agreements that each had concluded with their respective employees, and not to employ each other's ex-employees for as long as they were subject to restraint of trade agreements, without written consent first being obtained from the opposite party. It is common cause that the respondent company competes with the applicants in the same market in respect of its business, clients, products and/or services.

4. At the time of their resignation from the second applicant's employ, the second and third applicants were subject to restraint of trade agreements in terms of which they undertook to refrain from being employed by a competitor of the second applicant for a period of 24 months following the termination of their employment with the second applicant.

5. The first respondent employed the second and third applicants without obtaining the requisite consent from the second applicant as provided for in clause 3.5 of the court order. Upon learning thereof, the applicants instituted these proceedings against the respondent company, based on its alleged contempt of the court order, without seeking enforcement of the restraint of trade agreements against either the second or third respondents.

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[1] The written settlement agreement, concluded during August 2015, was signed on 27 August 2015 by Mr. Rick Claughton on behalf of Oakhurst Insurance Company Limited and on 20 August 2015 by Mr. Stephen Williams on behalf of B-Sure Africa Insurance Brokers (Pty) Limited.
[2] A copy of the court order appears at pp.66-77 of the papers.
[3] Clause 1.1.1 of the agreement of settlement.

6. All three respondents opposed the relief sought by the applicants against the first respondent. They filed a composite answering affidavit which was deposed to by Ramon Waldeck (third respondent) on behalf of the first and second respondents. Confirmatory affidavits from Colin Doller (second applicant) and Stephen Williams (Chief Executive Officer of first respondent) were filed in support thereof.

*The case for the applicants*

7. The applicants allege that the first respondent wilfully and knowingly breached the provisions of the court order, which they seek to enforce by means of an interdict. According to the applicants, the undertakings given by the parties[4] in clause 3.5 of the settlement agreement were unqualified and unconditional and therefore, a consideration of requirements such as reasonableness, validity, scope or protectable interest are 'totally irrelevant' for purposes of enforcing the court order.

*The case for the respondents*

8. The first respondent disputes that it contravened the terms of the court order, more particularly, clause 3.5 thereof, but if it is found to have done so, it disputes that its conduct amounted to contempt of court. The second and third respondents contend that their interests ought to be taken into account since the order sought against the respondent company will have a direct impact on their employment with the respondent company and will be prejudicial to their rights, particularly in circumstances where the applicants are 'indirectly attempting to enforce the second and third applicant's restraint of trade agreements without having to observe established legal principles that govern the enforceability of restraints of trade and the protection thereby afforded to employees.'

Relevant background facts

9. During 2014, the first applicant instituted motion proceedings in this division under case number 43481/2014 against the first respondent and one, Rudy Janse Van Niewehuizen for enforcement of a restraint of trade agreement against Van Niewehuizen, and ancillary relief.

10. The first applicant and the first respondent settled the dispute by entering into a settlement agreement, which agreement was made an order of court on 3 November 2015.

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[4] Being the first applicant, including its subsidiaries, and the first respondent, including its subsidiaries.

11. The second respondent, ('Doller') was employed by the second applicant on 20 January 2017 as a sales consultant in its *Dealer Sales Division.* A 'Dealer Sale' involves the selling of insurance products to motor vehicle purchasers who are referred to the second applicant, and in respect of whom leads were given by the second applicant's dealer clients[5] to the second applicant's sales consultants, of which Doller was one.

12. If the dealer client, through its various employees, refers a prospective client to the second applicant and such referral leads to a converted sale, the second applicant would compensate the dealer client in a certain amount.

13. The second applicant alleged that it relies on the customer relationships[6] established by its sales consultants with dealer clients for approximately 70% of its business, and that it takes approximately 6 to 12 months to build-up such a relationship with one or other contact person at the dealership.

14. The second respondent resigned from the second applicant's employ on 5 September 2017. He had been employed at the second applicant for a period of approximately 7 months, during which period he underwent some training[7] but only effectively carried out the work of a dealer sales consultant independently as from April 2017 (a period of approximately 5 months), this being less than the usual 6 to 12 month period necessary for building meaningful relationships with dealer clients.

15. Pursuant to his resignation, Doller took up employment with the respondent company, a direct competitor of the second applicant.

16. The third applicant ('Waldeck') was employed by the second applicant on 28 May 2015 as a sales consultant in its *Schemes Division,* with specific emphasis on servicing Barloworld, being a group of companies with whom the second applicant enjoys a contractual arrangement for the provision of quotations for short-term insurance products to the group's clients. According to Waldeck, Barloworld dealerships are contractually obliged to refer their clients to the

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[5] 'Dealer Clients' comprise motor dealers, including the finance and insurance sales persons (F& I's) at the dealership, with whom motor vehicle purchasers would normally deal when purchasing a motor vehicle at the dealership.

[6] These relationships are built up by means of regular contact and proficient servicing of requests for insurance from leads provided to the applicants' sales consultants by the relevant contact person at the dealer client.

[7] According to the second and third respondents, the training consisted of learning about the cover and benefits of the specific insurance products being sold, and how to use the second applicant's computer systems for purposes of recording the particulars of dealerships and their contact persons into the sales consultant's profiles onto an electronic dealer book, as well as how to enter the insured clients' particulars into the respective quotations and administrative systems of the second applicant for purposes of keeping a record of successful sales.

second applicant and this occurs irrespective of any *'personal relationship'* that a sales consultant may have with such dealer.[8] According to the respondents, the respondent company has no contractual arrangement with Barloworld and obtains no leads or referrals from Barloworld dealers.

17. Waldeck had previously been employed by the second applicant during 2012. He had also previously been employed by the respondent company during the period September 2014 until April 2015. He was approached by the second applicant in 2015 and offered employment at a better compensation package, as a result of which he returned to the second applicant's employ on 28 May 2015.

18. According to Waldeck, he resigned from the second applicant's employ on 6 September 2017. Earlier during 2017, he had approached the respondent company in regard to employment. On that occasion, permission was sought from the second applicant for Waldeck to take up employment with the respondent company, which was refused. Shortly before his resignation from the second applicant's employ, he again approached the first respondent in regard to employment. No permission was sought from the second applicant on this occasion. He received a formal offer of employment from the respondent company on the day after his resignation at the second applicant.

19. Waldeck and Doller now occupy positions as sales consultant in their employment at the respondent company.

20. It is common cause that both Doller and Waldeck had entered into restraint of trade and confidentiality agreements with the second applicant.

21. In terms of the relevant restraint of trade agreements, Doller and Waldeck are *inter alia,* not entitled, for a period of 24 months after termination of their employment with the second applicant, to be employed by any company within the Republic of South Africa which carries on any business in competition with the second applicant or which sells competing products or renders competing services to that of the second applicant, or to canvass business in respect of such competing products or services from prescribed clients[9] or to sell or supply or render services to prescribed clients.

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[8] The applicants allege that their service agreements are non-exclusive, that is, the dealerships are not obligated to provide leads to the second applicant. The agreements provide for the amount of compensation that is payable to a referrer in the event that a referral leads to a converted sale.

[9] '*Prescribed clients*' are defined, *inter alia,* as any person who is or was a client or customer of the Badger Group or who is or was a prospective client/customer whom the employee had approached to do business with within a preceding year of his termination of employment, or who purchased products from the group or to whom prescribed services were rendered during the preceding year.

22. It was not in dispute that Doller and Waldeck each received R1 100.00 per month for the duration of their employment with the second applicant, in lieu of the restraints of trade imposed upon them.

23. Pursuant to exit interviews conducted with both Doller and Waldeck, the second applicant addressed emails to them in which they were reminded of their obligations under their restraint of trade and confidentiality agreements and of the consequences in the event that they breached the provisions thereof. An email was also addressed to the respondent company in which the second applicant contended that the respondent company had acted in contempt of the court order and in which the applicant demanded that the respondent company terminate its employment contracts with both Doller and Waldeck.

24. The first respondent held the view that the agreement of settlement was only applicable for a period of 24 months, which period had lapsed on 20 August 2017. The respondent company had informed the applicants of such view prior to the launch of the application. Having been refused permission by the second applicant to employ Waldeck prior to 20 August 2017, that is, during the currency of the agreement of settlement, the respondent company did not then employ him. The respondent company waited until after the expiry of the settlement agreement before making Waldeck an offer of employment. Therefore, on its version, it had not acted in breach of the court order by employing Waldeck and Doller subsequent to the 20th August 2017. The respondents disputed *inter alia,* that the applicant had any protectable interest,[10] that Doller and Waldeck had gained any considerable knowledge of the applicants' business, that the restraint provisions were just and equitable or reasonable or that they ever came into possession of any confidential information relating to the second applicant.

25. Prior to the launch of these proceedings, both Waldeck and Doller furnished written undertakings to the applicants, *inter alia,* not to elicit business from clients of the second applicant whilst they are employed as sales consultants by the first respondent. The first respondent also informed the second applicant that Waldeck and Doller had provided certain undertakings, as a condition of their employment with the second respondent, *inter alia,* not to:

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'*Prescribed products or services*' are those sold or rendered by the Group in the ordinary course of its business. '*Competing products or services*' are those sold or rendered in competition with the prescribed products and services. The relevant restraint of trade agreement appears at pp.134-145 of the papers.

[10] The respondents asserted that if the second applicant indeed established a protectable interest, that they would not infringe thereon.

25.1. elicit any business from a list of clients and potential contacts provided by the second applicant to either of them; and

25.2. to derive any benefit (or for the benefit of others) from any information or knowledge specifically related to the second applicant's business. which had been provided to them whilst they were in the employ of the second applicant.

26. It is convenient at this stage to set out the pertinent clauses in the settlement agreement upon which reliance is placed by the parties to this application.

27. Paragraphs 2 and 3 of the court order containing the settlement agreement, provides, in relevant parts, as follows:

"2. NON SOLICITATION OF EMPLOYEES

2.1 The parties hereby undertake to not for a period of 24...months from date of last signature of this settlement agreement...directly or indirectly...

2.1.1 Encourage or entice or persuade or induce any employee of the other party (whether in the other party's employ ...or within the other party's group of companies, to terminate his employment with the other party or the Group;

2.1.2 any information or advice to any employee of the other party...or use any other means...to result in such employee terminating his employment with the other party...and/or becoming employed by...the other party...

3. RESTRAINT OF TRADE AGREEMENTS

3.1 Both parties have entered into restraint of trade agreements with their respective employees.

3.2 Both parties agree that the terms and conditions contained in such restraint of trade agreements may vary from employee to employee.

3.3 ...

3.4 Both parties agree that, without limitation, they compete within the Republic of South Africa in respect of business, clients, products and/or services.

3.5 As a result both parties agree that:

3.5.1 They will respect each other's restraint of trade agreements with their respective employees;

3.5.2 They will not employ an ex-employee of the other party who is subject to a restraint of trade agreement unless express written permission is obtained from the other party, being the previous employer, from a

person in a managing director position or such higher position, which consent may be on a case to case request basis'

3.5.3 They will take positive steps, on being approached by a prospective employee and/or when engaging a prospective employee to ascertain whether such person:

3.5.3.1 Was employed with the other party to this agreement;

3.5.3.2 Whether a restraint of trade agreement has been concluded with such person. "

28. It is common cause that the respondents had knowledge of the court order and that the first respondent employed the second and third respondents in the knowledge that Waldeck and Doller had signed restraint of trade agreements with the second applicant.

Relevant legal principles

29. In *Pheko and Others v Ekurhuleni Metropolitan Municipality,*[11] the constitutional court held as follows:

> "Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court...This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders...Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order." (footnotes omitted)

30. The requirements of a contempt order are the following:[12]

(a) The existence of a court order;
(b) That the respondent had service or notice of the court order;
(c) Non-compliance by the respondent with the court order;
(d) That the respondent acted wilfully (intentionally) and *mala fide* in transgressing the court order.

31. In *Fakie supra,*[13] the court went on to state as follows:

> " [9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'.[14] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly,

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[11] 2015(5) SA 600 (CC) at para 28.
[12] See: *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (CC) at 344G-345A.
[13] At p.333, paras 9 &10.
14 *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* 1996 (3) SA 355 (A) 367H-I; *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 602 (SCA) paras 18 and 19.

> believe him- or -herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.[15] Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).[16]
>
> [10] These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent. " (Footnotes omitted)
> (own emphasis)

32. It is trite that once an applicant has proved the order, notice thereof and non-compliance therewith, the respondent bears an evidential burden in relation to wilfulness and *mala fides.*[17] A respondent can defend himself by satisfying the court that there is a reasonable possibility that he did not act wilfully or mala fide. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established. See: *Pheko supra* at 621 B-C.

33. Our courts have held that civil contempt remedies, other than committal, may still be employed.[18] These include any remedy that would ensure compliance. In *Faki supra,*[19] it was held that 'a declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.[20]

Defences relied on by respondents

34. The respondents raised various defences, the first being that the respondent company did not contravene the provisions of paragraph 3.5 of the court order, but even if it did, any contravention thereof was not committed wilfully or with *mala fides.*

35. The respondents contend that when clause 3.5 is read in the wider context of the settlement agreement as a whole, and more particularly, clause 2 thereof, it is 'clear that the parties intended and understood that the order was only intended to bind the parties for a period of 24 months from the date of last

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15 *Consolidated Fish (Pty) Ltd v Zive* 1968 (2) SA 517 (C) 524D, applied in *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 (T) 691C.
16 *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 (T) 692E-G per Botha J, rejecting the contrary view on this point expressed *Consolidated Fish v Zive* (above). This court referred to Botha J's approach with seeming approval in *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* 1996 (3) SA 355 (A) 368C-D.
17 Ibid *Fakie.*
18 Ibid *Pheko*, at 621D.
19 At 345B.
20 It is trite that the elements of contempt must be proved beyond a reasonable doubt.

signature thereof on 21 August 2015. It therefore ceased to operate after 20 August 2017, being prior to its employment by the respondent company of the second and third applicants'.[21] According to the respondents, such an interpretation is 'the only sensible meaning that can be ascertained from the agreement if read as a whole, for if clauses 2 and 3.5 were to be considered in isolation, it would give way to insensible or unbusinesslike results, including that such clauses are then apparently mutually inconsistent.' This, so it was contended, was apparent from the following illustration: in terms of clause 2 of the court order, after the expiry of 24 months, the first respondent could approach any of the second applicant's employees (even those subject to restraint of trade agreements), offer them higher salaries and thereby induce them to leave their employ, as long as those who were subject to restraints, did not come and work for the first respondent (the first respondent being prohibited from employing them under clause 3 thereof).

36. The applicants contend, on the other hand, that clauses 2 and 3.5 are mutually exclusive and stand apart, without being contradictory. It was pointed out in the replying affidavit that the two clauses contain certain distinctions. Whereas clause 2 relates to *all* employees, clause 3 is restricted only to those who are subject to restraint of trade agreements with the applicants. On this basis, so it was contended, for a period of 24 months following the date of last signature of the agreement of settlement, neither party would be entitled to solicit any of the other party's employees, whether the employees are under restraint or not, [clause 2]; however, for as long as the parties remain competitors (in perpetuity), they are obliged to respect each other's restraint of trade agreements, by not appointing any employees who are still under restraint by the other party. [clause 3]. A further distinction comes from the fact that there are employees in the employ of the applicants who are not subject to restraint agreements and who the first respondent could employ after the lapse of the 24 month period provided for in clause 2.

37. The respondents' *riposte* to the aforegoing, is that 'it is clear from clause 3.1 that the parties did not single out any portion of their respective employees as those who have entered into restraint of trade agreements.'

38. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[22] the Supreme Court of Appeal summarised the approach to be followed in the interpretation of written agreements as follows:

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the

[21] See: p. 112 of the papers.
[22] 2012 (4) SA 593 (SCA) at 603F.

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."

39. These principles were recently re-affirmed by the SCA in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd,*[23] where the following was stated:

> "...This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. ...a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention. ...A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing. "(own emphasis)

40. Neither party set out the surrounding circumstances that led to the conclusion of the settlement agreement in its specific terms. The apparent contradiction between clause 2 and 3 of the court order, as demonstrated by the respondents, becomes somewhat diluted when regard is had to the apparent purpose to which each of the clauses is directed, as alleged by the applicants.[24] I am therefore not persuaded that the meaning contended for by the respondents, namely, that the agreement would only be valid for a period of 24 months, is the only sensible meaning to be ascribed to the agreement. But this in itself is not the end of the enquiry.

41. The respondents allege that 'the applicants do not in this application seek to enforce the second respondent and my restraint of trade agreements, but only to prohibit us from being employed by the first respondent.' The respondents contend that 'in purporting to enforce the court order, the applicants' have attempted to enforce the second applicant's restraint of trade agreements with the second and third respondents indirectly, without having to observe the principles applicable to restraints of trade.'[25] The argument advanced by the respondents in this regard is persuasive. In my view, it would be against public policy for competing employers to attempt to bypass established legal principles that are applicable to restraint of trade agreements by means of their

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[23] 2016 (1) SA 518 (SCA) at paras 27-29

[24] I bear in mind that the applicants raised this in the replying affidavit even though they were apprised of the respondents' contentions prior to the launch of the application – see: p. 112 of the papers. However, as stated in *Lagoon Beach Hotel v Lehane* 2016 (3) SA 143 at 152 I, the 'respondent *a quo*, did not seek to avail itself of the opportunity to deal with the additional matter ...set out in reply, and I see no reason why these allegations should therefore be ignored.' I respectfully agree with these sentiments.

[25] As alluded to in para 8 above, the applicants contend that requirements such as reasonableness, validity, scope or protectable interest are 'totally irrelevant' for purposes of enforcing the court order.

conclusion of agreements that would have the effect or result that employees are thereby prevented from challenging the reasonableness of their restraint agreements but are nonetheless restricted from taking up employment or even subjected to forced dismissals for accepting employment, albeit in contravention of their restraints, in such circumstances.

42. In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis,*[26] the Appellate Division[27] decided that, in South African law, an agreement in restraint of trade is on the face of it, valid – and hence enforceable – and will only be invalid and unenforceable if it is contrary to public policy on account of it unreasonably restricting a person's right to trade or to work. 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. See: *CTP ltd and Others v Argus Holdings Ltd and Another* 1995 (4) SA 774 (A) at &84 A-C.[28] It is trite that the reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced.[29]

43. In my view therefore, clause 3 of the agreement of settlement, which was made an order of court, must be read subject to an implied term that the restraint of trade agreements referred to therein are not unreasonably restrictive for purposes of protecting the employer's proprietary interests.[30]

44. Presumably the learned presiding judge who made the settlement agreement an order of court was persuaded that the agreement did not offend against public policy by reason of the fact that the agreement would include the aforesaid implied term.

45. If such a term were *not* imported into the agreement by law, having regard to the applicants' version, it would mean that just because an employee is subject to a restraint agreement, he or she would not be able to take up employment with the respondent company during the period of the restraint, regardless of whether or not the restraint is reasonable or whether or not the restraint is

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[26] 1984 (4) SA 874 A at 891 A-C.
[27] As it was then known.
[28] See too: *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) 271 (SCA) aat para 8.
[29] See: *Aquatan (Pty) Ltd v Janse Van Vuuren and Another* (2017) 38 ILJ 2730 (LC) (4 May 2017)
[30] In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506(A) at 532G-533A, Corbett JA stated that an implied term 'is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation.'

necessary for the protection of the employer's protectable proprietary interests, and the employee would effectively be barred from challenging the validity or enforceability of the restraint. In my view, this would make a mockery of the law and would offend against the *boni mores* of society.[31]

46. It is only where a restraint is found to be *reasonably required* for the protection of the party who seeks to enforce it that it is constitutionally permitted.[32] If the court were to enforce a restraint indirectly, in circumstances where the employer has not brought proceedings or sought relief for the enforcement of the restraint against the employee, but achieves that exact same result without observance of established legal principles that govern the enforceability of restraints of trade and the protection thereby afforded to employees,[33] it would amount to an affront to the rights enshrined in sections 9(1), 22 and 34 of the Constitution.[34] It goes without saying that the interests of the second and third respondents would have to be considered in determining whether or not to grant the relief sought in the present proceedings.

47. Even if the respondents have contravened the terms of the court order,[35] on a consideration of the totality of the evidence, I am left with reasonable doubt as to whether any non-compliance was wilful and *mala fide* – stated differently, there is at least a reasonable possibility that the respondent company genuinely, albeit mistakenly, believed itself entitled to act in the way claimed to constitute the contempt. In the words of Cameron JA: 'In such a case good faith avoids the infraction'. On this basis alone, the application is doomed to failure.

*Interests of second and third applicants in the order sought*

48. Prior to the launch of the application as well as in the answering affidavit, the respondents challenged the validity and enforceability of the restraint of trade agreements which the second and third respondents had signed with the second applicant.[36] In this regard, the following comments will suffice: I bear in

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[31] In the words of Charles Dickens, taken from 'Oliver Twist' 1838: " *'If **the law** supposes that'*, said Mr. Bumble, squeezing his hat emphatically in both hands, *'**the law** is an **ass** — a idiot'*." These sentiments are in my view, apposite on the facts and in the context of the present matter.

[32] See: *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 13 read with authorities cited in fn14..

[33] That is, without it being established that the employer's protectable interests are infringed by the unlawful conduct; without the employer having to prove a breach on the part of the employee of the restraint;; and without the employee being afforded the opportunity of showing that it is not reasonably required or, stated differently, because it is unreasonable either as to area, duration or subject matter.

[34] The Constitution of the Republic of south Africa, 1996.s 9(1) guarantees every person equal protection and benefit of the law. s 22 guarantees every citizen the right to choose his trade, occupation or profession freely, the practise of which is regulated by law. S 34 guarantees all persons the right to have any dispute that can be resolved by the application of law decided in a *fair* public hearing before a court.

[35] On the basis that the agreement of settlement did not expire on the 20th August 2017.

[36] See: pp. 108-109; and 112-114 of the papers.

mind the test proposed in *Basson v Chilwan*[37] for determining the reasonableness of the restraints. Even if I were to accept for present purposes that the applicants have a proprietary interest in the form of customer connections and confidential information (pertaining to the financial compensation paid to dealers in respect of dealer referrals), the applicants' professed fear is that the motor dealers with whom the second and third applicants interacted whilst working as sales consultants with the second applicant will now take their '*leads*' to the first respondent. However, the facts do not support a finding that the second respondent, over the period of five months, acquired any influence over the dealers with whom he dealt, such that would enable him to influence or induce the dealers to refer their leads to him whilst in the employ of the first respondent. The applicants did not identify any dealers with whom the second respondent might have developed such connections, nor did they indicate that any dealers were lost when the second respondent took up employment with the respondent company.[38] The same applies with regard to the third respondent. In any event, Waldeck's primary responsibility was in relation to the servicing of clients at Barlow dealerships. The unrefuted fact of the matter is that the first respondent is not on Barloworld's panel and has no contractual arrangement with Barloworld and is therefore not in a position to obtain leads or referrals from Barloworld dealers. As pointed out by the respondents' counsel, the applicants failed in their affidavits to identify a single dealer whose business has been or may be 'poached' from it by the second or third respondents. Furthermore, the second and third respondents have demonstrated that they did not acquire knowledge of the amounts paid in respect of referrals, nor were they privy to payments actually made to dealers in that regard. It has also not been demonstrated in these proceedings that the second and third respondents would be able to use any confidential information belonging to the applicant in such a manner that it would give the respondent company an unfair commercial or strategic advantage.

49. The second and third respondents have tendered various undertakings to the applicants, *inter alia*, not to elicit any business from a list of clients and potential clients as are provided to them by the second applicant. The tender has a bearing on the second consideration mentioned in *Basson supra,* namely, whether the second applicant's protectable proprietary interest is threatened by the respondents. The undertakings are contained at pp 264 and 265 of the papers. The respondents have indicated in the papers that they will abide by

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[37] 1993 (3) SA 742 (A) at 767 A-D

[38] I am in agreement with the submission made by the respondents' counsel that 'the applicants are especially generic and vague in describing what information the second and third respondents' were entrusted with or what use there would be for such information in the performance by a sales consultant of his or her duties.'

the terms of their tender. Having regard to the fact that the applicants may still pursue relief for the enforcement of the restraint of trade agreements against the second and third respondents in separate proceedings, should they be so advised, I see no need to make these undertakings an order of court.

50. For all the reasons given, the application falls to be dismissed with costs. The general rule is that costs follow the result. I see no reason to depart therefrom.

ORDER:

51. The application is dismissed with costs.

MAIER-FRAWLEY AJ

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| Date of hearing: | 21 November 2017 |
| Date of judgment: | 13 December 2017 |
| Judgment delivered | 15 December 2017 |

APPEARANCES:

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|---|---|
| Counsel for Applicants: | Adv. P. J. De. Bruyn (082 318 8984) |
| Attorneys for the Applicants: | Lombard Kotze Inc c/o Rooseboom Attorneys<br>Ref: DT Boshonig (011 678-2280). |
| Counsel for the Respondent : | Adv. E. J. J. Nel (083 414 2634) |
| Attorneys for the Respondent: | Jansen & Jansen Inc c/o E Da C Luiz Attorney<br>Ref: D. Jansen (011 348 0763) |