



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: B560/2024

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

2 APRIL 2024

DATE

SIGNATURE

In the matter between:

BETTERLIFE ORINATION SERVICE (PTY) LTD

T/A BETTERBOND

Applicant

and

LEBOHANG LETLHAKU

First Respondent

MORTGAGEMARKET (PTY) LTD

Second Respondent

JUDGMENT

COWEN J

1. The applicant, Betterlife Origination Service (Pty) Ltd (Betterbond), is in the business of bond origination, bond consulting and financial intermediation services. Betterbond has approached this Court urgently to enforce a restraint of trade agreement against the first respondent, Lebohang Letlhaku. Ms Letlhaku is currently working with a direct competitor, the second respondent, MortgageMarket (Pty) Ltd. The first respondent opposes the application.

2. As the applicant is seeking final relief, the facts fall to be determined in accordance with the principles of *Plascon Evans and Wightman*.¹

3. It is common cause that Betterbond and Ms Letlhaku concluded a written contract of employment on 3 October 2022 (the employment agreement). The restraint clause that Betterbond seeks to enforce is contained in Clause 19. I return to its terms below, but the relief claimed seeks to restrain three activities:
 - 3.1. The conduct of any business with the second respondent or any other direct competitor of Betterbond in regard to any restricted lead sources (as defined

¹ *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A) at 634H-635C; *Wightman t/a JW Construction v Headfour (Pty) Ltd and ano* 2008(3) SA 371 (SCA), para 13.

in the employment agreement) within Gauteng, for a period of 6 (six) months from the date of the order.

3.2. The enticement of restricted parties (as defined in the employment agreement) to terminate their business relationships with Betterbond or to provide their business to the second respondent or any other third party who operates in direct competition with the applicant for the restraint period.

3.3. The further dissemination of confidential information of Betterbond to the second respondent or any other third party.

4. The general principles relating to enforcement of restraints of trade agreements are now well-established. In the pre-constitutional era, the then Appellate Division confirmed, in *Magna Alloys*,² that restraint of trade agreements are *prima facie* valid and enforceable in accordance with the principle of *pacta sunt servanda*. However, this is subject to its reasonableness, and resultant accordance with public policy.

5. In *Basson v Chilwan*, the Appellate Division held that it is in itself contrary to public policy if a restraint operates to prevent a person from conducting commerce or pursuing a profession in the absence of a protectable interest asserted by the restraining party. A restriction that is reasonable between the

² *Magna Alloys and Research (Pty) Ltd v Ellis* 1984(4) SA 874 (A).

parties may nevertheless harm the public interest and *vice versa*. The following considerations would need to be determined:³

5.1. Does the applicant have a protectable interest that deserves protection.

5.2. Is so, is that interest threatened or breached by the other party.

5.3. Does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive.

5.4. Is there an aspect of public policy unrelated to the relationship that requires the restraint to be maintained or rejected;⁴

5.5. Does the restraint go further than necessary to protect the relevant interest.⁵

6. In *Reddy v Siemens Telecommunications*, the SCA affirmed the consistency of the common law approach with constitutional values, holding specifically that the considerations set out in *Basson* 'comprehend' the considerations in section 36(1) of the Constitution, the limitations clause.

7. This approach is subject to the Constitutional Court's holdings in *Barkhuizen v Napier*⁶ and more recently *Beadica v Trustees, Oregon Trust*.⁷ In brief, the determination of public policy is now 'rooted in the Constitution and the objective, normative value system it embodies.'⁸ What is required is a careful balancing exercise to determine whether the enforcement of a contractual term would be

³ [1993] 2 All SA 373, 1993(3) SA 742 (A) 767E-I. These findings were affirmed in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007(2) SA 486 (SCA) at para 16.

⁴ *Basson v Chilwan and others* 1993(3) SA 742 (A) at 767G-H; [1993] 2 All SA 373 (A); [1993] ZASCA 61.

⁵ This latter consideration was added in *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and another* 1999(1) SA 472 (W) at 484E.

⁶ [2007] ZACC 5; 2007(5) SA 323 (CC); 2007(7) BCLR 691 (CC) at paras 28 to 30.

⁷ 2020(5) SA 247 (CC) especially at paras 71 to 90.

⁸ *Beadica* at para 71. I do not separately reference the many cases referred to in *Beadica*.

contrary to public policy, balancing any ‘unacceptable excesses of “freedom of contract” while permitting individuals the dignity and autonomy to regulate their own lives.’⁹ Importantly, ‘public policy imports values of fairness, reasonableness and justice’, and ‘Ubuntu, which encompasses these values, is now also recognized as a constitutional value, inspiring our constitutional compact.’¹⁰ The Constitutional Court emphasized in *Beadica* that: ‘It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.’¹¹ The Court continued by emphasising that the principle of *pacta sunt servanda* ‘plays a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values.’ However:

‘ In our new constitutional era, *pacta sunt servanda* is not the only, nor the most important principle informing the judicial control of contracts. The requirements of public policy are informed by a wide range of constitutional values. There is no basis for privileging *pacta sunt servanda* over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances.’

8. Finally, the Constitutional Court in *Beadica* elucidated the principle of ‘perceptive restraint’, which a Court must exercise when approaching the task of refusing to enforce a contractual term. What this means is that while Courts must not shrink from their constitutional duty to infuse public policy with constitutional values, the power is to be exercised sparingly, in the clearest of, or worthy, cases.¹²

⁹ Id.

¹⁰ Id at para 72.

¹¹ Id at para 80.

¹² Id at paras 88 to 90, where this principle is elaborated upon.

The events giving rise to the application

9. It is common cause that before joining Betterbond, Ms Letlaku worked for some seventeen years in the bond origination or related businesses.

10. According to the applicant, Ms Letlaku resigned unexpectedly and without proper notice on or about 22 February 2024. The letter of resignation serves as a formal notification of resignation and records that it is motivated not by any unhappiness but by a 'strategic career move'. According to Ms Letlaku, whose evidence I accept, there were prior engagements on 17 February 2022, between herself and Ms Rosita Garde, Betterbond's regional manager and Ms Letlaku's superior. During this engagement, Ms Letlaku informed Ms Garde of her intention to leave Betterbond and her intention to take up an engagement with the second respondent as a partner with a significantly improved payment package.

11. On Monday 26 February 2024, Ms Garde sent Ms Letlaku an e-mail relating to the restraint and requested an undertaking that she will not breach it. The letter records that Ms Letlaku has, during her employment with Betterbond 'had access to extensive confidential and proprietary information, belonging to Betterbond, which possesses commercial value to Betterbond's competitors.' It records that it has come to Betterbond's attention that she has taken up employment with the second respondent, a direct competitor.

12. The letter then records, in paragraph 4:

'While your employment with Mortgage Market amounts to a direct violation of your restraint of trade undertaking and accordingly amounts to a breach thereof, it is not our intention to prevent you from taking up your new position at Mortgage Market, provided that you do not engage (whether directly or indirectly) any restricted lead sources, restricted parties and restricted transactions, nor are you to solicit any of Betterbond's staff or disclose any confidential or proprietary information of Betterbond. Attached hereto as Annexure "B" is an undertaking which you are required to sign immediately and return to us by no later than 17h00 on Tuesday 27 February 2024.'¹³

13. Ms Letlaku did not take up the offer and did not supply the undertaking sought.

According to the applicant, Ms Letlaku in fact advised repeatedly that she would sign the undertaking, including by way of a voice note sent to Ms Garde on 27 February 2024. This did not happen and Ms Garde confirms the evidence in the founding affidavit. By 1 March 2024, there were numerous queries from clients.

14. Between 1 and 3 March 2024, the IT department of Betterbond conducted investigations and discovered that:

14.1. On 15 February 2024, Ms Letlaku received her employment contract with MortgageMarket which she signed and returned on 16 February 2024.

14.2. During the period 16 February 2024 and 26 February 2024, Ms Letlaku was engaging with both Betterbond and MortgageMarket and referring Betterbond's clients to MortgageMarket.

¹³ The letter expressly records that the proposed undertaking does not constitute a novation or waiver.

- 14.3. Both prior to and during the period 16 to 26 February 2024, Ms Letlhaku redirected lead providers and clients to MortgageMarket. The lead providers are property practitioners that work for real estate agencies which have concluded agreements (some exclusive) to send leads to Betterbond.
- 14.4. During the same period, Ms Letlhaku sent a vast amount of BetterBond client information to her personal gmail account.
- 14.5. At least two customers were pre-approved by BetterBond with Ms Letlhaku as their consultant but were redirected by Ms Letlhalu to MortgageMarket.
15. At that point, the applicant arranged an urgent consultation with its attorneys and on Monday 4 March 2024, the applicant's attorneys wrote to the applicant to demand that she terminate her business relationship with MortgageMarket, undertake not to contact or solicit BetterBond's lead providers and customers and confirm under oath what confidential information has been misappropriated. A letter of demand was also sent to MortgageMarket. Betterbond requested responses to the letters on 6 March 2024. Ms Letlhaku elected not to respond. Mortgage Market declined to accede to any demands and I return to what they say below.

16. The application was sent to the first respondent (first in draft and later filed) on 8 March 2024. In the notice of motion, she was meant to deliver her answering affidavit a mere three days later, on 11 March 2024. She did not manage that in circumstances where she initially sought to access legal representation of her own and thereafter was able to secure legal representation with the assistance of the second respondent. A consultation was held on Monday 11 March 2024, consultations continued on 12 March 2024 and a comprehensive answering affidavit was then delivered on 16 March 2024. The applicant replied the following day, on 17 March 2024. The parties then delivered heads of argument

Urgency

17. I am satisfied that the application must be heard on an urgent basis. These are restraint proceedings, which as a general rule, have an inherent quality of urgency, and the usual requirements for an urgent application are met. The applicant will lose its right to enforce the restraint clause unless it can do so urgently.

18. I do not consider any urgency to have been self-created in this case as it was not unreasonable for the applicant to act as it did after the discussions of 17 February 2022. Moreover, the first respondent did not share all relevant information at that time with the applicant, which only came to learn of material relevant information about what was ensuing and her alleged breaches in early March 2024. The first

respondent also sought to resolve the matter without litigation on 26 March 2024 ultimately to no avail.

19. The time frames for respondent in this case were unduly truncated. However, the affidavits and heads of argument were ultimately delivered within extended time-frames that enabled the first respondent to deliver her answering affidavit and enabled the application to be argued before me on Friday 22 March 2024 as allocated. This ensued in circumstances where the second respondent facilitated the first respondent's access to legal representation.

20. Against this background, I am grateful for the assistance provided to me by counsel for both the applicant and first respondent, not least in the heavily burdened context of the urgent roll. I would have preferred to have had more time to prepare my reasons for decision but the circumstances are such that warrant a speedy judgment and accordingly I am not in a position to detail every submission or aspect considered.

Issues for decision

21. The issue for decision in this matter is whether the restraint agreement is enforceable in light of the principles articulated above. The onus of proving that the restraint is unreasonable and against public policy lies with the first respondent herself.¹⁴

¹⁴ *Magna Alloys. BHT Water Treatment (Pty) Ltd v Leslie* [1993] 3 All SA 126; 1993(1) SA 47 (W) 52F-54I.

22. The central contention advanced by the first respondent in this regard is that the applicant has no protectable interest, is merely seeking to stifle legitimate competition¹⁵ and in consequence, to enforce the agreement would amount to an unlawful limitation of the first respondent's constitutionally protected rights. Specifically, section 22 of the Constitution, which gives every citizen the right to choose their trade occupation or profession freely, and her right to dignity, protected in section 10.

23. Most centrally, the first respondent relies on the fact that when she joined Betterbond, she had seventeen years of experience in the area, during which she had built up an extensive pre-existing client base and acquired leads that she then maintained whilst at Betterbond. She explains that before she joined Betterbond, she disclosed her extensive network of leads in the Johannesburg area and that she was employed precisely because she was bringing these relationships to Betterbond. Before joining Betterbond, she worked with Absa Homeloans (for eight years), SA Homeloans (for four years) and with Multinet (for four years). She only worked with Betterbond for eighteen months, from October 2022 to February 2024, in the Pretoria region.

24. She explains that Gauteng outperforms other regions of the country in terms of the number of homeloans granted, with more than 50% of the total number of home loans for the twelve months to July 2023. Betterbond operates in regions, including Johannesburg North West, Johannesburg South East, Western Cape,

¹⁵ Cf *Pam Golding Franchise Services (Pty) Ltd v Douglas* 1996(4) SA 1217 (D)

Greater Pretoria, KwaZulu-Natal, North West, Eastern Cape, Free State & Northern Cape and Mpumalanga. It claims to have a market share of approximately 45% of originated home loans in South Africa and owns Private Property, PayProf, Remax, Chas Everit and Cell Captive for the insurance business.

25. She explains that high value employees and agents of Betterbond convert approximately R40 million per month, on which they earn commission. The value of the first respondent's intake was on average R15 million, of which she converted about R7 million monthly. She earned a basic salary of R 12 000 a month, with deductions R10 891. After commission her salary ranged from between her basic salary to R22 754.

26. Contending for the unreasonableness of the restraint, the first respondent refers to South Africa's employment market, marked by unemployment, drops in employment levels and fluctuations in available jobs. She avers that the applicant is effectively seeking to 'throw (her) into the unemployment market.' As against this, she avers that the applicant is not protecting any protectable interest, emphasizing that the applicant does not own her network of contacts which she did not acquire as a consequence of her employment with it. She refers to three deals that she initiated while running e-Bond, where she worked before she joined Betterbond. Moreover, she tenders to relinquish trade relationships she created in Pretoria and Tembisa which she accepts may arguably be said to have been secured while working at Betterbond.

27. In reply, the applicant points out that when enforcing restraints such as those in issue in this case, it is important to ensure that each consultant is held to their restraint otherwise there would be a cumulative harmful effect on the business of BetterBond. It points out that the applicant appears to have understated her earnings. On the terms of the restraint, Betterbond emphasizes that it is of limited duration, only 6 months, whereafter it accepts that it should be 'fair game' in the interests of competition. However, during the restraint period, it contends that it can legitimately protect its business dealings with its lead providers and continue with its current business. The Court's attention is then drawn to two recent cases, in which BetterBond has successfully enforced its restraint clause, to which I will refer as the *Smit* case¹⁶ and the *Maluleke* case.¹⁷ In respect of the three leads she brought to Betterbond, the applicant points out that she appears to have been working for her own account shortly before joining BetterBond and thus caused no harm in doing so. The applicant contends that the first respondent has failed to demonstrate that the leads referred to are her pre-existing clients and contend that in any event, the restraint does not differentiate.

The agreement

28. Clause 19 of the agreement is entitled 'Restraint of Trade and Restriction Against Soliciting Employees. I only repeat the core parts, being Clauses 19.3 and 19.4. By definition, the Restraint Period is limited to a six-month period from the Terminate Date, being the date on which the employee ceases to be a full time

¹⁶ *Betterbond (Pty) Ltd and another v Alister Smit and another* (Case No: J2898/18) delivered in the Labour Court on 5 October 2018 (*Smit*).

¹⁷ *Betterlife Origination Services (Pty) Ltd t/a Betterbond v Karabo Maluleke and others* Case no 2024-013771 delivered in the High Court, Johannesburg on 22 February 2024 (*Maluleke*).

employee of the applicant, in this case 22 February 2024. Clause 19.3 and Clause 19.4 read:

'19.3 The Employee warrants and undertakes that he/she shall not during the Restraint Period, in any capacity whatsoever, (including that of principal or proprietor, agent, broker, partner, representative, assistant, trustee or beneficiary of a trust, manager, member of a close corporation, member of a voluntary association, shareholder, director, employee, consultant, contractor, advisor, financier, demonstrator)-

19.3.1 directly or indirectly be associated or concerned with or interested or engaged in any Restricted Business or entity carrying on any restricted Business in the Territory or;

19.3.2 conduct any Business, the same or similar to, or in competition with the Business of the employer¹⁸ and/or the Group in regard to any Restricted Lead Source.¹⁹

The Employee shall not, either for his/her own account or as a representative or agent for any third party, while he/she is employed by the Employer and for a period of 6 (six) months after the Termination date, conduct any business, the same as, similar to, or in any competition with the Business of the Employer and/or the Group in regard to any Restricted Lead Source, nor shall the Employee be interested in any legal entity that conducts business with the Restricted Lead Source. The Employee shall not, either for his/her account or a representative or agent for any third party while he/she is employed by the Employer and for a period of 6 (six) months after the Termination date, persuade, induce, procure, solicit, entice or

¹⁸ "Business" means the business of the Employer, such business consisting of mortgage origination and related services conducted by the by the Employer and or the Group, including but not limited to:

- mortgage origination and aggregation;
- insurance and insurance systems and products relating to mortgage origination;
- related value added products;

and including all other processes and methods employed by the employer in conducting its business.'

¹⁹ "Restricted Lead Sources" means each and every entity that continues to be, or has been in the last 12 (twelve) months prior to the Termination Date, a business lead source for the Employer and/or the Group in regard to the Business within the Territory, including, but not limited to, any estate agency, estate agent, attorney firm, auctioneer, aggregation franchise, that has received or is entitled to receive remuneration from the Employer or the Group for the referral of the Business.

attempt to entice away a Restricted Party²⁰ from the Business of the Employer and/or the Group and/or from concluding a Restricted Transaction.²¹

19.4 Without limiting the generality of clause 19.3, the Employee shall not, during the period mentioned, in any capacity deal in any way with a Restricted Party in respect of any services and/or products which are substantially the same the same as those services and/or products which are offered by the Employer and/or the Group to the Restricted Party in question.

Analysis

29. I am unable to agree with the first respondent that the applicant does not have a protectable interest that is not susceptible to protection under a restraint clause. In context, what is being protected is the applicant's trade connections, current business dealings and client base which it obtains through its lead sources and who comprise parties with whom the applicant interacts for purposes of its business.

30. Moreover, there can be no real debate that, on the evidence before me, the interest has been breached by the first respondent in her business relationship with the second respondent, and that is threatened in her pursuing restricted transactions and by her conduct. Furthermore, while her legal representatives have done their best to assist her, the first respondent has – in her conduct - demonstrated an apparent disregard for her contractual obligations, which fortifies this conclusion.

²⁰ "Restricted Party" means each and every entity with whom the Employee has interacted with, in the course and scope of his/her employment and/or on behalf of the Employee or the Group and all other entities with which the Business or Group participates or proposes to participate in a Restricted Transaction, to the reasonable knowledge of the Employee;

²¹ "Restricted Transaction" means any business transaction or proposed transaction between the Employer or the Group and any other entity in regards to the Business within the Territory, undertaken or under consideration as at or during the preceding 12 (twelve) months of the Termination Date including but not limited to, any transaction pursuant to which the Restricted Party will participate in the conduct of the Business with the Employer and /or the Group, whether as a lead source or otherwise;

31. In considering whether the restraint goes further than necessary to protect the interest, I am of the view that the restraint probably does, both due to its duration and its broadly framed terms. However, having regard to the circumstances and the relief sought in this case, this can be practically and sensibly addressed by following the approach in *Maluleka*, which limits the duration of the restraint clause. In *Maluleka*, the duration was limited to a period of 4 (four) months from the termination date. In this case, and given the evidence and the first respondent's history in the industry, a 3 (three) month period is reasonable. As regards the geographical constraint, I am satisfied that restricting the restraint to Gauteng for this short time period is reasonable. Although the second respondent says that she worked in the Pretoria region, she later says that she did work in the Johannesburg area using her historical trade networks. It is true that Gauteng is the economic hub but on the second respondent's own evidence there is substantial work available in other provinces and she has sufficient experience to work in various related roles in Gauteng.

32. Regarding prior relationships, Mr Lennox submitted that this argument was rejected in the *Maluleka* case. That is indeed so, but in circumstances where the direct evidence showed that those relationships were enhanced or reinforced during the respondent's employment with BetterBond. There is no direct evidence in this case to that effect.

33. Notably, however, in *Rawlins*,²² referred to in *Smit*, the then AD stated:

²² *Rawlins and another v Caravantruck (Pty) Ltd* 1993(1) SA 537 (A) at 542G-H.

'In summary then, what Rawlins says is that during his employment with the respondent he largely dealt, not with its existing customers, but with his own pre-existing following or buyers whom he later found. Does this establish that the respondent did not have a proprietary interest of the kind under consideration? It is, of course, a factor in his favour; but not conclusively so (see *Cansa (Pty) Ltd v Van der Nest* 1974(2) SA 64 (C) at 69E-H and *M&S Drapers (a firm) v Reynolds* [1956] 3 All ER 814 (CA) at 820E; compare, however, the views of Denning LJ at 821A-E). 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.

The onus being on Rawlins to prove the unreasonableness of the restraint, it was for him to show that he never acquired any significant personal knowledge of or influence over the persons he dealt with as a salesman of the respondent over and above that which previously existed. In my opinion he did not do so. No allegation that he did not acquire such knowledge or influence is made by Rawlins. Nor do I think that it can be inferred. On the contrary, it would appear to be no less probable that Rawlins' relationship with the customers he dealt with as a salesman of the respondent were such as to make it reasonable for the respondent to protect itself. Rawlins worked for the respondent for some fifteen months. During this time, he received training in the use and marketing of products sold by the respondent. He was obviously a successful salesman. Taking account of the realities of commerce, it is a fair inference in these circumstances that it was Rawlins' employment with the respondent that gave him the opportunity to consolidate or even strengthen the prior rapport which he had with his customers.'

34. The first respondent relied upon *Digicore Fleet Management v Steyn*²³ to avoid the restraint. In that case, the employee worked for some 8 (eight) months as a 'sales executive' for a company that sold vehicle tracking systems to fleet owner, corporate and individual clients. She had come with useful contacts valuable to the appellant, both from previously selling tracking systems and from working in the insurance industry. The evidence in that case showed that she was not trained by Digicore, was given no support save for a computer, phone and brochures describing the products. She was given no confidential client information save for details of 20 (twenty) clients from a previous sales executive. Moreover, Digicore had previously concentrated on corporate and fleet management clients whereas she concentrated on cultivating her insurance contacts. In this context, it was held:

'When she left Digicore she took with her no more than she had brought to the business in the first place: experience in the field and contacts with insurance brokers in the Durban area. It can hardly be said, in the circumstances, that Digicore had any proprietary right that was in jeopardy when she left to work for a competitor'.

35. It would have been an easy matter for the first respondent to provide more information regarding her alleged historical contacts and her work at BetterBond, if it existed, so as to bring herself into the *ratio* of *Digicore*. In my view, the evidence and circumstances in this case is more aligned with *Rawlins*. In other words, the first respondent has not gone far enough to counter a common sense inference on the evidence that any historical trade connections she had were probably consolidated and strengthened as a result of her employment with Betterbond, a leading player in the industry. Moreover, she has failed, save in

²³ [2009] 1 All SA 442 (SCA).

one instance, to prove adequately that she did bring in clients based on her prior relationships. It does appear that she brought in three imminent deals when she joined BetterBond, but beyond that the evidence merely suggests that she may have had historical contacts from working in the industry. Moreover, she worked at BetterBond for some 18 (eighteen months) and the restraint clause is designed specifically to target contacts for a confined period, both backwards and forwards in time, thereby targeting current business.

36. If the restraint is limited in time, I am satisfied that the parties' respective interests are duly balanced in accordance with the Constitution. The applicant's interests are protected. The first respondent is only precluded from working with the second respondent, or another competitor, in Gauteng for this three-month period and is not disabled from working *per se* even during this brief period. She can, thereafter, pursue the work of her choosing wherever she may choose.

37. I am satisfied that the requirements for an interdict are met, in context of a restraint of trade dispute. A party cannot be expected to forego its entitlement to claim specific performance of a restraint clause merely because it might have a claim for damages in due course. Damages for a claim in this case would, moreover, be difficult to prove. The harm flows from the nature of the right protected.

38. There is a further matter which concerns a prayer sought to restrain the first respondent's ongoing distribution of 'confidential' information. What has been

shown to have happened is the distribution of information germane to restrained activities, indeed entailing the appropriation of specific clients and business opportunities. The first respondent submits that it has not been shown that the information is confidential.²⁴ However, it is not necessary to deal with that characterisation as an alternative narrower remedy suffices. The order that I make is to restrain the ongoing distribution of material that furthers the pursuit of any restrained activity or concerns business dealings of the applicant.

39. As to costs, they should follow the result.

40. I make the following order:

40.1. The forms and time limits prescribed by the Rules of this Court are dispensed with and the application is heard as one of urgency.

40.2. The First Respondent is interdicted and restrained from further breaching her restraint of trade undertakings in the following manner:

40.2.1. The First Respondent is restrained, either from being employed by or for her own account or as an agent for a third party, from conducting any business with the Second Respondent, or any other direct competitor of the Applicant, in regard to any restricted lead sources (as defined in the First Respondent's contract of employment) within

²⁴ I was referred to *Recycling Industries (Pty) Ltd v Mohammed and another* 1981(3) SA 250 (SE) at 258H-259F and *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and another* 1971(3) SA 866 (W).

Gauteng, for a period of 3 (three) months from the date of termination of the employment contract being 22 February 2024.

- 40.2.2. The First Respondent is restrained, either for her own account or as an agent for a third party, from contacting, inducing, pursuing, soliciting, enticing or attempting to entice away any restricted party (as defined in the first respondent's contract of employment) of the applicant to terminate their business relationships with the applicant and / or to provide their business to the second respondent or any other third party for the restraint period.
- 40.3. The first respondent is restrained from further disseminating information of the Applicant to the second respondent or any other third party that furthers the pursuit of any of the restrained activities or concerns business dealings of the applicant.
- 40.4. The first respondent must pay the costs of the application on a party and party scale.

S J COWEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION

Date of hearing: 22 March 2024

Date of decision: 2 April 2024

Appearances:

Applicant: Adv MA Lennox instructed by Hinrichsen Attorneys

First Respondent: Adv S Ogunronbi instructed by DOA Attorneys Inc

Second Respondent: Adv M Madi (watching brief) instructed by Mtshabe Attorneys Inc.