REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2126 / 2014

In the matter between:

FMW ADMIN SERVICES CC	**Applicant**
and	
JAKOBUS MARTHINUS STANDER	**First Respondent**
WYNAND DU PLESSIS	**Second Respondent**
DANIE JONES	**Third Respondent**
JONES & DU PLESSIS	**Fourth Respondent**

Heard: **11 September 2014**

Delivered: **16 September 2014**

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

Restraint of trade – nature of confidential information – no evidence of employees having confidential information – no protectable interest with regard to confidential information shown

Restraint of trade – nature of customer connections – no protectable interest with regard to customer connections shown – business of applicant contrary to public interest

Practice and procedure – requirement to make out case in founding affidavit – issue of determining factual disputes in restraint applications

Interdict – no protectable interest shown – business of applicant contrary to public interest – interdict refused

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter came before me as an urgent application brought by the applicant in terms of which the applicant sought to enforce a restraint of trade covenant against the four respondents. The application is opposed by the respondents, with the fourth respondent being the new business of the second and third respondents. 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]

[2] There are a number of factual disputes in this matter. Principally, the respondents dispute that they have been privy to any confidential information which could substantiate the existence of a protectable interest in this regard. The respondents also dispute that there are trade connections worthy of protection in favour of the applicant. In addition, the respondents contend that the weighing off of interests in this matter also favour them. Finally, the respondents have also raised an issue of public interest.

[3] In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[2] it was held that: 'Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the onus of proving that the enforcement of the condition would be contrary to public policy.' This same approach was followed in *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another*[3], *Bridgestone Firestone Maxiprest Ltd v Taylor*[4], *Rectron (Pty) Ltd v Govender*[5], *David Crouch Marketing CC v Du Plessis*[6] and *Experian South Africa (Pty) Ltd v Haynes and Another*.[7] In the judgment of *Jonsson Workwear (Pty) Ltd v Williamson and Another*[8], I accepted that the correct position in law was that the respondent party seeking to defeat the application of the restraint of trade had the

[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 ; *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers and Others* (2012) 33 ILJ 448 (LC) para 2 ; *Esquire System Technology* (*supra*) at para 38 – 40.
[2] 1984 (4) SA 874 (A) at 875H-I.
[3] (2008) 29 ILJ 1665 (N) para 89.
[4] [2003] 1 All SA 299 (N) at 302J-303B.
[5] [2006] 2 All SA 301 (D).
[6] (2009) 30 ILJ 1828 (LC).
[7] (2013) 34 ILJ 529 (GSJ).
[8] (2014) 35 ILJ 712 (LC) at para 8.

onus to prove the restraint of trade is unreasonable and not enforceable, and I shall follow the same approach in this matter.

[4] Although the respondents do bear the onus, I equally accepted in *Jonsson Workwear*[9] that the question of the onus does not affect the approach on how factual disputes in motion proceedings should be determined, and once again I shall apply the same approach *in casu*. In *Reddy v Siemens Telecommunications (Pty) Ltd*[10] the Court said that '…. A final order can only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify the order, and this applies irrespective of where the onus lies.' The Court in *Reddy* went further and said:[11] '…. For in the present case the facts concerning the reasonableness or otherwise of the restraint have been fully explored in the evidence, and to the extent that any of those facts are in dispute that must be resolved in favour of Reddy (these being motion proceedings for final relief). If the facts disclosed in the affidavits, assessed in the manner that I have described, disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.' This is the approach I will apply.

[5] The normal principles to resolve factual disputes in motion proceedings where final relief is sought was enunciated in the now regularly quoted judgment of *Plascon Evans Paints v Van Riebeeck Paints.*[12] In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road*

[9] Id at para 9.
[10] (2007) 28 ILJ 317 (SCA) para 4.
[11] Id at para 14.
[12] 1984 (3) SA 623 (A) at 634E-635C ; See also *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 ; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) para 38 ; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 ILJ 440 (LC) para 32 ; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) para 26.

Freight Industry and Another[13] the Court held as follows in apply this age old test: 'The applicants seek final relief in motion proceedings. Insofar as the disputes of fact are concerned, the time-honoured rules …. are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the 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.'

[6] I shall now set out the background facts that properly would form the factual matrix for the purposes of the determination of this matter, in accordance with the principles as I have set out above.

Background facts

[7] The applicant conducts business as a payroll service provider and labour consultancy. The applicant states that it also specializes in the administration of independent contractors for various of its clients, which was an important component of its business. Under 'independent contractors', the applicant explained that these were individual persons contracted to its clients on an individual contract basis by the applicant.

[8] I must immediately say that I have some concerns about the lack of particularity in some parts of the applicant's founding affidavit, especially where it concerns the issue of confidential information. The applicant in essence simply says that information is confidential and then leaves it there. I will deal with this, and the

[13] 2009 (3) SA 187 (W) para 19.

consequences of such failure to provide sufficient particularity, hereunder.

[9] According to the applicant, it started business in 1996, and its business evolved over the years. The applicant states that it took it 18 years to compile its existing customer base, and has provided a list of its current active clients at annexure "TR17" to the founding affidavit. The respondents have not disputed that this list of clients are indeed the applicant's existing clients. It is clear that the majority of these clients are in the private security services sector.

[10] In dealing with its products and services, the applicant has contended that it has what it calls a 'custom designed computer program' that electronically calculates (inter alia) the hours per week worked by an employee and the payments due to the employee. No further particulars of any kind are provided with regard to this program. The applicant then further contends that it has custom designed contracts and agreements which is sold to clients and administered by the labour consultants. The applicant has provided an example of such a contract attached to its founding affidavit.

[11] I intend to immediately deal with the issue of the purported custom contract. I have had detailed consideration of this contract. There is nothing custom about it. I find it hard to believe that it can even be said that such a contract has been designed over years as the applicant wants me to believe. The contract provided as an annexure to the founding affidavit is a stock standard, for want of a better description, service agreement where services are provided by an independent contractor to a client, coupled with an invitation to tender for work. Worse still, I have my doubts about the legitimacy of this kind of contract and modus operandae, which I will address hereunder.

[12] Turning then the computer program, and as I have said, the complete lack of proper particularity is disturbing. There is no description of what exactly this program does and why it is unique and custom. If one reads the founding affidavit, the only impression that can be gained from what is set out is that this is normal payroll administration software that can be bought off the shelf. In fact, and annexed to the founding affidavit is a business profile of the applicant that in my view clearly indicates nothing else but a standard payroll outsourcing service. There is simply nothing custom and unique in a program automatically calculating hours worked and payments due, and this is simply what any payroll program at the very least must do.

[13] What however is true is that the applicant, through the labour consultants employed by it, provides labour and employment consulting services to its various clients. In this regard, the labour consultants service specific clients of the applicant allocated to them. They are required to build and maintain their client base and maintain a close service relationship with the clients. The labour consultant is also required to regularly visit and call on clients, and keep them updated of developments. It is in fact through the labour consultant that the applicant provides professional consulting services to its clients. The respondents, in their answering affidavit, do not dispute any of this.

[14] Then, and where it comes to the respondents themselves, the first, second and third respondents were all employed by the applicant as labour consultants. The first respondent commenced employment on 10 November 2008 and resigned on 22 June 2014, effective date 31 July 2014. The second respondent commenced employment on 1 October 2007 and resigned on 30 June 2014, effective date 31 July 2014. Finally, the third respondent commenced employment on 5 May 2008 and resigned effective 1 April 2014. It is therefore clear that all these respondents were long serving employees of the applicant, as labour consultants.

[15] On 14 March 2014, the first respondent signed a restraint of trade agreement with the applicant. The second and third respondents signed identical agreements on 18 March 2014. The salient terms of this agreement, in simple terms, were:

15.1 The respondents undertook not to have any interest in, which included direct or indirect interest, any business competing with that of the applicant. Interest also included being shareholders or partners in such a business or being employees of such a business;

15.2 The respondents would not solicit the custom of the applicant's existing clients, or any client that been a client of the applicant one year prior to such respondent(s)' termination of service;

15.3 These restraint undertakings would apply for a period of 12 months' calculated form date of termination of employment of the respondents, and for the areas wherever the applicant had clients.

[16] I am compelled to point out that despite the restraint agreement defining 'confidential information', all the agreement does is define what confidential information is but imposes no duty or obligation on the respondents relating to it.

[17] The third respondent, after leaving the employment of the applicant on 1 April 2014, joined a directly competing business to that of the applicant, but as an employee, being NAPE. The applicant was aware of this, but did nothing to enforce the restraint. According to the applicant, the third respondent was not pursuing its clients at the time so it was not concerned. When the second respondent then resigned, the third respondent and the second respondent then joined forces and established the

fourth respondent effective 1 August 2014. The business of the fourth respondent is that of a labour consulting service provider, and it is clear that this would be in direct competition to the applicant in this respect.The first respondent has become employed with North West Employers' Organization as a liaison officer, as from 1 August 2014. Whilst liaison officer is not a competing activity to the applicant's business per se, the fact is that the first respondent's new employer on face value also seems to be an entity that competes with the applicant.

[18] The applicant has, in the founding affidavit, given some four individual examples of the second and third respondents transacting with its clients. Whilst I have concerns about the lack of particularity in the founding affidavit about this, and would have expected the applicant to provide a lot more detail, it is, fortunately for the applicant, the second and third respondents' own answering affidavits that comes to its aid in this regard. The respondents conceded that labour consultant work was done for EC Security and Crime Stop Security, which were existing clients of the applicant attended to by the second respondent during the course of his employment with the applicant. The second and third respondents however stated that they have no intention of soliciting the custom of the applicant's clients. This is however as far as the evidence to be accepted in this regard goes. There is no evidence of any kind of the first respondent soliciting the custom of the applicant's clients.

[19] The respondents have specifically stated that they have no confidential information about the applicant's costing and pricing, or the computer program. In the absence of a proper case being made out by the applicant in this regard, and in particular a replying affidavit by the applicant, I accept these contentions of the respondents. In any event, and as I have said above, the restraint agreement itself imposes no obligations on the respondents insofar as it concerns confidential information.

[20] The third respondent has specifically stated that he has been involved in labour consulting since 1991, and that this is the only trade and occupation he knows. The second respondent has made an identical contention, but in his case it dates back to 1994.

[21] The applicant has unfortunately not stated in clear terms when it became aware of the second and third respondent establishing their competing business. The undisputed evidence however is that the applicant has known since March 2014 of the third respondent joining a competitor NAPE. The undisputed evidence further is that the first respondent informed the applicant in June 2014 that he would become employed with North West Employers' Organization. Probabilities however indicate that when the second respondent actually left the applicant on 31 July 2014 to then join with the third respondent in starting the business of the fourth respondent, this was the time the applicant became aware of the fact that its interests needed protection, and I accept for the purposes of this application that this was the appropriate moment from which an urgent application became competent.

[22] The applicant did initially immediately react. On 1 August 2014, a letter of demand was sent by its attorneys to all three respondents, informing them that as far as the applicant was concerned, they were in breach of their restraint of trade agreements, in that they were acting in competition with the applicant and were soliciting the custom of the applicant's clients. It was demanded that the respondents provide written undertakings that they would not be associated with a competitor, that they would not solicit the custom of the applicant's clients, and that they would not disclose any confidential information. These undertakings had to be provided by 6 August 2014, failing which is was specifically recorded the applicant would file an urgent application.

[23] It was common cause that the respondents did not respond to these letters given to each of them. The applicant's urgent application was only filed on 4 September 2014, almost a month later. No explanation is given for this period of delay.

The issue of urgency

[24] The respondents have contended that the application should not be heard as one of urgency, as the applicant procrastinated and created its own urgency. There is some merit in this contention. Insofar as it concerned the first respondent, and on the evidence, the applicant had known at the very least since the end of June 2014 where he was going and did nothing about this. It is my view that in respect of the first respondent, he was just thrown into the mix by the applicant, so to speak, in case he joined the fourth respondent together with the second and third respondents. The applicant's real interest, in my view, was pertaining to the second and third respondents, and their new business. If this application was only brought against the first respondent, I would have had no hesitation to strike it from the roll for want of urgency.

[25] Insofar as it concerns the second and third respondent, I accept that the proper occasion to have brought an urgent application was after 31 July 2014. The letters of demand of 1 August 2014 displays prompt and immediate action. Some criticism can be levelled at the applicant for not explaining the time period between the expiry of the deadline in the letters of demand on 6 August 2014, and 4 September 2014 when the application was finally brought. It was incumbent upon the applicant to have explained this period.The applicant seemed to approach this matter on the basis of an entitlement to bring it on the basis of urgency. This approach is ill conceived.

[26] Urgent applications are governed by Rule 8. As was said in *Jiba v Minister:*

Department of Justice and Constitutional Development and Others[14]:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[27] Probably the most often referred to authority where it comes to the issue of urgency is that of *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*[15], and the following *dictum* from this judgment is important:

> 'Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.'

[28] As stated, the applicant has offered no explanation at all for the period between 7 August 2014 and 4 September 2014. The applicant thus came dangerously close to having its application struck from the roll for want of urgency. What in essence saved the applicant where it comes to urgency is the fact that the respondents at least had an opportunity to fully ventilate the issues raised in the founding affidavit and was willing to, and did, argue the application on the merits thereof. In also

[14] (2010) 31 ILJ 112 (LC) at para 18.

accept that restraints have an inherent quality of urgency and I refer to *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another*[16] where the Court held:

> '…. I accept that breaches of restraints of trade have an inherent quality of urgency…. '(emphasis added)

I also consider that restraints are of limited duration and concern fundamental rights, requiring immediate determination as a matter of general principle. I am therefore prepared, with some reservation, to consider the applicant's application as against the second and third respondents as one of urgency.

[29] Insofar as it concerns the first respondent, and considering that I have decided to deal with the merits of the applicant's application insofar as it concerns the second and third respondents, I will determine the application in respect of the first respondent as well, rather than striking it from the roll. I do this as a matter of convenience and to determine this entire matter once and for all.

The restraint principles

[30] The general principles applicable to the enforcement of restraints of trade was set out in *Basson v Chilwan and Others*[17], where Nienaber JA identified four questions that should be asked when considering the reasonableness of the enforcement of a restraint, being *(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? *(d)* Is

[15] 1977 (4) SA 135 (W).
[16] (2009) 30 ILJ 1750 (C) at 1761.

there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

[31] In the judgment of *Ball v Bambalela Bolts (Pty) Ltd and Another*[18] the Court dealt with the *Basson v Chilwan* enquiry and said:

> 'The enquiry into reasonableness has been refined and elaborated on in cases such as *Reddy* and *Basson*. The enforceability of a restraint essentially hinges on the nature of the activity that is prevented, the duration of the restraint, and the area of operation of the restraint. In particular, 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'

[32] In *Reddy*[19] the Court held that in deciding whether or not to enforce a restraint of trade, the following must be considered:

> 'A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim pacta servanda sunt. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense freedom to contract is an integral part of the fundamental right referred to in s 22.

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[17] 1993 (3) SA 742 (A) at 767G-H.
[18] (2013) 34 ILJ 2821 (LAC) at para 17.
[19] *Reddy v Siemens Telecommunications* (*supra*) at paras 15 – 16.

In applying these two principal considerations, the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest. Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest. An agreement in restraint of trade is concluded pursuant to 'law of general application' referred to in s 36(1). What is meant by this expression includes the law in the general sense of the legal system applicable to all which, in this case, consists of the corpus of law generally known as 'the law of contract' and which allows for contractual freedom and the conclusion of agreements pursuant thereto. The four questions identified in Basson comprehend the considerations referred to in s 36(1). A fifth question, implied by question (c), which may be expressly added, viz whether the restraint goes further than necessary to protect the interest, corresponds with s 36(1)(e) requiring a consideration of less restrictive measures to achieve the purpose of the limitation. The value judgment required by Basson necessarily requires determining whether the restraint or limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.'

[33] In *Jonsson Workwear* I said the following:[20]

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

[34] All three the respondents signed restraints of trade shortly before they left the applicant, and long after having started employment with the applicant. Whilst I note that in the answering affidavits the respondents contend that they were forced to sign the restraints of trade, that is a contention I need not deal with, considering the basis of the determination of this matter as set out in my judgment hereunder. I must however say that I have difficulty believing such a contention made by long standing and experienced labour consultants, who must surely know what their rights are and that an employer cannot unilaterally impose a restraint of trade on them. Insofar as it may be necessary, and if I had to determine this issue of the respondents allegedly being forced to conclude the restraints, it would have been my view that such contentions had no substance. I will however not dwell on this further.

[35] The fact is that the second and third respondents opened their own labour consulting business. That would of course be in opposition to the applicant's labour consulting business, and thus a breach of the restraint of trade agreement as it stands. It would also seem that the second respondent has transacted with at least two clients of the applicant, which would equally be in breach of the restraint of trade as it stands.Finally, the first respondent has accepted employment with a business that competes with the applicant, albeit that there is some question mark as to whether he is employed in a competing activity at such business.

[36] What must now be considered is whether it is reasonable to enforce the restraints of trade against the respondents. Two considerations immediately come to the fore, being whether the applicant has a protectable interest and if so, whether the respondents are infringing on such any protectable interest. As will be discussed

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[20] *Jonsson Workwear (Pty) Ltd v Williamson and Another (supra) a*t para 44.

hereunder, an issue of public interest also arises. In *Dickinson Holdings Group*[21] it was held that a protectable interest can be found to two general categories, the first being trade (customer) connections, and the second being confidential information. The applicant, in its founding affidavit, relied on both these categories.

Protectable interest: competing business / activity

[37] The issue of confidential information as a category of protectable interest can be immediately disposed of. The applicant has made out no proper case in its founding affidavit in this regard, for the reasons I will now set out.

[38] I will first deal with the respondents' occupations as labour consultants. The occupation of a labour consultant, per se, constitutes skills, experience and expertise attaching to the person of the labour consultant, and not his or her employer, in the absence of specific evidence by the employer that it is only through the employer's efforts that the labour consultant attained such skills, experience and expertise. An example would be where the employer employs a labour consultant, fresh out of university (so to speak) and proceeds to comprehensively train, skill and equip such labour consultant for practice. But in the case of the respondents' *in casu*, there was nothing of the sort. They came to the applicant with the necessary skill, experience and expertise in tow. In *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others*[22] the Court held as follows:

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[21] *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (supra) at para 32. See also *Basson v Chilwan (supra) at* 769 G – H ; *Bonnet and Another v Schofield* 1989 (2) SA 156 (D) at 160B-C; *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another* (*supra*) at para 27.
[22] (2007) 28 ILJ 145 (SCA) para 8 – 9.

‘….What is clear, however, is that the interest must be one that might properly be described as belonging to the employer, rather than to the employee, and in that sense 'proprietary to the employer'. The question in the present case is whether the interest that is relied upon - the skill, expertise and 'know-how' that the employees undoubtedly acquired in the techniques for manufacturing these machines - was one that accrued to the employer or to the employees themselves.

The rationale for this policy was succinctly explained by Kroon J in Aranda Textile Mills (Pty) Ltd v L D Hurn as follows:
'A man's skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-how or skills. Such know-how and skills in the public domain become attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy.'

Thus the mere fact that the first and second respondents have taken up employment with AMS Manufacturing, assuming that it is in competition with the appellant, does not in itself entitle the appellant to any relief if all they will be doing is applying their skills and knowledge acquired whilst in the employ of the appellant. It is only if the restriction on their activities serves to protect a proprietary interest relied on by the appellant that they would be in breach of their contractual obligations. ….’

The Court concluded:[23]

> 'In my view, the facts establish that the know-how for which the appellant seeks protection is nothing other than skills in manufacturing machines albeit it that they are specialised skills. These skills have been acquired by the first and second respondents in the course of developing their trade and do not belong to the employer - they do not constitute a proprietary interest vesting in the employer - but accrue to the first and second respondents as part of their general stock of skill and knowledge which they may not be prevented from exploiting. As such the appellant has no proprietary interest that might legitimately be protected.'

[39] Applying the ratio in *Automotive Tooling Systems*, the difficulty for the applicant is that it provides no evidence of any kind that the skill, experience and expertise of the respondents serve to establish a proper proprietary interest in favour of the applicant, other than the respondents as labour consultants servicing clients belonging to the applicant, as labour consultants. The fact is that client relationships are separately protected as a protectable interest under the ambit of the category of trade connections, and cannot also serve as basis for the respondents as labour consultants being prevented to pursue their chosen occupation in this field where the skill, experience and expertise accrue to them as persons.

[40] When it comes to other confidential information, I have dealt with the facts in this regard above. The fact is that other than a vague and bald statement about a custom computer program and reference to a special contract that is not special at all and actually legally questionable, the applicant has provided no proper evidence or case at all about confidential information. In a nutshell, the applicant's

[23] Id at para 20.

entire case in this regard is mere *ipse dixit*. In *Mozart Ice Cream*[24] specifically in the context of a restraint of trade it was said: 'It is clear however …. that the mere ipse dixit of the applicant cannot suffice on its own to establish these proprietary interests'. I wish to make specific reference to the following dictum in *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another*[25] where the Court said:

> 'The applicant's legal representative glibly states in his heads of argument that it 'clearly had an interest worthy of protection'. He goes on to say that the employee had access 'to all the applicant's trade secrets, customer particulars, pricing and all other confidential operational information'.
>
> But is this borne out by the facts? In order to establish that, I have to consider the facts as set out in the pleadings in accordance with the well-known principles set out in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd. ….
> Based on this evidence of the employee, it does not appear to me that the applicant has an interest worthy of protection that is threatened by the employee.'

In my view, the exact same considerations apply to the applicant's case *in casu*, where it comes to the issue of confidential information.

[41] What must however be fatal to the applicant's case with regard to confidential information is the fact that the restraint agreement itself contains no stipulated obligation on the respondents where it comes to confidential information in the agreement itself. It is not good enough to just define confidential information and describe what it is. The agreement must also prescribe what is expected from the respondents with regard to such defined confidential information. The following

[24] *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* (*supra*) at 1758.
[25] (2011) 32 ILJ 601 (LC) at paras 43 – 46.

basic principle was enunciated in *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*[26], which should be applied in this instance:

> 'Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence'.

Contractually, and on the evidence, the applicant thus has no protectable interest insofar as an obligation to keep confidential information confidential and not to disclose the same to third parties.

[42] The restraint of trade covenant itself contains, in essence, two undertakings only. The first is a prohibition on having any interest in a competing business or activity, to the business of the applicant. The second is protecting trade connections. No case has been made out, both in contract and with regard to the facts as established by the founding affidavit as considered with the answering affidavit and with it the application of the *Plascon Evans* test, as to a protectable interest pertaining to trade secrets or confidential information.

[43] In short, the applicant has made out no case as to why any competing business or activity by the respondents should be prohibited. There is nothing the applicant does, and no information the respondents had access to, which is worthy of being called a protectable interest. In fact, and if regard is had to the applicant's own business profile attached to the founding affidavit, it is clear to me that the business of the applicant is that of a stock standard labour consultancy, labour

[26] 1941 AD 43 at 47

broker and payroll bureau. In seeking to prevent the respondents' competing activities, the applicant, in my view, is doing no more than seeking to stifle competition, which cannot be done by way of a restraint of trade. As was said in *North Safety Products (Africa) (Pty) Ltd v Nicolay*[27]:

> ' …. a covenant in restraint of trade is enforceable unless the respondent discharges the onus of proving that 'at the time the enforcement is sought, the restraint is directed solely to the restriction of fair competition with the ex-employer ...'

[44] The only thing that the applicant has come close in showing a protectable interest to exist is where it comes to protecting its customer base, which I accept could and would be a proper protectable interest for a business such as that of the applicant. After all, it is the customer relationships that lie at the very core of the applicant's business, considering the nature of the services that it provides. I will next deal with the issue of trade connections.

Protectable interest: trade connections

[45] On face value, and as I have said above, it would appear that the applicant has shown a proper protectable interest to exist where it comes to the issue of trade connections. 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 to rather transact with them than the applicant. The applicant is entitled to, and has a legitimate interest in protecting its client base.

[46] In *Rawlins and another v Caravantruck (Pty) Ltd*[28] 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

[27] (2007) 28 ILJ 350 (C) at 353H – I
28 1993 (1) SA 537 (A) at 541D-I

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

The Court concluded:[29]

'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. ….'

[47] In *Esquire Technologies*[30] Steenkamp J said:

'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 learned Judge concluded:[31]

'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. ….

[29] Id at 542F-I.
[30] *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another* (*supra*) at para 27
[31] Id at paras 31 – 32. See also *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another*

> A customer connection exists where a customer belongs to the employer and the employee obtains influence over the customer by virtue of his employment.'

[48] Considering the above principles, and if this was where the enquiry stopped, I would have had little hesitation in concluding that the applicant had shown a proper protectable interest to exist where it came to the issue of trade connections. The appropriate order in such a case, and assuming all the other *Basson* requirements for reasonableness were met, would be to interdict the respondents from in any way contacting, approaching, transacting with or in any way soliciting the custom of the applicant's clients, even if the respondents were allowed to operate and conduct their own competing business or employment.

[49] In short, I accept that considering the nature of the relationships the respondents had with the applicant's clients, as well as the nature of the services the respondents rendered to such clients, the respondents would exercise sufficient influence over such clients so as to be able to effectively entice such clients away from the applicant, and to the respondents. The nature of the business of the applicant itself enhances a need for protection in this regard. I accept that a proper protectable interest would in normal circumstances exist in this regard. But unfortunately for the applicant, this is not where the enquiry stops in this instance.

Public interest

[50] In their answering affidavits, all three the respondents have raised an issue which in my view directly goes to the issue of public interest. The respondents have said that the applicant's own independent contracting model is questionable. It is contended by the respondents that this independent contracting model had been

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(2012) 33 ILJ 629 (LC) at paras 34 – 36.

the subject matter of investigative reporting, and was the subject matter of contentions of undermining pricing structures in the private security services sector. The respondents have said that this contract is in fact circulated in the CCMA as part of awareness training relating to the legitimacy of independent contracts, and that the validity and status of these independent contracts are questionable. According to the respondents, the applicant administers some 15 000 'contractors' on this basis. The applicant has not filed any replying affidavit to contradict what the respondents have said in this regard, or to offer any kind of explanation. I find this concerning.

[51] Ironically therefore, the very alleged 'custom contract' the applicant sought to rely on to establish a protectable interest serves as the applicant's undoing where it comes to considerations of public interest. This contract must be considered in proper context, which is exactly what the respondents allude to above. I will firstly refer to the business profile of the applicant's own business, attached to the applicant's founding affidavit. In this profile, a part of the applicant's business is described as 'independent contractors'. I intend to quote from what the applicant says in this profile about this business, as follows:

> 'All Independent Contractors are provided to FMW Group Clients in terms of Section 198(3) of the Labour Relations Act, 2002' (sic)

> 'FMW is the leader in the market of Independent Contractors. An Independent Contractor is hired to you but will neither be an employee of FMW Labour Group, nor be an employee of your company, this person will be a contractor hired to achieve a specific goal and gets paid based on the achievement of that goal. It is the same principal of opening a job up for tender, once the tender is awarded, the winning party is responsible to achieve the required goal before payment thereof.' (sic)

[52] Based on this business model, if one can call it that, individual persons are then required to conclude a service agreement purporting to be an independent service contract, but only after first being expected to 'tender' for the work. It is clear that the majority of the applicant's clients are in the private security services industry, which explains the example of the contract provided being called 'Invitation to tender for security assignment by professionally qualified security service provider'. From the documents attached to the applicant's founding affidavit, as read with the above modus operandae conducted by the applicant, the following scheme emerges:

52.1 An individual person tenders for the providing of security services. The tender is designed to appear to be that of a completely independent and third party security service provider tendering to a client for such services. But it is clear from the contract itself that this 'tender' is made by one individual person who works providing security services, in other words being nothing but a security guard;

52.2 The company to which this service is provided then 'accepts' the tender, and an independent contract is then concluded between such company and what is termed 'the self employed security officer'. This contract so concluded purports to be an independent service agreement in which this individual security guard contracts to work as a security officer without any employment benefits or protections;

52.3 Added to the above, the company with whom this security officer 'contracts' then rents all the equipment and uniform necessary for the

security officer to do his or her work, and this 'rent' is deducted from the contract remuneration;

52.4 But worse still, the security officer is required to sign a 'declaration' to the effect that he or she exercises their 'right' in terms of section 22 of the Constitution to render services as a self employed security officer and that the provisions of the LRA and BCEA are not applicable.

[53] The above being the business model the applicant seeks to protect, and which clearly forms the basis of its trade connections, a clear public interest consideration arises. I have little hesitation in concluding that the applicant's business model in this regard is unlawful and not worthy to protect or even be allowed to perpetuate. The applicant is perpetrating a sham to avoid compliance with the provisions of the LRA and the BCEA and is clearly exploiting vulnerable individual security guards desperate for work in an economy where work is scarce. I say this for the specific reasons to follow.

[54] The private security services sector is subject to the Sectoral Determination 6: Private Security Sector, published in terms of the BCEA.[32] This sectoral determination applies to '…. every employer and employee in the private security sector that guards or protects fixed property, premises, goods, persons or employees including monitoring and responding to alarms at premises which are guarded by persons or by electronic means ….'[33]. The Sectoral Determination then contains a specific presumption as to who is an employee, and this includes:[34]

[32] Published under GN R1250 in *GG* 22873 of 30 November 2001 (as amended).
[33] Clause 2(2)(a).
[34] Clause 18(1).

> 'Any person on contract performing the duties of a security officer, as defined in subclauses 2(62) to 2(66), as well as any person on contract performing the duties of other categories, as defined herein, except for managers.'

Subclauses 2(62) to 2(66) constitute the definitions of security officers grades A to E and all the duties related to such grades. In addition, clause 18(2) provides that:

> 'Until the contrary is proved, a person who works for, or provides services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present-
>
> *(a)* the manner in which the person works is subject to the control or direction of another person;
>
> *(b)* the person's hours of work are subject to the control or direction of another person;
>
> *(c)* in the case of a person who works for an organisation, the person forms part of that organisation;
>
> *(d)* the person has worked for that person for an average of at least 40 hours per month over the last three months;
>
> *(e)* that person is economically dependant on the person for whom they work or provide services;
>
> *(f)* the person is provided with their tools of trade or work equipment by that person; or
>
> *(g)* the person only works for or supplies services to one person.'

[55] There is no doubt that the applicant's purported tender document and consequent independent contract ticks all the employment boxes in terms of the Sectoral Determination. It is clear that all these self employed security officers do nothing else but fulfil the functions and duties of grade A to E security officers. In addition, virtually all the presumptions in clause 18(2) find application. It is clear that the

purported self employed security officers forming the basis of the applicant's trade connections are not self employed at all, but should actually be employees of either the applicant or its client.

[56] In addition, and in terms of clause 20 of the Sectoral Determination:

> '(1) Employers shall abide by the provisions of the Labour Relations Act, Act 66 of 1995, as amended, in respect of Temporary Employment Services, Labour Brokers and Independent Contractors.
>
> (2) Notwithstanding the above, no employer may use the services of Temporary Employment Services, Labour Brokers or Independent Contractors unless the Temporary Employment Service, Labour Broker or Independent Contractor provides the employer with satisfactory proof that it is in compliance with-
> *(a)* Sectoral Determination 6;
> *(b)* the Unemployment Insurance Act;
> *(c)* the Compensation for Occupational Injuries and Diseases Act;
> *(d)* the South African Revenue Services, and is in possession of an IT30 tax certificate; and
> *(e)* the rules of the Private Security Sector Provident Fund.'

The applicant's modus operandae is clearly at odds with the above. The applicant's business profile specifically records, as set out above, that it provides the self employed security officers to its clients in terms of Section 198(3) of the LRA. Therefore, and on its own version, the applicant provides these security officers to clients either on an independent contract or labour broking basis, which means that the applicant and its clients are in breach of the aforesaid provisions of the Sectoral determination. This would clearly not be in the public interest to allow such a contravention to perpetuate.

[57] The applicant's reliance on section 198(3) of the LRA is in any event ill conceived and at odds with the law. The fact is that sections 198(1) and (2) of the LRA create an irrevocable presumption of employment of the personnel of the temporary service provider (that are provided to its clients) with the temporary service provider. The fact that the relationship may be styled as an independent contract matters not. The relationship will always be one of employment. In *LAD Brokers (Pty) Ltd v Mandla*[35] the Court said:

> '…. The question to be answered is what does s 198 intend to achieve in its exclusionary subsection (3) read with subsection (1). Does the person who is an 'independent contractor' and who 'renders the service or performs the work' stand in an independent contractor relationship with the 'client' or with the 'temporary employment service' or both?'

The Court concluded:[36]

> 'For the sake of certainty the legislature clearly intended labour brokers and the like who pay the remuneration to be held liable as employers under the Act. Subsections (4), (5) and (7) of s 198 seek to draw the net tighter around the temporary employment services.
>
> To interpret s 198(1)-(3) to include independent contractors who are such in relation to temporary employment services would ignore the attribute that the contractors must render services or perform work for the client (not the temporary employment service who pays).

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[35] (2001) 22 ILJ 1813 (LAC) at para 26.
[36] Id at paras 28 – 30. See also *National Union of Metalworkers of SA and Others v SA Five Engineering (Pty) Ltd and Others* (2007) 28 ILJ 1290 (LC) at para 21; *Colven Associates Border CC v Metal and Engineering Industries Bargaining Council and Others* (2009) 30 ILJ 2406 (LC) At para 19.

> To determine whether the service provider is an independent contractor of the temporary employment service is therefore as an end in itself a futile exercise. Even if he is, should he not also act as independent contractor viz-à-viz the client, the exclusionary subsection (3) does not apply. ….'

For this reason as well, the applicant's independent contracting structure is not in accordance with the provisions of the LRA and protecting it will not be in the public interest.

[58] But worst of all, in my view, is the use by the applicant of a business model that is nothing more than a shameless attempt to circumvent minimum employment protection for what is really employees. This is evident from the statement in the business profile to the effect that neither the applicant nor the client employs such persons, and the declaration these persons are required to sign disavowing any reliance on the BCEA or LRA. This kind of independent contracting model of in essence engaging employees through independent contracts has been criticized more than a decade ago in *Building Bargaining Council (Southern and Eastern Cape) v Melmons Cabinets CC and Another*[37]. In specifically dealing with persons that were really employees but were required to sign independent contracts, Landman J (as he then was) held as follows:[38]

> 'The law takes a special interest in persons who hire out their labour as employees. It provides them, currently, with a set of minimum terms and conditions and provides some measure of protection regarding job security. The health and safety and unemployment needs are catered for by various statutes. All this protective legislation rests upon the employee being an 'employee' as defined in the applicable statute. In this case it is the Labour Relations Act. The legislature, precisely because most employees have historically been the weaker

[37] (2001) 22 ILJ 120 (LC).
[38] Id at para 8.

> party in bargaining their contracts of service, has seen it fit to prohibit an employee from contracting out of the Labour Relations Act and in particular an applicable collective agreement.'

I agree with the above reasoning. Landman J then, in dealing with the facts in *Melmons Cabinets*, said the following, which in my view is equally apposite *in casu*:[39]

> 'The contract between Melmons and Mr Alfred Mawa, …. envisages a full-blown contract between a principal and an independent contractor. It envisages a sophisticated relationship. Mr Mawa's duties were relatively simple and they still are. He accompanies a team which installs cupboards. He assists them with loading the truck. At their destination he waits until the cupboards are installed and then wipes them clean, using a rag and thinners. He also uses some paint and a paintbrush to touch up blemishes. In terms of his contract with Melmons he has to deliver a completed product or services. Presumably he only renders a service. He is obliged to be in attendance on normal business days or as Melmons may instruct. He is obliged to report to a certain Mr A J Louw, who is described as a quality controller. Mr Mawa is obliged to conform to the spirit of the agreement which inter alia requires him to be polite to customers and to be sober and alert. He is obliged to conform with Melmons administrative systems and procedures.'

As I have said, the applicant's contract regime as evidenced by the document attached to the founding affidavit equally envisaged the same result. The duty to be fulfilled by the independent contractor is simply the unsophisticated duties of a security guard working under the instruction of a client. It is untenable to think that such a person would be wise to a process of allegedly tendering for a service, such tender then being approved, and such person then being contracted to provide a service on the same basis as security service provider companies would

[39] Id at para 13.

do. And added to that, this 'contractor' is then provided with all the equipment and uniform to do the work, and this is deducted from his or her pay. In *Melmons Cabinets*, the learned Judge concluded:[40]

> '….The dominant and overwhelming impression that the agreement and the evidence gives is that Mr Mawa is still a mere employee, albeit one encumbered by sets of rights and duties which operate to his detriment. One's impression on reading the record is that one has to deal with the surreal. Melmons, with the assistance of its employers' organization, COFESA, has perpetrated a cruel hoax on Mr Mawa. He believes that he is a self-employed entrepreneur, earning more than he did as an employee. He is blissfully ignorant of his newly acquired obligations and the loss of rights and privileges which Melmons has persuaded him to forego. He has no job security, he has no claim for unfair termination of his services, he is prohibited from relying on the benefit of a collectivity such as a trade union. It is fanciful to believe that he would be welcome in any employers' organization. He has no protection against accident or illness at work. He has no safety net in the event that he cannot find work to do. He has no minimum terms and conditions such as paid holidays, paid sick leave or severance benefits. The agreement which purports to be an independent contractor-principal relationship is a sham and it remains a sham even though Mr Mawa has consented to it. In truth I Mr Mawa is an employee and Melmons is his employer.'

The above ratio is exactly the situation *in casu*. The applicant's contract is nothing but a sham to seek to extract it and its clients from the employment relationship and the benefits and protection then bestowed on employees in terms of employment legislation. This cannot be a business model that serves to be protected as a legitimate protectable interest.

[40] Id at para 21.

[59] But matters do not even end there. In the undertaking required to be signed, it is glibly recorded that the self employed security officer exercises his or right in terms of section 22 of the Constitution, implying that this contract is the exercise of a fundamental right that must be respected. I cannot disagree more, and am of the view that exactly the opposite is true. In *Barkhuizen v Napier*[41] the Constitutional Court dealt with the issue of constitutionality and contract terms and said:[42]

> 'Ordinarily, constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, "is a cornerstone" of that democracy; "it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom".
>
> What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.'

[41] 2007 (5) SA 323 (CC).
[42] Id at paras 28 – 29.

The applicant's contract regime simply cannot pass muster if the above principles are applied. It is contrary to constitutional values and seeks to exploit vulnerable individual persons in a society where there is a shortage of available employment. It is contrary, in any event, to the right to fair labour practices in the Bill of Rights. It seeks to undermine what is in essence fairness and equality in the workplace.

[60] Also and in *NAPE v INTCS Corporate Solutions (Pty) Ltd*[43] the Court dealt with the contractual relationship with individuals in the context of the labour broking environment, and said:[44]

> 'Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, it should be recalled 'is the general sense of justice of the community, the boni mores, manifested in public opinion'.
>
> As has been observed further, in the judgment, 'while public policy endorses the freedom of contract, it nevertheless recognizes the need to do simple justice between the contracting parties. To hold that a court would be powerless in these circumstances would be to suggest that the hands of justice can be tied; in my view, the hands of justice can never be tied under our constitutional order'

I fully agree with this reasoning. In *NAPE*, the Court then further held:[45]

> '…. this does not mean that the labour broker and the client are at liberty to structure their contractual relationships in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client.

[43] (2010) 31 ILJ 2120 (LC).
[44] Id at paras 53 – 54.
[45] Id at paras 60 – 61.

> Nor does it mean that labour brokers and clients may structure their contractual relationship in a way that would undermine the employee's constitutionally guaranteed right to fair labour practices. If labour brokers and clients are given the licence to contract for standards that are less than the fundamentals guaranteed, the right to security of employment of employees involved in this tripartite relationship will be severely undermined.'

If simple justice is done in respect of what the applicant seeks to do *in casu* with its independent contracting model, and now also seeks protect in this application, such contracts simply cannot be sustained. The enforcement of this contract regime would be unjust and unfair, and severely undermines the right to security of employment of those persons the applicant seeks to contract with, and whom are in reality nothing more than security guard employees.

[61] As I have touched on above, the applicant seeks to rely on section 198(3) of the LRA. But the point that the applicant misses, in addition to what I have already said, is that section 198 must always be interpreted and applied to give effect to fair labour practices. In *Dyokhwe v de Kock NO and Others*[46] the Court held:

> '…. To the extent that employment through a TES as opposed to a former employer - while the employee carries on doing the same job, but at a lower rate - may threaten employment security and other aspects of the constitutional right to fair labour practices, s 198 must be interpreted strictly in order to protect workers governed by s 198.'

The Court concluded:[47]

[46] (2012) 33 ILJ 2401 (LC) at para 25.
[47] Id at para 51.

> 'I can see no reason why the well-known principles relating to sham independent contractor relationships should not also apply to TES relationships. The question remains who the true employer is; and although no presumption akin to that in s 200A addresses this question in a TES relationship, the court should not shy away from examining that relationship.'

[62] I thus conclude that the applicant's independent contracting model which on its own version is the cornerstone of its protectable interest where it comes to trade connections is unlawful and at odds with the constitutional values of fair labour practices and just and fair play. It seeks to avoid the protections afforded by employment legislation such as the LRA and BCEA. It directly undermines security of employment, and in any event flies directly in the face of the minimum terms and conditions for individual security guards specifically imposed on the private security services sector in Sectoral Determination 6.

[63] Whilst the applicant's business clearly also has legitimate parts, such as the payroll business unit and the labour consulting business, the fact remains that a material part of the business is simply not legitimate. In *Labournet Holdings (Pty) Ltd v McDermott and Another*[48] the Court specifically dealt with the consequence of such an illegitimate business on the enforcement of a restraint of trade, and said:[49]

> 'The business model used by LNH requires of its employees, such as the respondents, to misrepresent their capacities. They purport to be officials of an employers' organization when they appear before the CCMA, councils and the Labour Court. The NEF deceives the Registrar of Labour Relations in regard to its true nature. The public at large is encouraged to think that they are dealing with the NEF, an employers' organization, when, in fact, they are dealing with LNH or

[48] (2003) 24 ILJ 185 (LC).
[49] Id at para 31.

> one of its subsidiaries. This is not a legitimate interest that is worthy of protection. It is against the public policy to carry on this sort of business. It would also, in my opinion, be against public policy to enforce a restraint and protect such a business. ….'

Applying the same reasoning as above, it would not be in the public interest to seek to enforce any protectable interest the applicant may have in this case. As I have illustrated above, it is not in the public interest for the applicant to conduct the kind of business that it does in respect of its independent contracting model. In order to discourage doing this kind of business, it must be made clear that it cannot be protected as a legitimate protectable interest, which is what he applicant seeks to do.

Conclusion

[64] In the circumstances, the applicant has failed to establish the existence of protectable interest. That has to be the end of the matter for the applicant. Without a protectable interest being shown to exist, the applicant simply cannot establish a clear right, being the first requirement to be successful in the interdict it seeks. As I said in *Jonsson Workwear*:[50]

> 'In my view, the applicant has thus failed to demonstrate a clear right in this matter. I conclude that the applicant has no protectable interest …. To enforce the restraint of trade in these circumstances would be unreasonable. As the applicant has not demonstrated a clear right, this is where the enquiry stops. The applicant has thus not discharged the onus on it to obtain the relief sought.'

[50] *Jonsson Workwear (Pty) Ltd v Williamson and Another* (*supra*) at para 64.

[65] It is consequently unnecessary to consider the other restraint principles set out in the judgment of *Basson*, or the other interdict requirements. The applicant's application falls to be dismissed. However, and considering the duty of this Court to ensure that justice is done, I intend to direct that the Registrar forward a copy of this judgment to the Director: General of the Department of Labour, and to the Private Security Industry Regulatory Authority (PSIRA), to investigate what I believe to be the contravention by the applicant of the Sectoral Determination 6: Private Security Sector.

Costs

[66] This then only leaves the issue of costs. There is no reason why costs should not follow the result.

Order

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

67.1 The applicant's application is dismissed with costs.

67.2 The registrar is directed to forward a copy of this judgment to the Director: General of the Department of Labour, and to the Private Security Industry Regulatory Authority (PSIRA), for investigation as to whether the applicant is acting in contravention of Sectoral Determination 6: Private Security Sector.

Snyman AJ
Acting Judge of the Labour Court

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