



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1990 / 2014

In the matter between:

L'OREAL SOUTH AFRICA (PTY) LTD

Applicant

and

SHAUN DAVID KILPATRICK

First Respondent

HENKEL SOUTH AFRICA (PTY) LTD

Second Respondent

Heard: 9 September 2014

Delivered: 16 September 2014

Summary: Restraint of trade – principles stated – application of principles to matter – issue of protectable interest, infringement of such interest and the weighing off of interests of the parties considered

Restraint of trade – nature of confidential information – evidence of infringement of confidential information – employee shown to have access to confidential information

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

Interdict – issue of clear right – repudiation of restraint agreement by employer – principles of repudiation considered – no repudiation shown – employee in any event cannot rely on breach of agreement where employee himself already in breach

Interdict – proper protectable interest and infringement of such interest shown – balance of convenience favouring the employer – interdict granted

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 first and second respondents. The application is only opposed by the

first respondent, with the second respondent indicating that it would abide by the outcome of the case. 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 is a factual dispute between the parties, as evidenced from the affidavits, on the two issues of the existence or not of a protectable interest, and whether such protectable interest (if it exists) has been infringed by the first respondent. The situation was made worse by the applicant seeking to introduce what was called a 'confidentiality affidavit' the day before this matter was argued before me, which affidavit contained some 140 pages of documents the applicant extracted from the first respondent's laptop computer as proof that he had access to confidential information. The introduction of such confidentiality affidavit was vigorously opposed by the first respondent.
- [3] In deciding how to resolve this factual dispute, I firstly consider the issue of the onus. 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*

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 ; *Royalservice 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.

*Govender*⁵, *David Crouch Marketing CC v Du Plessis*⁶ and *Experian South Africa (Pty) Ltd v Haynes and Another*.⁷ On the other hand, some authorities have held that in the new constitutional dispensation, there has been a shift in the onus to the effect that the party seeking to enforce the restraint has the onus to prove that it is enforceable, and reference is made to *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain*⁸, *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another*⁹ and *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another*.¹⁰ In the judgment of *Jonsson Workwear (Pty) Ltd v Williamson and Another*¹¹, 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 onus to prove the restraint of trade is unreasonable and not enforceable, and I shall follow the same approach in this matter.

- [4] This being said, and accepting that the first respondent does bear the onus, I equally accepted in *Jonsson Workwear*¹² 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*¹³ 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:¹⁴ ‘.... 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

⁵ [2006] 2 All SA 301 (D).

⁶ (2009) 30 ILJ 1828 (LC).

⁷ (2013) 34 ILJ 529 (GSJ).

⁸ 2001 (2) SA 853 (SE).

⁹ 2008 (2) SA 375 (C).

¹⁰ (2011) 32 ILJ 601 (LC) para 25.

¹¹ (2014) 35 ILJ 712 (LC) at para 8.

¹² *Id* at para 9.

¹³ (2007) 28 ILJ 317 (SCA) para 4.

¹⁴ *Id* at para 14.

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*.¹⁵ In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*¹⁶ 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 will now deal with the issue relating to the applicant’s so-called ‘confidentiality affidavit.’ Mr Miltz, representing the applicant, sought to explain this affidavit as nothing more than the production of confidential documents it did not want to disseminate from the outset, and is produced at a late stage so as to ensure, as far

¹⁵ 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.

¹⁶ 2009 (3) SA 187 (W) para 19.

as possible, that the documents which are confidential remain confidential. I have some difficulties with this contention. Firstly, the 'confidentiality affidavit' is not just the production of documents. It is also a 10 page affidavit which at a cursory glance actually deals with substantive issues. I accept the contentions of Mr Kaplan who represented the first respondent that this 'confidentiality affidavit' is more akin to a further founding affidavit, which cannot be admitted without proper application being made for this to be allowed. It is my view that this being a restraint of trade dispute, the applicant must have reasonably anticipated a material factual dispute as to the issue of the protectable interest, especially considering the prior correspondence between the parties before this application was brought. There is no reason why the applicant could not have incorporated the contents of the 'confidentiality affidavit' into the founding affidavit, especially considering its own admission that it had the first respondent's laptop for some time prior to bringing this application, and that it was the applicant's own case that the first respondent in any event had this information already in his head. As I said in *Jonsson Workwear*¹⁷, albeit in the context of an application to refer the factual dispute to oral evidence: 'By not anticipating the factual dispute that was inevitable in arising in this matter and dealing with it accordingly, it is my view that the applicant cannot now be allowed to remedy this defective conduct'. In my view, the same considerations must apply to the 'confidentiality affidavit', and accordingly, I shall have no regard whatsoever to the 'confidentiality affidavit' or any of its annexures in deciding this matter.

[7] 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

¹⁷ Id at para 19.

- [8] The applicant conducts business as the African component in the international cosmetic business of L'Oreal. The applicant conducts business in five divisions, one being a manufacturing operation in Midrand, and the four others being four different operating divisions. The four operating divisions are the PPD, L'Oreal Luxe, Active Cosmetics, and Consumer Products. The division at stake in the current proceedings is the PPD division.
- [9] The PPD division has six hair care brands that forms the core of its operations, being L'Oreal Professional, Kerastase, Redken, Pureology, Mizani and Matrix. Of these, the premium brand is the L'Oreal Professional brand which is marketed and distributed to hairdressers and consumers across the entire country. This brand accounts for about 14% of the total haircare market and some 25% of the total PPD division's business.
- [10] The first respondent commenced employment with the applicant on 8 February 2010 as its national sales manager for the L'Oreal Professional brand in the PPD division. The first respondent, in the hierarchy, reported directly to the PPD general manager. The scope of the first respondent's duties was applied across the entire country, but he was based in Johannesburg. The applicant and the first respondent concluded a written contract of employment on 8 February 2010, which contract of employment did not contain a restraint of trade covenant. All that this contract contained, of relevance to the subject matter of these proceedings, was a general confidentiality clause and undertaking.
- [11] The first respondent clearly occupied a senior management position, signified by a subsequent change of his title to that of business unit manager for L'Oreal Professional. The applicant in its founding affidavit referred to the first respondent

being in a senior management position in such specific words, which was never disputed in the answering affidavit.

[12] Only on 12 July 2012, more than two years of him starting employment at the applicant, did the applicant and the first respondent conclude a restraint of trade agreement. The salient terms of this agreement, in simple terms, were:

- 12.1 'Protectable interests' was defined as including business methodology, any product knowledge, trade connections, financial and marketing policies, sales and sales team strategies, performance and management, and technological know-how;
- 12.2 The first respondent agreed that he has had access to and acquired an in depth knowledge and know-how of the business of the applicant, and that the applicant was entitled to protect this confidential information the first respondent so had acquired;
- 12.3 The first respondent agreed to a perpetual confidentiality undertaking to keep the trade secrets and confidential information of the applicant, confidential and undertook not to disclose such to any third party or derive any profit from such disclosure;
- 12.4 The first respondent agreed that for a period of 12 months' calculated from the date of termination of employment of the first respondent, the first respondent *inter alia* would not be employed by a competitor of the applicant, solicit the custom of the applicant's customers, or solicit the employment of the applicant's employees;

12.5 The applicant agreed that 'in consideration' for the undertakings given by the first respondent in terms of the agreement, the applicant would compensate the first respondent by way of paying 66% of his basic salary on a monthly basis for a period of 12 months following his termination of employment, the first payment being due at the end of the month immediately following his termination of employment.

[13] The first respondent was a good performer. It appears from the evidence as a whole that he was valuable to the applicant. According to the applicant, and considering that the first respondent was in essence a general manager of a business unit, he had access to all sales and marketing information of the PPD brands. The applicant has contended that the first respondent held the 'key accountability and responsibility' of his business unit's brand portfolio, turnover, and profitability in the market he had to service. The applicant listed the first respondent's particular duties as: (1) implementing national brand strategies, and determining and implementing necessary local adjustments in this regard; (2) enhancing brand attraction, image and awareness; (3) increasing market share and sales growth; (4) managing the business unit's profitability (including budget, profit and loss account, stocks and inventory); (5) designing, implementing and monitoring marketing activities and distribution strategies; (6) building the image of the business unit; and (7) recruiting, developing and managing the sales teams.

[14] In the answering affidavit, the first respondent described himself in essence as a sales manager, driving the sales staff, with the view to grow sales of the products and meet budgetary requirements. The first respondent stated that where it came to brand development, marketing and distribution strategies, he worked only pursuant to the instructions of the zone director for Africa and the Middle East (one Ciro Rago). The first respondent contended that he did not recruit and develop management

teams. Finally, the first respondent stated he did not deal with customers as this responsibility lay with a sales team of 10 employees and a field educational team of 4 employees, all reporting to him.

[15] I must say that I find most of the first respondent's contentions unlikely. In my view, the title says it all, being business unit manager of L'Oreal Professional, which is, as stated, responsible for 25% of the division's revenue. The first respondent himself in his answering affidavit states that he initially was the national sales manager but this 'role title' later changed to business unit manager. The duties of a business unit manager would, as a matter of common sense and logic, entail those functions listed by the applicant in the founding affidavit. For example, and for the first respondent to manage the business unit but not exercise some control over the profit and loss account is not believable. The fact is that the first respondent reports directly to the general manager of PPD, which operates a number of brands, indicating total responsibility by the first respondent for the brand he was tasked with. It is simply natural to accept that the first respondent in all respect manages the brand he is responsible for, being that of L'Oreal Professional, and in that capacity he has to know everything there is to know about this business unit, the products, and the brand.

[16] Whilst it may be so that the first respondent operates under the instruction and direction of Rago where it comes brand development, marketing and distribution strategies, it is my view that the first respondent is clearly the one responsible for the day to day implementation and operation thereof. It is the first respondent that must give guidance to his sales force in this regard. It must also be mentioned that the total sales compliment is not insignificant, being a total of 14 employees together with the educational team. There is simply no way in which the first respondent can effectively manage this sales force to achieve, using his version, sales growth and

the meeting of budgetary requirements, without driving brand development, marketing and distribution strategies. I accept that what the first respondent did at the applicant, as part and parcel of his day to day duties, was in fact as listed by the applicant in the founding affidavit.

[17] The applicant then proceeded to list specific aspects of the information the first respondent had access to during the course of his employment with the applicant. This was listed as including: (1) the historical commercial analyses of the PDD clients; (2) detailed knowledge of key accounts; (3) knowledge of all client accounts and discount structures; (4) knowledge of new launches on the brand; (5) knowledge of technological advances on colour and in retail; (6) profit and loss knowledge; (7) knowledge of pricing structure and increments; (8) marketing budgets; (9) strategic vision and trends of PPD for 2 years in advance; (10) the profile of all the staff members in the business unit; and (11) intended future acquisitions. The applicant has also said that the first respondent was exposed to and was 'acutely aware' of the applicant's business and marketing plans, in all respects, until the end of the second quarter of 2015.

[18] In the answering affidavit, the first respondent disputes most of the above. The first respondent contended that the applicant's information he had access to was extensive, and it was impossible for him to have a recollection thereof. The first respondent stated that knowledge of major hair salons was in the public domain. The first respondent further stated that he signed in the region of 500 contracts per year and could not recall even a fraction of them. According to the first respondent, the discount structures are open to the sales staff and the sales staff would present this to the customers, and thus this information was in the public domain. As to new launches, the first respondent said this comes from the international market and with South Africa lagging some 3 to 6 months behind the international market, this was

equally in the public domain. The first respondent stated that technological advances are done in Paris and he knows nothing of it. As to the financial information, the first respondent stated that this was published on the internet and are thus in the public domain, and in any event any information he may have had in this regard regularly changes and that which he had is now stale. The first respondent said that the applicant sends out its price lists to the hairdressing trade, and thus this is in the public domain as well. The first respondent admitted that he had knowledge of the budget, but said this was of no value to a competitor and was in any event stale. Finally, the first respondent said he had no strategic knowledge as this was only known by the main board of directors in Paris.

[19] Whilst I do accept that there is some truth in what the first respondent says, I must state that it is my view that the first respondent is understating his position and his actual knowledge. I accept that it is unlikely that the first respondent would have any information that would be useful to a competitor where it came to strategic decision making and technological advances. The fact is that the first respondent's position, at its core, was a position concerned with day to day operations and management of the business unit, and thus he would be tasked with implementing strategies, rather than being at the forefront of creating them. But the fact that the first respondent did not develop strategies and technological advances cannot mean that he does not know about them, and knows that such strategies have been developed and are due to be implemented. He would have to know about this, so he can properly discharge the duties for which he was employed. For example, the first respondent would have to be briefed on the detail of a new hair colour technology, so that he in turn can brief and manage his sales force to roll this out to customers, and then manage such roll out. This kind of information would still be quite useful to a competitor.

[20] Much of the first respondent's defense is based on a contention that the information

concerned is in the public domain. Whilst this may be partly true, it is certainly not all true. Using the example of the discount structures, and on the first respondent's own version, this is certainly not published on the internet. The sales representatives who know the discount structures do not update and brief competitors such as the second respondent on this. Any competitor would not readily know exactly to what customer the applicant would sell what product at what price and in what quantity. But the first respondent would know this, as he managed the sales force and the profit and loss account on a day to day basis for the last four years. I find it completely unlikely that the first respondent would not know who the key customers of the applicant are and what exactly they buy and at what price they do so, and must reject his contention that he cannot recall such information. This information, in my view, would be very useful to a competitor such as the second respondent.

[21] The first respondent admitted he had knowledge of the budget. He however contends that this information is now stale. I do not accept this. The budget, for example, determines spend and revenue going forward. That is why it is a budget. In this context, the first respondent must know the applicant's level of tolerance when it comes to discount and expenditure with the view to grow sales. This, after all, on the first respondent's own version, was his very job. For the first respondent to in essence rely on a defense that he either cannot recall this information or that it is stale is in my view not sustainable. I accept the applicant's contention that in this respect, the first respondent is fully apprised of this kind of information (as it is relevant to him in the execution of his duties) which remains relevant until the middle of 2015, so therefore not only is the information far from stale, but it would be of use to a competitor.

[22] I also simply cannot accept that to place products and prices on the internet means that everything about the product and the price is now public domain. If that is so,

why even have a sales force, as all any hair salon would do is to go onto the internet and order. As the first respondent himself said, he had a field educational team of four persons, which in itself indicates that there is a lot more to product knowledge than reading what is published on the internet. I accept that the first respondent must have had product knowledge not readily available to third party competitors, and which would be considered to be confidential and useful to competitors.

[23] This then brings me to the issue of the conferences and international meetings, and zone and other meetings, which is common cause the first respondent attended. The immediate question is that if the first respondent is a lowly sales manager just looking after day to day activities of a sales force, why would he attend these conferences and meetings? It is common cause that the first respondent attended the L'Oreal worldwide meeting from 3 to 7 June 2013 in Mondiale. It is also common cause that the first respondent attended what was called a zone meeting in 2014 shortly before he left. The applicant states that in the worldwide meetings, brand strategies and best practice are shared, workshops are held in this regard, and product launches are agreed. In the zone meetings, according to the applicant, the marketing, launches and distribution plans for the products in the zone are discussed. Added to these meetings, there are meetings with the CEO every two months also attended by the first respondent, which deal with operational issues. I accept that information and discussions in these kind of meetings would not be of the kind that is generally in the public domain.

[24] The first respondent, despite conceding the existence of these meetings and his attendance thereat, simply contends that because the applicant lags behind the rest of the world, what he learnt in the meetings are now in the public domain. The first respondent also contends that by providing the information concerned to delegates and staff members at the meetings / conferences concerned, it equally comes into

the public domain. The first respondent, in this regard, misses the point. These kind of meetings and conferences are not attended by third parties or competitors. They are attended by the senior personnel of L'Oreal. I cannot accept that all that is discussed in these kind of meetings would just be information destined to be in the public domain. If what the first respondent says is true, then why even have these meetings, and for example not just circulate directives by e-mail and that is that. As the applicant has specifically said in the founding affidavit, these meetings have strategic importance and deals with information useful to a competitor, and I accept this to be the case.

[25] In short, I accept the first respondent occupied a senior management position, and had complete and detailed access to all the applicant's confidential information, insofar as it concerned his L'Oreal Professional business unit. This information included product information, financial information, budgets, business performance, marketing and sales strategies and profit and loss accounts. I also accept that considering the nature of the first respondent's position, and on his own version the fact that he had to grow sales and achieve budget objectives, he knew who the applicant's key customers were, what products they bought, what prices they paid, and what discounts were applicable to them. Also, and as the first respondent directly managed and drove a sales team, the first respondent must have had knowledge of sales and marketing strategies, and as the applicant said, product launches as well. All of this information is not the kind of information the applicant would want disseminated to competitors, especially a competitor such as the second respondent. I also consider that the applicant actually in his restraint of trade agreement itself confirmed that he had access to this kind of information, that it was confidential and was worthy of protection.

[26] The first respondent resigned on 2 June 2014. The resignation letter records that the

first respondent resigns as business unit manager of L'Oreal Professional and gives two months' notice. On face value, the resignation seems amicable. But this unfortunately quickly changed.

[27] On 9 June 2014, the first respondent is asked by the applicant's human resources director, Selinah Liphoko ('Liphoko') where he intended to work after leaving the applicant. He refused to disclose this. It also appears from the affidavits that the issue was persisted with by Liphoko, and in the first respondent's own words, he 'was forthright and open in persistently refusing to disclose' his future intentions. I accept that Liphoko was concerned about this, and as a result, and on 29 June 2014, the first respondent was informed in writing that he need not work out the rest of his notice, that he had to leave on 30 June 2014, and would be paid in lieu of notice to 31 July 2014. The first respondent was specifically reminded of his restraint obligations.

[28] On 3 July 2014, the applicant became more formal about the issue. A letter was given to the first respondent, in which the terms of his restraint were quoted and he was reminded he was subject to the restraint. The letter recorded that the applicant had every intention of enforcing the restraint, and should the first respondent be found to be in breach of the same, the applicant would protect its rights. Reference was also made to the fact that the first respondent was again asked on the same date what his intentions with regard to future employment was and again he refused to disclose this. It was demanded that the first respondent provide written undertakings by 9 July 2014 that confirmed he was bound by the restraint, that he did not intend being employed by a competitor, that he would not breach the restraint, that he would not use the applicant's confidential information, and that he would reveal where he was going. It was recorded that if the first respondent did not comply with this demand, it would be assumed that he was joining a competitor. It is common cause

that other than informing the applicant by e-mail on 9 July 2014 that he would answer the letter on 10 July 2014, the first respondent actually never answered this letter, and on his own version, and despite saying he would answer, he deliberately decided not to answer.

[29] On 25 July 2014, Liphoko heard rumour of the first respondent joining the second respondent. It was common cause that the second respondent is a direct and fierce competitor of the applicant in the same marketplace. The applicant tried to confirm this rumour and when it could not, it decided to instruct its attorneys to deal with the matter further.

[30] On 4 August 2014, the applicant's attorneys send a letter of demand to the first respondent. The letter dealt with the events in June and July 2014, and recorded that the applicant heard the first respondent had joined the second respondent. The first respondent was referred to the terms of his restraint of trade, and it was demanded that he provide written undertakings that he would adhere to his restraint of trade and confidentiality undertaking, and in particular, that he would not join the second respondent. These undertakings had to be provided by 7 August 2014.

[31] It was common cause that the first respondent did commence employment with the second respondent on 1 August 2014. Unfortunately, the first respondent did not take the Court into his confidence by disclosing in what capacity he joined the second respondent. The applicant stated that its information was that he was commercial sales director, which the first respondent simply baldly denied. I accept that the first respondent was employed at the second respondent in a commensurate, if not promoted, position to that he occupied in the applicant.

[32] The first respondent's attorneys answered on 6 August 2014. In the answer, the first

respondent refused to provide the undertakings sought for two reasons. The first reason was that the first respondent had to be compensated in terms of the restraint agreement in consideration for the undertakings he provided, and since the applicant in its letter of 3 July 2014 exhibited its 'clear and unequivocal' intention not to do so, the applicant thus repudiated the agreement which repudiation the first respondent accepted, cancelling the agreement. The second reason was a bald contention that the applicant had no protectable interest.

[33] On 7 August 2014, the applicant's attorneys disputed that the restraint agreement had been repudiated, and stated that the intent of the letter of 3 July 2014 was to procure undertakings from the first respondent. It was contended that the interpretation by the first respondent's attorneys of clause 3.2 of the restraint did not accord with 'business efficacy'. The first respondent was again called on to provide the undertakings sought. The first respondent's attorneys in turn answered on 11 August 2014, reiterating their previous contentions with regard to the breach of the agreement and cancellation thereof, as well as the lack of a protectable interest. However, the first respondent's attorneys indicated that the first respondent would be willing to provide an undertaking that the first respondent will not use confidential information of the applicant.

[34] On 14 August 2014 the applicant's attorneys, and clearly in response to the contentions of the first respondent's attorneys with regard to the issue of the breach and cancellation of the restraint agreement, stated that the first respondent was already in breach of the restraint agreement when the letter of 3 July 2014 was sent, and confirmed that it would comply with its payment obligations in terms of the restraint agreement if the first respondent in turn complied with his obligations in terms of the restraint agreement by providing the undertakings sought. One last demand was made for the undertakings to be provided by 15 August 2014. The first

respondent's attorneys answered on 15 August 2014 that whilst the tender by the applicant to comply with the payment provisions of the restraint agreement was noted, this was too late, as the agreement was already cancelled. That was then the end of the correspondence exchange between the parties.

[35] A final issue to refer to is that the applicant also contended that the first respondent was instrumental in a sales representative of the applicant, being one Debbie Jurgens, leaving and joining the second respondent. The only evidence the applicant really could offer in this regard was the coincidence of her joining the second respondent on the exact same date as the first respondent, being 1 August 2014. As opposed to this, the first respondent has put up a detailed explanation as to how Jurgens came to be employed by the second respondent. There is no reason not to accept this explanation by the first respondent and I thus conclude that the first respondent had nothing to do with Jurgens becoming employed at the second respondent, and will have no further regard to this issue.

[36] The urgent application by the applicant was then served and filed on 25 August 2014, some 9 days after the end of the correspondence exchange. The first respondent filed an answering affidavit 4 September 2014, which is also some 9 days after receipt of the urgent application. The replying affidavit was filed on 8 September 2014.

The issue of urgency

[37] The first respondent contended that the application could not be heard as one of urgency, as the applicant procrastinated and created its own urgency. In a nutshell, the first respondent contended that the applicant's letter of 3 July 2014 stated that if the first respondent did not provide undertakings by 9 July 2014, it would be

assumed the first respondent intended working for a competitor, and when the first respondent did not provide the undertakings by that date, the application should have then been immediately brought. In addition, the first respondent contended that the letter from the applicant's attorneys of 4 August 2014 gave a deadline of 7 August 2014 to provide undertakings, and similarly, when the undertakings was not forthcoming on such date (in fact on 6 August 2014 when the first respondent's attorneys answered), the application should have been then brought and not almost three weeks later.

[38] The applicant's contentions as to urgency where, in a nutshell, that although it may have suspected or even assumed that the first respondent would be going to work for a competitor, it had no proof and did not even know who this competitor was. It contended that it would not bring an application without knowing who the competitor was and whether the first respondent would indeed work there. The applicant stated that it has hamstrung because the first respondent, despite continuous requests by the applicant, refused to disclose where he was going to be employed. According to the applicant, the first inclination it had that the first respondent would actually be joining the second respondent was on 25 July 2014. After seeking to confirm this, attorneys were instructed and a formal letter of demand followed a week later. The intervening correspondence took the matter to 15 August 2014. The applicant then had to wait for the managing director to return from overseas on 19 August 2014 to give approval for a Court application. The application was then completed in the next three days, and filed the next Monday 25 August 2014.

[39] Urgent applications are governed by Rule 8. As was said in *Jiba v Minister: Department of Justice and Constitutional Development and Others*¹⁸:

¹⁸ (2010) 31 ILJ 112 (LC) at para 18.

'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.'

[40] 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)*¹⁹, 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.'

[41] In specifically dealing with a restraint of trade application, the Court in *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another*²⁰ said:

'This application was brought on an urgent basis during the court recess. The application was launched on 27 September 2011. The respondents submit that the applicant should have approached the court earlier, ie on 22 September 2011, when it learnt that she intended to take up employment with Ecomed.

¹⁹ 1977 (4) SA 135 (W).

²⁰ (2012) 33 ILJ 629 (LC) at paras 21 – 24.

In my view, litigants should be encouraged in any attempt to avoid litigation, rather than rushing to court as a first option. Litigation is costly and often unnecessary. In this case, the applicant wrote to the employee on 22 September 2011 in the following terms:

'You are reminded and warned that you are prohibited from being employed by the competitors [sic] in terms of your restraint of trade. You are further requested not to commence employment with the competitors as such action will amount to the breach of your restraint of trade agreement with the company. Should you proceed to join the competitor, the company will have no option but to enforce the restraint of trade. You are therefore requested to undertake in writing that you will not be joining the competitor in breach of your restraint of trade.'

She did not respond. Although the applicant did not impose a deadline on her to do so, it launched its application within a very short time - five days after it had sent the letter to the employee - when it became apparent that no undertaking would be forthcoming. Had the letter had the desired effect, any litigation and the attendant costs would have been unnecessary. And the application was launched before the employee had left the applicant's employment and before she could take up employment with Ecomed.

In my view, the applicant has established sufficient grounds for urgency.'

I fully agree with the above reasoning of Steenkamp J. I accept that the period between 4 and 15 August 2014 is fully explained by the correspondence between the respective parties. In fact, a small concession it may be, but the applicant managed to extract an undertaking not to use confidential information in the course of this correspondence. As late as 15 August 2014, the applicant tried to convince the first respondent to comply with the restraint agreement against a specific tender of payment in terms of the payment provisions of the restraint agreement. Considering that 15 August 2014 was a Friday, I do not think the following week which was taken to procure final instructions, brief an attorney, to

draft, settle and finalise the application, is an undue delay and I consider this to be sufficiently expeditious conduct not to detract from the matter being heard as one of urgency.

[42] I may further point out that despite the grumblings of the first respondent in its answering affidavit that it was only given until 29 August 2014 to file an answering affidavit, the fact is that it took a further week from such imposed date to file the answering affidavit, taking in essence the same time as the applicant did (after 15 August 2014) to bring its application. The applicant took no issue with the fact that the answering affidavit was only then filed. From a consistency perspective, at the very least, both parties are equally accommodated as to time taken to file papers, which I also consider to be factor weighing in favour of this matter being considered as one of urgency.

[43] This then leaves only the period between 3 July 2014 and 4 August 2014. I must say that I take a dim view of the first respondent refusing to disclose where he was going, and then complaining about urgency for this period. I agree with the applicant that it was entitled to first establish where the first respondent was going before it could bring an application. After all, the prospective new employer would have an interest in the dispute and would often be cited in the restraint proceedings, as actually happened *in casu*. The first respondent simply cannot be allowed to profit from his own obstructive behaviour as a basis to challenge urgency. I accept that the first inclination the applicant finally had that the first respondent was actually joining the second respondent, which would be the true catalyst for bringing the application, was on 25 July 2014, and the applicant approached its attorneys virtually immediately after that.

[44] Finally in this regard, and in *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another*²¹ the Court held:

‘.... I accept that breaches of restraints of trade have an inherent quality of urgency....’ (emphasis added)

I agree with this. The point is that restraints are of limited duration and concern fundamental rights, requiring immediate determination as a matter of general principle.

[45] I therefore conclude that the applicant has shown proper cause as contemplated by Rule 8 for this application to be determined as one of urgency. I accordingly determine that this application is urgent, and will decide it on this basis.

The repudiation issue

[46] Before dealing with the actual legal principles applicable to restraints, and applying the same to the facts of this matter, I will first deal with the repudiation point raised by the first respondent. This issue has direct application as to whether or not a clear right exists for the purposes of granting an interdict, which is what any restraint of trade application really entails.

[47] The point made by the first respondent in this regard is crisp. According to Mr Kaplan, representing the first respondent, the first respondent agreed to the restraint obligations and in particular to not working for a competitor, in consideration for being paid 66% of his monthly salary on a monthly basis for a period of 12 months from date of resignation. Mr Kaplan stated that this payment provision was a material term of the restraint agreement. When the applicant then said in its letter of 3 July 2014

²¹ (2009) 30 ILJ 1750 (C) at 1761.

that it would not pay the restraint payment even if the first respondent did not join a competitor²² it breached the restraint agreement, in that it showed a clear and unequivocal intention not to comply with the agreement. According to Mr Kaplan, because this was breach of a material term of the agreement it constituted repudiation of the agreement, which the first respondent accepted, and cancelled the agreement. This meant, in the submission of Mr Kaplan, that as the restraint agreement was validly cancelled, the applicant simply had no rights in terms of this agreement susceptible to be enforced in this Court.

[48] Mr Kaplan is of course correct in saying that if this contention of the first respondent is to be upheld, then the applicant's restraint application must fail, as it simply would have no clear right to the relief sought, and would thus not satisfy the very first requirement needed for an interdict to be granted. This is therefore an important issue which I will now deal with first.

[49] From the outset, I accept the payment provisions in terms of the restraint agreement is indeed a material term of such agreement, and breaching the same would constitute repudiation which could substantiate cancellation. The phrase 'in consideration for the undertakings given' makes this clear. This being said, this phrase however does a lot more than just confirm that the term is material. It equally confirms the existence of what can be referred to as a bilateral agreement, or, as more commonly known, a reciprocal agreement. There can be no doubt that performance by one party to this agreement is directly linked to, and dependent upon, performance by the other. Simply put, and provided the first respondent complies with the restraint undertakings, he will be paid. Surely, it will be preposterous to suggest that the first respondent would be entitled to payment under

²² The exact wording of the letter of 3 July 2014 at para 6 reads: 'We clarify however that if you have resigned in order to take up a position and/or start a business which is not in competition with the Company

the restraint agreement if he breaches the very undertakings the payment is a quid pro quo for. It is because of the application of this principle or reciprocity and all its consequences that I consider the first respondent's repudiation contention to have no substance, and I will now set out the reasons for so concluding.

- [50] Firstly, and for the first respondent to accrue any right to payment in terms of clause 3.2 of the restraint agreement, the first respondent must comply with or at least undertake or tender to comply with the restraint undertakings he gave in the agreement. I have no doubt that by the time the applicant's letter of 3 July 2014 was given to the first respondent, being the letter that the first respondent alleges constitutes the repudiation, the first respondent was actually already in material breach of the restraint agreement himself. This is evident from the fact that he had refused to disclose where he was going to be employed after he resigned and that the only plausible and logical inference has to be that he had already accepted a position at the second respondent by then. It must be accepted that employment at and joining the second respondent is equally in material breach of the restraint agreement. Even if one accepts, for the purposes of argument, that the applicant's letter of 3 July 2014 indeed constituted breach of the restraint agreement, I am of the view that because the first respondent himself was already in material breach of the agreement at that point in time, he simply cannot rely on such subsequent breach by the applicant to cancel the restraint agreement. In *Moodley and Another v Moodley and Another*²³ the Court said the following:

'In *Erasmus v Pienaar* [1984 (4) SA 9 (T)] Ackermann J, while expressing reservations about the given reason (that an unaccepted repudiation operates as a waiver of sorts), fully endorsed the notion that the repudiation may release the aggrieved party all the same from taking measures which, in terms of the agreement,

.... then no compensation would in such circumstances be payable'

he would otherwise have been obliged to take. The court (at 29A read with 22J) accepted the proposition (if I may be permitted to paraphrase) that the one party's repudiation, though not treated by the other as a cause for cancellation, may nevertheless (i) excuse the latter from formal acts preparatory to performance; and (ii) entitle him, in appropriate circumstances, to suspend his own performance until the guilty party has reaffirmed his willingness and ability to fulfil his side of the bargain, provided that the aggrieved party, to the knowledge of the repudiating one, remained ready, willing and able to perform his part. The appropriate circumstances would be that the aggrieved party cannot proceed without co-operation from the other or that the principle of mutuality of performance would entitle him, eventually, to withhold his own performance.

The rationale for the rule was said to be (if I may again paraphrase) that a party to a contract ought not to be allowed, by his own wrongful conduct, to advantage himself or to disadvantage his counterpart. To permit the repudiating party to take advantage of the other side's failure to do something, when that failure is attributable to his own repudiation, is to reward him for his repudiation; conversely, it would disadvantage the other party to be obliged to make the effort and incur the expense of tendering a guarantee or of performing some other act when such a step, because of the repudiation, has become nothing but an idle gesture.'

In my view, the above is indeed applicable *in casu*. The first respondent was already in material breach at the time of the letter of 3 July 2014 by the applicant. The first respondent cannot take advantage of the applicant's continued attempts in securing compliance with the restraint agreement (and not cancelling it) to detract from his own prior wrongful conduct, which would in essence be a reward for his own prior repudiation.

[51] In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*²⁴ the Court said:

²³ 1990 (1) SA 427 (D) at 431C – H.

‘.... One party, having repudiated a contract, cannot retroactively nullify it as a potential cause of action by taking advantage of the opposite party's later breach and cancelling the contract before the opposite party thought of doing so.’

The first respondent, in my view, is seeking to do exactly this. The first respondent, having himself already repudiated the restraint agreement, is seeking to nullify his own breach using the mechanism of the applicant's alleged later breach, and thus preventing the applicant from exercising its own rights in respect of the first respondent's prior breach. This, in my view, cannot be permitted. I consider the following dictum from the judgment in *Frost Building CC v Swift Housing (Pty) Ltd*²⁵ to be apt *in casu*:

‘.... The last point I wish to make is that I find it inconceivable that our law would allow a party who is guilty of breach or a wrongful repudiation to hide behind his reprehensible conduct, or the result thereof, to avoid his obligation.’

[52] In any event, and because of the application of the principle of reciprocity *in casu*, there exists an important consideration of good faith and fair play where it comes to the rights and obligations of both parties in terms of the restraint agreement. This principle was dealt with by the Constitutional Court in *Botha and Another v Rich NO and Others*²⁶. That case concerned an instalment sale agreement to buy immovable property from a trust, which had a cancellation clause stated that breach by the purchaser would entitle the seller to cancel the agreement and retain all payments made to point of cancellation. After having made most the payments, the purchaser defaulted on the remaining instalments, and the seller successfully sued for cancellation and eviction. The purchaser however claimed transfer of the property

²⁴ 2001 (2) SA 284 (SCA) at para 36.

²⁵ 1991 (3) SA 318 (W) at 322A-B.

against a tender of payment of the outstanding balance of the purchase price and interest. The Court held as follows:²⁷

‘It is true that Ms Botha was in arrears and had failed to rectify her breach. It is an accepted principle of our law that where a contract creates reciprocal obligations, own performance or tender of own performance by a claimant is a requirement for the enforceability of her claim for counter-performance. This is an instance of the principle of reciprocity. The other side of the coin is that the party from whom performance is claimed may raise the failure of counter-performance as a defence. In bilateral contracts the obligations of parties are prima facie reciprocal. For the principle to operate the obligations of the parties must be reciprocal in the sense that performance of the one cannot be enforced without performance of the other.’

The Court further held:²⁸

‘.... The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way.’

The Court also considered the issue of cancellation of the contract by one of the parties in such a case, especially where the party in default tendered compliance with

²⁶ 2014 (4) SA 124 (CC).

²⁷ Id at para 43.

²⁸ Id at para 46.

the agreement, and said:²⁹

‘It is another manifestation of the principle of reciprocity that where a contract has been lawfully cancelled, mutual obligations arise to restore the respective performances’

[53] I am clearly bound by what the Court said in *Botha*. I in any event, and with respect, fully agree with what was said. *In casu*, the applicant and the first respondent struck a deal to the benefit of both. The first respondent *inter alia* agreed he would not work for a competitor for a prescribed period, and in exchange, the applicant would pay him an agreed sum of money. This agreement can only be honoured if both parties give effect to these two fundamental reciprocal obligations. It is simply not good faith conduct by the first respondent to seek to cancel the agreement based on alleged repudiation by the applicant of its obligation to pay if the first respondent has in effect already made it clear that he is not going to comply with his commensurate obligation. I have no doubt that this cancellation approach adopted by the first respondent was a pursuance of his own self interest without any consideration of the interests of the applicant and cannot be allowed.

[54] As a matter of principle, no man can be allowed to profit from his own wrongdoing, especially in a situation of an agreement that has material reciprocal obligations. In *Food and Allied Workers Union v Ngcobo NO and Another*³⁰ the Court referred with approval the following passage from an article of PM Nienaber³¹ where the author said:

‘It is a fundamental principle of our law that no man can take advantage of his own

²⁹ Id at para 50.

³⁰ 2013 (5) SA 378 (SCA) at 393H-394B.

³¹ ‘The Effect of Anticipatory Repudiation : Principle and Policy’ 1962 *Cambridge Law Journal* 213 at 225.

wrong. *Nullus commodum capere potest de injuria sua propria*. From this broad proposition it follows that a contracting party cannot liberate himself from a contract by reason of his own breach. A contract mutually made cannot be terminated unilaterally, unless the law authorises the one to do so by reason of the other's misconduct. Rescission cannot be effected at the instance of the guilty party. Hence the innocent party to a breach of contract, entitled to rescind, is not obliged to do so.'

[55] Insofar as the first respondent is considered to have actually cancelled the agreement in the letter from his attorneys on 6 August 2014, he was simply not entitled to do so, and such cancellation was invalid. The Court in *Milloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd and Others*³² dealt with a reciprocal contract where the obligation of a respondent to pay in terms of an agreement was linked to the appellant's obligation to release certain shares. The Court held that this meant that the appellant must release the shares before being able to claim payment in terms of the agreement.³³ The Court concluded by determining that as the principle of reciprocity applied in the above circumstances: 'It follows that the appellant was not entitled to cancel the USA agreement'.³⁴ A similar approach was followed in *TH Restaurants (Pty) Ltd v Rana Pazza (Pty) Ltd and Others*³⁵ where the Court dealt with a reciprocal agreement where a franchisor had obligations which he undertook to perform and the franchisee had obligations to pay royalty and advertising fees in consideration for those services of the franchisor. In deciding whether the one party could cancel the agreement because of breach by the other where both parties were in breach, the Court held that because these obligations were reciprocal:³⁶

³² 2008 (4) SA 325 (SCA).

³³ See para 50 of the judgment.

³⁴ Id at paras 51 – 52.

³⁵ 2012 (5) SA 378 (WCC).

³⁶ Id at para 52.

‘.... I, accordingly, cannot confirm and declare that the franchise agreement concluded between the applicant and the first respondent has been validly terminated’

I intend to follow the same approach *in casu*. I do not consider that the first respondent has validly terminated the agreement. In my view, the first respondent simply cannot validly cancel the agreement without at least first tendering compliance with his obligations under the agreement, and should the applicant then persist with its initial approach constituting breach, then the first respondent can be permitted to validly cancel the agreement. The cancellation was invalid because it was premature in the absence of the first respondent first seeking to remedy his own breach in terms of his reciprocal obligations under the restraint agreement. As said in *Nieuwoudt v Maswabi NO and Others*³⁷:

‘Where the principle of reciprocity is applicable the defendant is assisted by a presumption that in any bilateral contract the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his obligation.’

[56] This then brings me to the applicant’s attempts (assuming there is a breach of the restraint agreement) to right its wrongs. Before bringing these proceedings, and in a final attempt to resolve the dispute, the applicant on 14 August 2014 tendered full compliance with the payment provisions of the restraint agreement, provided the first respondent just give the undertakings sought. The first respondent refused to accept this, persisted with the cancellation, and refused to provide the undertakings sought. This approach by the first respondent was in the circumstances ill conceived, especially considering the obligation the applicant owed him was the payment of

³⁷ 2002 (6) SA 96 (O) at 101E – F.

specified and quantified sums of money. In *Thompson v Scholtz*³⁸ the Court said:

‘.... where the shortcoming in the plaintiff’s performance is capable of being restored (or ‘cured’) the Court has a discretion, if fairness so dictates, of allowing the plaintiff his contractual remuneration - but minus the cost of restoring his defective work to the required contractual standard.’

The Court further held:³⁹

‘.... It is fundamental to the second proposition that the shortfall in the plaintiff’s performance, firstly, must be capable of being fully restored to contractual standard and, secondly, that the cost of doing so must be capable of being quantified.

Restoration can take place either by way of substituted performance or by way of a monetary award for the cost thereof. It is for the plaintiff to calculate and prove the cost of restoring the defective work. At the end of the exercise, once the plaintiff has remedied the defective performance either by substitution or by an adjustment the ‘contract price’, the position is viewed as if the plaintiff had performed in full. The aggrieved party in effect would have received his full contractual due, partly in *specie*, partly in money, and consequently becomes liable in return to perform his side of the bargain.’

Applying the same basis of reasoning *in casu*, The point is that the applicant’s tender would have resulted in full performance of its obligations under the restraint agreement. Fairness dictated that this had to be allowed to happen, and the first respondent then had to be held liable to give effect to his obligations under the agreement.

³⁸ 1999 (1) SA 232 (SCA) at 241D – E.

³⁹ *Id* at 241G – I.

[57] In any event, and at the heart of the relationship between the applicant and the first respondent was that of employment. The employment relationship that existed formed the very foundation of the conclusion of the restraint of trade and the first respondent is actually referred in the restraint agreement as 'the employee'. The restraint agreement is clearly a part of the material terms and conditions of employment of the first respondent with the applicant.⁴⁰ As the relationship between the parties is seated in employment, and if it is once again accepted for the purposes of argument that the applicant did wrong by writing that it did in its letter of 3 July 2014, the fact is that the applicant has a right to right a wrong it committed. This it clearly did in its letter of 14 August 2014, which was written in close proximity to the first respondent seeking to cancel the agreement on 6 August 2014. From a fairness and equity perspective, which permeates an employment relationship, the applicant should be given an opportunity to remedy any such wrongdoing, especially if that remedy constitutes full restoration of the *status quo ante* prior to the wrongdoing and is made in close proximity to the events constituting the wrongdoing. In *Kemp t/a Centralmed v Rawlins*⁴¹ the Court dealt with the situation of an unfair dismissal, which can equally be considered to be repudiation of the employment contract⁴². Zondo JP (as he then was) held as follows:⁴³

'.... The appellant may have treated the respondent unfairly when he dismissed her in the manner in which he did but he had 'a right to seek to right the wrong' that he had committed by offering to put the respondent back in the position in

⁴⁰ See *Singh v Adam* (2006) 27 ILJ 385 (LC) at para 18; *David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (LC) para 14.

⁴¹ (2009) 30 ILJ 2677 (LAC). The SCA in *Rawlins v Kemp t/a Centralmed* (2010) 31 ILJ 2325 (SCA) upheld the findings of the LAC with regard to the principles set out in the LAC judgment.

⁴² See for example *President of the Republic of South Africa and Others V Reinecke* 2014 (3) SA 205 (SCA) at para 24; *Memela and Another v Ekhamanzi Springs (Pty) Ltd* (2012) 33 ILJ 2911 (LC) at para 8; *Mangope v SA Football Association* (2011) 32 ILJ 1132 (LC) at para 20 – 21; *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) at para 8.

⁴³ *Id* at para 26.

which she would have been had she never been dismissed. It is what I call an employer's 'right to right a wrong'. And, if that offer was genuine and reasonable, as it has been conceded on behalf of the respondent it was, I cannot see why the appellant must be ordered to pay her compensation which would not have arisen if the respondent had accepted the offer of reinstatement. In my view it is very important to affirm the employer's 'right to right a wrong' that he or she has made in these kinds of circumstances. If an employer unfairly dismisses an employee and he wishes to reverse that decision, he must be able to do so, and if the employee fails to accept that offer for no valid reason, the employer has a strong case in support of an order denying the employee compensation.'

I can see no reason why the same considerations could not find application in the matter now before me. If the applicant committed a wrong in how it initially sought to interpret the restraint agreement, it was entitled to remedy this. There is no case made out that the applicant would not have complied with its payment obligations in the restraint, having made the tender on 14 August 2014. There is no indication that the applicant was not *bona fide* in doing this. To the contrary, I think the first respondent was being opportunistic and behaving in a self serving manner to cover up in own breach of the restraint agreement in not accepting this tender. I believe the repudiation argument was nothing else but a bit of clever lawyering generated after the fact to provide a defense to the first respondent against his restraint of trade obligations. It is not lost on me that it is the first respondent's attorney that raised this for the first time more than a month after the fact in his answer to the letter of demand from the applicant's attorney, and not the first respondent himself that answered the 3 July 2014 letter on such basis, despite saying on 9 July 2014 that he would answer on 10 July 2014. The simple point is that fairness dictates that the first respondent should not be allowed to escape his restraint bargain on this basis.

[58] I conclude in this regard by saying that I in any event do not consider that the

applicant's letter of 3 July 2014 is a repudiation of the restraint agreement. In order for the conduct of the applicant in this regard to constitute a repudiation the conduct of the applicant has to be such so as to show that the applicant has a deliberate and unequivocal intention to no longer be bound by the restraint agreement. In *Datacolor*⁴⁴ the Court said, and I quote in some detail:

'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract. . . . Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated . . . ' (per Corbett JA in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D - F). This is the conventional exposition of the operation of the doctrine of repudiation leading to rescission, with its emphasis on the guilty party's intention and the innocent party's acceptance. At the same time this Court has repeatedly stated that the test for repudiation is not subjective but objective Thus it has recently been said in *Metalmil (Pty) Ltd v AECL Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) at 684I - 685B:

'It is probably correct to say that respondent was *bona fide* in its interpretation of the agreement and that subjectively it intended to be bound by the agreement and not to repudiate it. This fact does not, however, preclude the conclusion that its conduct constituted repudiation in law. Respondent was not manifesting any intention to conduct its relations with appellant and to discharge its duties to appellant in accordance with what it was obliged to do on an objective interpretation of the agreement. In effect, it was insisting on a different contract, however *bona fide* it might have been in its belief that it was not.'

⁴⁴ *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd (supra)* at paras 16 – 18. See also *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at para 38; *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013 (2) SA 502 (GSJ) at para 19.

.... The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.

As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.

The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is 'a serious matter', requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed.'

[59] In my view, the letter of 3 July 2014 does not exhibit a deliberate and unequivocal intention not to be bound by the agreement. The opposite is true. The letter is permeated with demands by the applicant for undertakings by the first respondent to comply with the agreement. It is specifically stated that the agreement will be enforced. All the background facts⁴⁵ speak of the applicant wanting the restraint agreement to be applied and adhered to, which include both wanting to know from

⁴⁵ See *Datacolor* (*supra*) at para 20.

the first respondent where he will take up employment (which the first respondent refused to disclose) followed by the first letter of 29 June 2014. It is also significant that the first respondent only invoked the repudiation argument when the applicant's attorneys in August 2014 demanded compliance with the restraint, indicating that it was not 'anxiously' considered as a breach until such time as the applicant made enforcement of the restraint a reality through its attorneys. Objectively speaking, the conduct of the applicant as a whole was consistent with that of a party wanting compliance with the restraint agreement, and certainly did not show a deliberate and unequivocal intention not to be bound by it.

[60] The alleged repudiating statement in the letter of 3 July 2014 must be given proper context, as in fact confirmed by the first respondent's own version. It is clear to me that the applicant interpreted the payment provisions of the restraint agreement as meaning that the applicant was under no obligation to make the payments to the first respondent if he found any alternative employment, even if it was not with a competitor. This interpretation was clearly wrong. The point is that the applicant's objective (albeit wrong) interpretation of the payment provisions of the agreement, constituted its perception of compliance with the agreement, and not an intention not to comply. But even if there is some subjective view involved on the part of the applicant, it was quickly remedied, as set out above, and full compliance was tendered.

[61] In short, I conclude that the applicant did not repudiate the restraint agreement on 3 July 2014. I further conclude that even if the letter of 3 July 2014 is a repudiation by the applicant, the first respondent is not entitled to rely on such repudiation and cancel the agreement as he himself at the time of this cancellation was already in material breach of the agreement. I consider the purported cancellation of the agreement by the first respondent on 6 August 2014 to be invalid. Finally, fair play and good faith dictates that the first respondent be

held to his obligations in terms of the restraint agreement *per se*, considering the applicant has tendered full compliance with its obligations. The first respondent's repudiation point is thus rejected, and I conclude that there exists a valid and binding restraint agreement before me, susceptible to enforcement. I will now proceed to determine whether such restraint agreement should be enforced, applying the relevant legal principles applicable in the case of restraint enforcements.

The restraint principles

[62] The general principles applicable to the enforcement of restraints of trade was set out in *Basson v Chilwan and Others*⁴⁶, 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 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?

[63] In the judgment of *Ball v Bambalela Bolts (Pty) Ltd and Another*⁴⁷ 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

⁴⁶ 1993 (3) SA 742 (A) at 767G-H.

⁴⁷ (2013) 34 ILJ 2821 (LAC) at para 17.

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'

[64] In *Reddy*⁴⁸ 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.

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'.

[65] In *Jonsson Workwear* I said the following:⁴⁹

'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 be 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.'

[66] It was, as stated, common cause that the first respondent commenced employment with the second respondent and that such employment is in breach of the restraint agreement at it stands. At the heart of the issue then raised by the first respondent as to why the restraint should nonetheless not be enforced, is the contention that the applicant has no protectable interest and that his employment at the second respondent does not infringe any protectable interest in any event. In order to determine these issues, it must be considered what exactly constitutes a protectable interest. In *Dickinson Holdings Group*⁵⁰ it was held that a protectable

⁴⁸ *Reddy v Siemens Telecommunications* (supra) at paras 15 – 16.

⁴⁹ *Jonsson Workwear (Pty) Ltd v Williamson and Another* (supra) at para 44.

⁵⁰ *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (supra) at para 32. See also

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, but the thrust of its case was seated in confidential information as a protectable interest.

Protectable interest

[67] Turning then to confidential information as a category of protectable interest, the Court in *Dickinson Holdings Group*⁵¹ listed the following categories of confidential information:

- '.... (1) Customer lists drawn by a trader, and kept confidential for the purposes of his own business.
- (2) Information received by an employee about business opportunities available to an employer.
- (3) The information received in confidence by an employee whilst in employment with a particular employer remains protected by a legal duty, implied by the contract of employment.
- (4) Information which, although in the public domain is nevertheless protected as confidential when skill and labour have been expended in gathering and compiling it in a useful form, and when the compiler has kept his useful compilation confidential, or has distributed it upon a confidential basis.
- (5) Information relating to the marketing of a new product, if such proposals are the product of skill and industry and have been kept confidential.
- (6) Information relating to the specifications of a product, and a process of manufacture, either of which has been arrived at by the expenditure of skill and industry or has been kept confidential.

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.

⁵¹ Id at para 33 – 35.

(7) Information relating to the prices at which one person has tendered competitively to do work for another is confidential in the hands of one who stands in a fiduciary relationship to the tenderer.....'

[68] In *David Crouch Marketing*⁵² the Court also dealt with the issue of the meaning of confidential information and said:

'A former employer who wishes to rely on or enforce a restraint of trade agreement in order to protect secrets and confidential information must therefore show that the information, know-how, technology or method is unique and peculiar to its business and that such information is not public property or that it falls within the public's knowledge. In other words, the former employer must show that the interest that it has in the information it seeks to protect, is indeed worthy of protection. In this regard the court in *Hirt* pointed out that the information which the former employer wishes to protect 'must be objectively useful to a competitor in order to be confidential as between ex-employee and an ex-employer' (para 46). Clearly, as already indicated, not all information obtained by the employee during the course of his employment will be secret or confidential (see also *Advtech* at para 20). The following passage referred to by the court in *Hirt* with approval from Colman *The Law of Trade Secrets* (Sweet & Maxwell 1992) at 60 explains the circumstances in which information may be considered to be confidential: '[The] latest attempt to draw the line between protectable and non-protectable information in English law is to be found in *Faccenda Chicken v Fowler* [1986] 1 All ER 617 (CA) where it will be remembered that Neill J said that, in order to determine whether information could be classified as so confidential that an employee should not be allowed to use or disclose it after termination of the contract of employment, it was necessary to consider all of the circumstances of the particular case, but the following were among those to which particular attention should be paid:

(1) The nature of the employment; employment in a capacity where confidential information is habitually handled may impose a higher obligation of confidentiality,

because the employee could be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reached him only occasionally.

(2) The nature of the information itself; in order to be protected, the information must be of a highly confidential character - no other information could be protected even by a covenant in restraint of trade.

(3) Whether the employer impressed on the employee the confidentiality of the information.

(4) Whether the information can easily be isolated from other information which the employee is free to use or disclose.

The result of this is that if information is not categorised as confidential under Neill LJ's criteria, then it forms part of the employee's general knowledge and skill, which he is free to use for his own benefit or for the benefit of others after the termination of the contract of employment....'

[69] I also wish to make reference to what the Court in *Esquire System Technology*⁵³ said about confidential information, where the Court held as follows:

‘.... our case law has frequently recognized certain categories of information as confidential. These include:

(a) Information received by an employee about business opportunities available to an employer, even if such information could be obtained from another source. The potential or actual usefulness of the information to a rival is an important consideration in determining whether it is confidential or not.

(b) Information relating to proposals or, inter alia, the marketing of a new product.

(c) Information relating to the price at which one person has tendered competitively to do work for another is confidential in the hands of those who stand in a fiduciary relationship to the tenderer.

Information is confidential if it meets the following requirements:

(a) It must be capable of application in a trade or industry.

⁵² *David Crouch Marketing CC v Du Plessis (supra)* at para 21.

⁵³ *Esquire System Technologies (supra)* at para 29.

(b) It must not be public knowledge or public property (in other words, it must be known only to a restricted number or closed circle of people).

(c) It must, objectively, be of economic value to the person seeking to protect it.'

[70] Finally, and recently on the issue of confidential information, the Court in *Experian SA (Pty) Ltd v Haynes and Another*⁵⁴ said 'It is trite that the law enjoins confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it.' What thus must now be done, as part of the value judgment to be exercised in this matter, is to determine whether there is a case made out on the proper accepted facts as to whether the information the first respondent had access to whilst employed with the applicant would fall within the parameters of what could be classified as confidential information in terms of the above authorities, and also whether this information would be of benefit to the second respondent as employer of the first respondent.

[71] I have dealt with the kind of information the first respondent had access to above. In my view, this is the kind of information that would clearly be considered to be confidential and which the applicant would not want disseminated to competitors. I consider the first respondent's contentions that he had access to a substantial amount of information but that he now cannot remember most of it, especially considering he was the business unit manager in the largest business unit in the PPD division, to be unlikely. As business unit manager, the first respondent had to drive the performance and results of the business unit. Being a properly performing employee, the first respondent could only do this if he had all the confidential information at his disposal relating to products, marketing, finances, margins and

⁵⁴ (2013) 34 ILJ 529 (GSJ) para 19.

customers and would have an active recollection of such information as and when needed. There is simply no way in which such kind of information in the context of such duties of the first respondent can be considered to be in the public domain. I also accept that the information the first respondent had access to would be of value to the second respondent as direct competitor.

[72] It also cannot be ignored that the first respondent, and despite already been employed for some years and being under no legal obligation to do so at that point in time, signed the restraint agreement in which he actually confirmed in writing that he has access to confidential information that is of substantial value to the applicant and which the applicant is entitled to protect. At the time when this was signed, the first respondent had been in the position long enough to know exactly what information he had access to, and since he signed a contract confirming this, I see no reason why he should not be held to that which he agreed to in writing in this regard.

[73] All the efforts of the first respondent in steadfastly refusing to disclose where he was going once he resigned further convinces me that he actually knew he had access to the kind of information the first respondent would want to prevent from being exposed to the second respondent. Simply put, if the applicant never had a protectable interest in this regard from the outset, then why not simply tell the applicant where he was going. The deliberate refusal to make disclosure also indicates mala fides on the part of the first respondent.

[74] On his own version, the first respondent has conceded that the industry is fiercely competitive. On the probabilities, information that a business unit manager of one competitor would have about the business activities of his employer would always be useful to another competitor in such an industry. It is especially information about customers, what they buy, who they are, and what discounts they receive that would

be important. Of further importance would be how the applicant markets its products and what it considers in deciding on product distribution trends and activities, which would include sales trends. I also accept that the kind of information the first respondent would receive at the international conferences and zone meetings would be something a competitor would like to have. This is exactly what the applicant has said in its founding affidavit, and as I have said above, I accept this to be true.

[75] Even if some of the information is ultimately in the public domain, which is one of the first respondent's principal defences, the fact remains that it did take substantial time, effort and resources to create, compile and reduce it down to a useable form, and that the distribution of most of such information was done on a confidential basis. An example would be the applicant's price list and discount structures. Whilst it may be so that this information is provided to customers, and even accepting the first respondent's version that the customers may share this information with other suppliers, the fact remains that the information is given to customers not to disseminate into the market place but to keep for themselves. This information, despite being made so available, remains confidential.

[76] In short, therefore, the nature of the information the first respondent had access to and used on a day to day basis was confidential. The seniority and nature of his position further confirms this. It was in fact impressed on the first respondent by the applicant, in a contract concluded long after him becoming employed, that the information was confidential and he agreed to that being the case. It is impossible to isolate this information from the first respondent upon him leaving as it is the kind of information used by him on a daily basis in discharging his duties and would therefore remain known to him. This information would have value to the second respondent as competitor. I thus conclude that the applicant has a protectable interest in the form of confidential information the first respondent had access to.

[77] There is also very little doubt that, based on the above principles of law and all the considerations of fact *in casu*, the applicant's protectable interest has been breached by the first respondent's employment with the second respondent. In fact, the first respondent's refusal to disclose where he was going confirms that he must have known employment at the second respondent would be such a breach. I accept that the first respondent is employed at the second respondent in a directly related position, which I have dealt with above. The risk caused by the above is patently obvious, and this is all the applicant has to show to succeed to establish breach of the protectable interest. As was said in *Reddy*:⁵⁵

'.... Reddy will be employed by Ericsson, a 'concern which carries on the same business as [Siemens]' in a position similar to the one he occupied with Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist. The restraint was intended to relieve Siemens precisely of this risk of disclosure. In these circumstances the restraint is neither unreasonable nor contrary to public policy. I agree with the remarks of Marais J in BHT Water:

'In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given....'

⁵⁵ Id at para 20.

[78] The full bench of the High Court on appeal in *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (Aka Baghas) and Another*⁵⁶ said the following:

'Where the ex-employer seeks to enforce against his ex-employee a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has in fact utilised information confidential to it - merely that the ex-employee could do so. (See *International Executive Communications Ltd (Incorporated in the Netherlands) t/a Institute for International Research v Turnley and Another* 1996 (3) SA 1043 (W) ([1996] 3 B All SA 648) at 1055D - F (SA).) In short, the ex-employer 'has endeavoured to safeguard itself against the unpoliceable danger of the [ex-employee] communicating its trade secrets to a rival concern after entering their employ. The risk that the [ex-employee] will do so is one which the [ex-employer] does not have to run, and neither is it incumbent upon the [ex-employer] to inquire into the bona fides of the [ex-employee] and demonstrate that [he or she] is mala fide before being allowed to enforce its contractually agreed right to restrain the [ex-employee] from entering the employ of a direct competitor.'

[79] I thus accept that the applicant has a proper protectable interest in the form of the confidential information the first respondent had access to whilst employed at the applicant, and that this protectable interest has been infringed by virtue of the first respondent's employment with the second respondent.

Weighing off of interests and public interest

[80] As discussed above, the employment of the first respondent with the second respondent is an infringement of the protectable interest of the applicant, and this employment clearly placed such interest at risk. But clearly also, the first respondent has an interest to pursue the occupation he wants and knows, and it

⁵⁶ 2004 (4) SA 174 (W) at para 13.4.1.

would seem, in a promoted position at the second respondent. What must now be considered is the quantitative and qualitative weigh of the respective interests of the two parties as contemplated by question (c) in *Basson*.

- [81] In weighing off these interests, it is my view that such exercise undoubtedly favours the applicant *in casu*. I say this for a number of reasons. The first is that I consider what I believe the first respondent's mala fide conduct in refusing to disclose where he was going to take up employment, despite being consistently required to do so by the applicant. I also consider that the first respondent concluded the restraint long after he became employed and when there would have been no obligation on him to do so, in which he confirmed the nature of the interests the applicant was seeking to protect. I finally consider that the first respondent was properly warned beforehand not to take up employment in breach of the restraint, before he even left the employ of the applicant.
- [82] Another crucial consideration is that the restraint agreement in fact provides for payment to the first respondent as a *quid pro quo* to adhering to the restraint. Although there was initially a hiccup in this regard, the fact remains that the applicant tendered compliance with this obligation and still in the Court proceedings tendered such compliance. I will thus take this into account in conducting the weigh off exercise as well.
- [83] The first respondent has not taken the Court into his confidence by setting out what his past experience and background was. In simple terms, he has not disclosed his CV which could indicate whether perhaps he has knowledge and experience in another industry. It was up to the first respondent to have informed the Court, for example, that all he did in his life was to work in the cosmetics

industry and that is all he knew and understood and could reasonably do. His failure to provide this kind of information must count against him in the weigh off.

[84] Also, the issue of seniority of the first respondent is an important consideration in the weigh off.⁵⁷ The following dictum in *Pest Control (Central Africa) Ltd v Martin*⁵⁸ illustrates this, where the Court said ‘.... A restriction, which would be absurd when imposed upon a junior engineer in a huge concern, might be perfectly reasonable in the case of a general manager with the whole business at his finger tips.’ As I have said in *Jonsson Workwear*.⁵⁹

‘.... The point is that the more senior the position of the employee, the more likely it is that the employee would have access to such kind of confidential information that would be most useful to a competitor and highly prejudicial to an erstwhile employer if revealed.’

[85] In the end, the first respondent can work anywhere else and do whatever he wants, other than in that part of the cosmetics industry where the applicant does business. In exchange for this, the first respondent is paid. Based on the aforesaid, and in circumstances similar to the matter *in casu*, the Court in *Ball* concluded.⁶⁰

‘In my view, quantitatively and qualitatively, the interest of the first respondent surpassed that of the appellant. The fact that the appellant stated that she did not intend and did not use any of the information in favour of or for the benefit of the second respondent is irrelevant in determining whether the restraint is reasonable,

⁵⁷ See *Dickinson Holdings Group (supra)* at para 38 ; *SA Breweries Ltd v Muriel* (1905) 26 NLR 362 at 370-371 ; *Stewart Wrightson (Pty) Ltd v Minnitt* 1979 (3) SA 399 (C) at 404B-C; *Random Logic (Pty) Ltd t/a Nashua, Cape Town v Dempster* (2009) 30 ILJ 1762 (C) at para 32 ; *Experian (supra)* at para 43

⁵⁸ 1955 (3) SA 609 (SR) at 613G.

⁵⁹ Id at para 51

⁶⁰ Id at para 25.

or in determining whether the restraint had been breached. Furthermore, in my view, there was no other fact or aspect of public policy, at the time when the restraint was to be enforced, which required that the restraint be rejected. In the circumstances, I am satisfied that the court a quo correctly concluded that the restraint was reasonable and enforceable and in granting relief accordingly.'

[86] On this basis, the *Basson* question (c) must be answered in favour of the applicant as well. The weighing off of interests clearly favours the applicant.

[87] Finally, there is simply no issue of public interest that should intervene in this instance, as there is nothing unlawful in the interest itself and the two parties to the contract knowingly and willingly entered into the restraint of trade. No issue or argument in this regard was in any event raised before me.

Conclusion

[88] Based on all of the above, I will now finally turn to the interdict requirements. The first question is thus whether the applicant has demonstrated the existence of a clear right. In the context of this matter, this means whether the applicant has a protectable interest. As I have set out above, I accept that the applicant has a legitimate and proper restraint of trade agreement susceptible to being enforced. I equally accept that the applicant has a proper protectable interest in the form of confidential information and that the employment of the first respondent with the second respondent infringes on such protectable interest. The weighing off of interests favour the applicant and there is no intervening issue of public interest. In my view, the applicant has therefore properly demonstrated a clear right to the relief sought, and the existence of an injury both committed, and reasonably apprehended.

[89] This then leaves only the issue of the absence of any other satisfactory remedy. I accept that the applicant has no reasonable alternative remedy. In fact, the only alternative remedy would be for the applicant to sit and wait and see if it suffers any damages or losses as a result of any conduct by the respondents in breach of the first respondent's restraint of trade, and then claim damages. Not only is this notoriously difficult to prove, but such an approach renders rather hollow the very motivation behind restraints of trade, being the protection of the business against harm happening or further accruing. This actual risk of harm would in any event justify the granting of the interdict sought by the applicant.⁶¹ As was said in *Esquire Technologies*⁶²:

'Should the restraint be enforceable and should the applicant have interests worth protecting, it would suffer irreparable harm if it is not enforced. The harm caused by an employee who divulges trade secrets to a competitor cannot be easily remedied by a damages claim in due course. The question remains whether the applicant does have such interests worthy of protection - a question I will deal with under the heading of a clear right.'

Alternative Remedy

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

⁶¹ *Point 2 Point Same Day Express CC v Stewart and Another* 2009 (2) SA 414 (W) at para 14

⁶² *Id* at para 39 and 40. See also *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and*

[90] The applicant has accordingly satisfied all the requirements for the granting of the interdict sought, and is accordingly entitled to most of the relief sought in its notice motion. Two things however need to be said in this regard. The first is that the applicant has failed to show that the first respondent was pursuing its employees to secure their employment with the second respondent and I shall make no order in this regard. Secondly, I intend to add a provision to the order given in this judgment to ensure that the applicant also complies with its obligations in terms of the restraint agreement, but as the first respondent clearly has been employed by the second respondent since 1 August 2014 and received remuneration from it until now, I shall only make this provision operative from date of this judgment..

Costs

[91] This then only leaves the issue of costs. There is no reason why costs should not follow the result, and in this regard the applicant has been substantially successful.

Order

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

92.1 The first respondent is interdicted and restrained from being employed by the second respondent, or any other competitor of the applicant, for the period 1 August 2014 until 31 July 2015, in the Republic of South Africa.

92.2 The first respondent is interdicted and restrained for the period 1 August 2014 until 31 July 2015, from carrying on, being engaged, concerned or interested in or soliciting business for or being a proprietor of,

shareholder, member or partner in or acting as a consultant, trustee, manager, agent, representative, advisor or in any other capacity of, or rendering any services to, or lending, advancing or binding himself as surety for or otherwise assisting financially, directly or indirectly, whether for personal gain or not, any competitor of the applicant in the Republic of South Africa.

92.3 The first respondent is interdicted and restrained for the period 1 August 2014 until 31 July 2015, and in the Republic of South Africa, from enticing, persuading or inducing any customer of the applicant to cease doing business with the applicant and/or taking such customer's business elsewhere, in respect of any services and/or products offered by the applicant to its customers.

92.4 The first respondent is interdicted and restrained, whether for his own benefit or the benefit of any third party, from utilizing or directly or indirectly disclosing or making available or deriving any profit from, any of the applicant's confidential information.

92.5 The applicant is ordered to pay the first respondent 66% of his basic monthly salary as from 16 September 2014 until 31 July 2015, on a monthly basis on the last day of each and every succeeding month, provided the first respondent continues to comply with the terms of this order. The monthly salary for the period from 16 September to 30 September 2014 shall be adjusted pro rata for payment on 30 September 2014.

92.6 The first respondent is ordered to pay the costs of the application.

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

APPLICANT:

Advocate I Miltz SC

Instructed by Cowan Harper Attorneys

FIRST RESPONDENT:

Advocate J L Kaplan

Instructed by Ian Levitt Attorneys