THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: J 1095/15

PINNACLE TECHNOLOGY SHARED MANAGEMENT SERVICES (PTY) LIMITED	**First Applicant**
PINNACLE MICRO (PTY) LIMITED t/a PINNACLE AFRICA and t/a PINNACLE SECURITY (PINNSEC)	**Second Applicant**

and

YVETTE VENTER	**First Respondent**
REDITRON (PTY) LIMITED	**Second Respondent**

Heard: **18 June 2015**

Delivered: **14 July 2015**

Summary: **Urgent application to enforce restraint of trade agreements- restraint provisions unreasonable.**

JUDGMENT

WHITCHER, J

Introduction

[1] The first and second applicants are wholly owned subsidiaries of Pinnacle Technology Holdings. The first respondent was employed by the first applicant but was deployed to render services to the second applicant. These services included that of an external accounts manager from August 2012 to 28 May 2015.

[2] The business of the second applicant entails the assembly, sale, marketing, support and distribution throughout South Africa of computer hardware, software, peripherals and related products and services in the security industry. The job of the first respondent entailed designing a complete system package for customers combining the second applicant's products, services, pricing and discount structures and the customer's creditworthiness and sales history with the second applicant.

[3] On 6 October 2014 the first respondent signed a new contract of employment with the first applicant, which incorporated restraint of trade undertakings in favour of the first and second applicant. In April 2015 she resigned from the employment of the first applicant to take up employment as an accounts manager with the second respondent from 1 June 2015. The applicants contend that the second respondent is a competitor of the second applicant and in taking up employment with the second respondent the first respondent is in breach of the restraint of trade agreement.

[4] Based on the provisions of the restraint of trade agreement, the applicants seek an urgent interdict preventing the first respondent, for a period of twelve months from 1 June 2015, throughout South Africa, from being employed by the second respondent and/or having a direct or indirect interest in a competitor of the applicants and from approaching or soliciting orders from customers of the applicants. They also seek an order interdicting and

restraining the second respondent for a period of twelve months from 1 June 2015 from employing the first respondent.

Issues in dispute

[5] The following issues are in dispute:-

5.1 Urgency.

5.2 Whether the first respondent was compelled to sign the restraint of trade agreement under circumstances of duress and whether this constitutes a basis for the first respondent to avoid the consequences of the agreement.

5.3 Whether there is a protectable interest that warrants the enforcement of the restraint of trade undertakings. The reasonableness of the area and duration of the restraint of trade provisions is also in dispute.

Urgency

[6] I am satisfied that the application is urgent. The period of the restraint of trade provisions that the applicants seek to enforce, i.e. 12 months, will expire on 31 May 2016. By reason thereof and having regard to the time that it takes to enrol an opposed motion before this Court the applicants evidently cannot seek redress in the ordinary course. If the breach and reasonableness of the restraint of trade provisions are proved, the harm occasioned by the breach is on-going. A breach of a restraint of trade is invariably of an urgent nature[1]. It is also evident that once the applicants became aware that the first respondent intended to take up employment with the second respondent, they proceeded as expeditiously as possible.

[1] See *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C) para [4] at 378. In *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C) Davis J stated at 88J-89A that breaches of restraint of trade have an inherent quality of urgency. See also *L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another (J1990/2014) [2014] ZALCJHB 353 (16 September 2014)* para [44] at 23; *FMW Admin Services CC v Stander & Others* (2015) 36 ILJ 1051 (LC) para [28] at 1061; *ARB Electrical Wholesalers (Pty) Ltd v Grove and Others (C335/14) [2014] ZALCCT 31 (3 June 2014)* para [20] at 7; *Care for Cars CC v Rabe (J1744/14) [2014] ZALCJHB 295 (6 August 2014)* para [9] at 3, 4.

Evaluation of evidence

[7] The applicants seek a final interdict on application. In terms of the rule laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[2] the application is to be decided on the first respondent's version together with the admitted facts in the applicants' founding affidavit (this rule applies even where a respondent bears an onus[3]) and the facts stated in the first respondent's answering affidavit are to be accepted unless the first respondent's versions are so far-fetched or clearly untenable that the court would be justified in rejecting such version merely on the papers.

[8] In the context of a restraint of trade, Malan AJA in *Reddy v Siemens Telecommunications (Pty) Ltd*[4] held further as follows:

> "[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 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."[5]

[9] *Reddy v Siemens* alerts us to the fact that making a determination on the enforceability of a restraint of trade involves making a value judgment on the reasonableness of the restraint. Competing constitutional and policy values

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[2] 1984 (3) SA 623 (A) at 634H-635C.
[3] *BHP Billiton Inc and Another v De Lange and Others* 2013 (3) SA 571 (SCA) para 51 at 587; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para [4] at 491.
[4] 2007 (2) SA 486 (SCA).
[5] See also *L'Oreal supra* para [4], pp 4, 5; *Jonsson supra* para [9] at 718, 719; *FMW Admin Services CC v Stander & others supra* para [4] at 1055, 1056.

permeate disputes of this nature. It is not simply a question of deciding, using evidentiary rules, what version to accept with the result automatically following.

Alleged duress

[10] It is the first respondent's case that the restraint of trade agreement upon which the applicants rely was induced by duress entitling her to avoid same.

[11] Corbett J in *Arend v Astra Furnishers (Pty) Ltd* [6] held that duress may take the form of inducing in a contracting party a fear by means of threats and that where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based on fear, the following elements must be established:

(i) a reasonable fear that the threat might eventuate;

(ii) that the fear was caused by the threat of some considerable evil to the ex-employee;

(iii) that the threat was of imminent or inevitable evil;

(iv) that the threat or intimidation was unlawful or *contra bonos mores*;

(v) that the moral pressure exerted by the threat has caused damage.

[12] In *Medscheme Holdings (Pty) Ltd and Another v Bhamjee*[7] the SCA stated the following:

> "[18] English and American law both recognise that economic pressure may, in appropriate cases, constitute duress that allows for the avoidance of a contract. As pointed out by Van den Heever AJ in *Van den Berg & Kie Rekenkundige Beamptes v Boomprops* 1028 BK 1999 (1) SA 780 (T), that principle has yet to be authoritatively accepted in our law. While there

[6] *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305-306B
[7] 2005 (5) SA 339 (SCA)

> would seem to be no principled reason why the threat of economic ruin should not, in appropriate cases, be recognised as duress, such cases are likely to be rare. (The point is underlined by the dearth of English cases in which economic duress was found to have existed.) For it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. I agree with Van den Heever AJ (in *Van den Berg & Kie Rekenkundige Beamptes* at 795E - 796A) that hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more - which is absent in this case - would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress."

[13] In her answering affidavit, the first respondent describes the circumstances surrounding her signature to the restraint of trade agreement. In September 2014 the sales manager, Fred Saayman, informed her that all staff would be required to sign new contracts of employment. At the beginning of October 2014, his personal assistant, Zessica Zuppa, informed her that if she did not sign the new contract of employment incorporating the restraint of trade she would not be paid her salary. This communication was followed up by an email from Zuppa to all staff confirming that if they did not sign the new agreement, they would not be paid their salaries. The sales manager often issued instructions through Zuppa so she considered the threat of non-payment of salary to be serious and imminent. She signed the agreement in fear that her failure to do so would result in her being unable to meet her monthly financial commitments. She was especially concerned because her husband had taken a cut in salary and her family was thus dependant on her. At the time of signing the agreement, she was seeking alternative employment and was reluctant to bind herself to a restraint of trade.

[14] The applicants contend that the first respondent's allegations should be rejected as far-fetched and untenable because the first respondent has never

previously alleged that she was compelled to sign the contract of employment with the threat that if she did not do so she would not be paid her salary. The first time she made this allegation was in her answering affidavit. Moreover, her allegations are completely at odds with the contents of her letter of resignation. In her resignation letter, the first respondent thanks the applicants for being good to her and for everything she learnt whist in their employ.

[15] I accept the first respondent's version of the factual events surrounding her signature of the restraint of trade agreement because the applicant's refutation of her version is not substantiated by a confirmatory affidavit from Zuppa or a relevant staff member. This omission is not explained in their affidavits. The timing of her complaint and a courteous resignation letter are not so strange to render her version far-fetched and improbable.

[16] I am, however, not convinced that the circumstances under which the first respondent signed the agreement amount to duress contemplated in *Arend* or *Medscheme supra*. Although the first respondent was entitled to payment of her salary because she was already in the employ of the applicants when she was asked to sign the contract and the threat emanating from the applicants' representative was one of material financial harm, something more (as contemplated in *Medscheme*), which is absent in this case, would need to exist for the applicant's conduct to be considered an illegitimate or unconscionable threat and for the first respondent to have reasonably felt induced thereby to sign to the contract. In this case, that something would have been, prior to the threat, a clear indication from the first respondent to the first applicant that she does not accept the restraint of trade provisions in her contract.

[17] Having said that, I do note that the first applicant was able to obtain the first respondent's signature on the contract using its considerable advantage in terms of bargaining power. While there was no proverbial gun to the first respondent's head, the table on which the restraint of trade was signed leaned heavily against her.

[18] I also take note of the fact that the first respondent was neither offered nor paid any amount in excess of her remuneration at the time the restraint was signed

as potential compensation for future lack of earnings should she wish to leave the employ of the applicants.

Breach of agreement

[19] It is evident, having regard to the evidence before me, that the second respondent is a competitor of the second applicant. Both companies sell computer hardware, software, peripherals and related products and services, including those related to the security industry, and deal with information technology software.

[20] This finding however does not end the matter. The issue is whether the restraint provisions are reasonable and thus enforceable.

Approach of the courts in regard to protectable interest

[21] The enforceability of a restraint of trade agreement is to be considered at the time at which enforcement is sought.[8]

[22] The test set out in *Basson v Chilwan and Others*[9] for determining the reasonableness or otherwise of the restraint of trade provision is the following:

a. Is there an interest of the one party which is deserving of protection at the determination of the agreement?

b. Is such interest being prejudiced by the other party?

c. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?

d. Is there another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?

[8] See *Reddy supra* para [16] at 497; *Magna Alloys* at 894F-G, 895D-I, 897C-E, 898C-E.
[9] 1993 (3) SA 742 (A) at 776H – 777B.

[23] In *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another*[10] Wunsh J added a further enquiry, namely whether the restraint goes further than is necessary to protect the interest.

[24] Policy consideration is also a factor. In *Reddy v Siemens supra* Malan AJA stated as follows:

> "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 of contract is an integral part of the fundamental right referred to in s 22. …In applying these two principal considerations, the particular interest 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 parties may for some other reason be contrary to the public interest."[11]

[25] Proprietary interests capable of protection fall into two categories, namely trade connections of the business, and which is made up of goodwill and relationships with customers, potential customers, suppliers and trade secrets, consisting of confidential matters which would be useful for the carrying on of the business and which could therefore be used by a competitor if disclosed to it.[12]

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[10] 1999 (1) SA 472 (W) at 484E.
[11] Para [16].
[12] *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 at 502D-F

[26] The cases are clear, however, that mere customer contact does not miraculously create a protectable interest. The connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business.

[27] In *Rawlins and Another v Caravantruck (Pty) Ltd*,[13] Nestadt JA stated the position as follows:

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

[13] 1993 (1) SA 537 (A) at 541

the type of product being sold; and whether there is evidence that customers were lost after the employee left . …"

[28] The categories of protectable confidential information were set out in *Dickinson Holdings (Group) (Pty) Ltd and Others v Du Plessis and Another*[14] as follows:

a. Customer lists drawn by a trader, and kept confidential for the purposes of his own business.
b. Information received by an employee about business opportunities available to an employer.
c. 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.
d. 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.
e. Information relating to the marketing of a new product, if such proposals are the product of skill and industry and have been kept confidential.
f. 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.
g. 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.

[29] It was also stated in *Dickson* that the type of information alone does not necessarily establish its confidentiality. All of the relevant circumstances must be considered. Furthermore information must be objectively useful to a competitor in order to be confidential as between ex-employee and an ex-employer.

[14] 2008 (4) SA 214 (N) (Full bench) para [33]-[35] at 225, 226.

[30] The position regarding trade secrets and confidential information is summarised by Saner as follows:

> "For an employer to succeed in establishing that its trade secrets and confidential information are interests justifying protection by the restraint, it should demonstrate in reasonably clear terms that the information, know-how, technology or method, as the case may be, is something that is unique and peculiar to the employer and which is not public property or public knowledge and which is more than just trivial." [15]

[31] In *Reddy* (*supra*), Malan AJA stated:

> "However, all the facts must be considered. Siemens and Ericsson are competitors providing services to telecommunication network operators. Although Vodacom and Cell C are customers of Siemens, Ericsson does some business with them. Siemens still has to acquire any of MTN's business. Reddy is in possession of trade secrets and confidential information of Siemens. Moreover, shortly before his resignation from Siemens, he attended a training course updating his knowledge of the processes, methodologies and systems architecture developed by Siemens. Information of this kind, if disclosed, could be used to the disadvantage of Siemens. This is not a case such as *Basson v Chilwan* where an employer's application to assert a protectable interest in respect of customer connections against an ex-employee who had no such connections was dismissed. Reddy is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively, is obvious. It is not that the mere possession of knowledge is sufficient, and this is not what was suggested by Marais J in BHT Water: 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

[15] At 7-14(1)

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. …In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant. Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the services of a competitor.'"

[32] As contended by the applicants, the reality of the situation is that an employee who intends to use his or her ex-employer's confidential information will not do so overtly as he or she does not want to be "caught out", to put it colloquially, by his or her erstwhile employer. Thus, in order to claim an infringement of its proprietary interests an employer need only prove that its erstwhile employee is potentially able to exploit its confidential information or customer connection in his or her new employment. It will be sufficient to create the real probability that the employee will consciously or unconsciously do so in the new employment, because of the loyalty he owes to his or her new employer.

Analysis of facts

[33] The two categories of protectable interests relied upon by the applicants is customer connections and confidential information.

[34] It is common cause that in her capacity as accounts manager for the second applicant the first respondent liaised with customers and prepared quotations, which included designing a complete system packages for the customers combining the second applicant's products, services, pricing and discount structures and the customer's creditworthiness and sales history with the applicant. The applicants contend that in the process she forged influential relationships with the second applicant's customers and became privy to confidential information of the second applicant. On account of this they allege the first respondent is in a position to cause the second applicant's existing customers to take their custom to the second respondent. They contend that she could use the information to undercut the second applicant's pricing.

[35] It is not disputed that the first respondent has been in the security industry throughout her working life and has gained knowledge and experience in this field. She said that by virtue of her experience she acquired knowledge of methodology, capability, logistical arrangements and sales patterns of equipment used in the industry; information which she alleges is freely available in the public domain. I would add that it is also obvious that she acquired a skill for designing product and service packages for customers. Common sense dictates that this skill and knowledge would be useful to a competitor of the second applicant. However, the basis of the application is not her skills or her ability to act upon information in the public domain which she may now use to assist her new employer to compete with her old. The issue is whether any relationships and confidential information she acquired while working for the old employer are likely to assist her new employer.

Trade and customer connections

[36] I accept the first respondent's contention that there is no credible evidence that she created customer connections whilst in the employ of the applicants which are of such a nature that they constitute a protectable interest in the hands of the applicants.

[37] It is common cause that a company called Integriton is the second applicant's most important customer and biggest contract (amounting to approximately

R100 million) and, according to the applicants' own version, was "the first respondent's key account" during the last year of her employment with the applicants. In her resignation letter, this is the only account mentioned by the first respondent.

[38] In her answering affidavit, the first respondent describes the trade connections surrounding the Integriton contract. She states that the customer relationship between the second applicant and Integriton was developed at the level of the directors of the two companies and not at her level as an accounts manager. Moreover, the contract was already in established in 2013 and is at an advanced stage. The applicants did not refute these claims in any meaningful manner and even describe the two Chief Executive Officers of the respective companies as business associates as well as friends. The first respondent thus demonstrated that her relationship with Integriton is not such as to place her in a position to influence the company to take their custom to the second respondent.

[39] The first respondent further demonstrated that there is no prospect of the second respondent undercutting the relationship between the applicants and Integriton. It is common cause that the tender awarded to Integriton is to supply security systems to the Department of Correctional Services. The first respondent alleged that the tender required that Bosch products be utilised and as a result the applicants, through its holding company, acquired a Bosch agency to secure the supply of goods to Integriton. According to the first respondent, the second respondent does not supply Bosch products and thus cannot compete with the applicants in this regard. In their replying affidavit the applicants merely contend that the tender also made provision for other 'brands of computer and computer-related products" but do not suggest that the second respondent competes with the applicants in this field.

[40] The first respondent also alleged that approximately 80% of the Integriton contract has already been fulfilled. This was not refuted by the applicants.

[41] I find that the first respondent has established that there is no potential threat from the respondents to the applicants' biggest and most significant client.

[42] It is common cause that the first respondent dealt with 18 other customers of the second applicant. The first respondent alleges that during her last year with the applicants her primary focus was on the Integriton account and she had no opportunity to develop influential relationships with the other 18 clients. These contentions are not seriously disputed by the applicants who merely allege that she did deal with other customers. The applicants make no attempt to describe the nature and extent of the customer connections which the first respondent may have had with these customers. The applicant does not identify a single person with whom the first respondent has allegedly created a relationship which is of such a nature that that will divert the business from the applicants to the second respondent.

[43] Eight of the 18 customers were already customers of the second respondent before the first respondent went to work for the second respondent. The applicants contend that the first respondent, armed with confidential information acquired from the applicants, place her in a position to take these clients away completely from the applicants. This issue is dealt with below.

Confidential information

[44] The second category of protectable interest relied upon by the applicants is trade secrets and confidential information.

[45] The applicants in their founding affidavit describe the information they allege the first respondent acquired whilst in their employ and conclude that this information is "confidential". The information can be boiled down to a list of the second applicant's customers (this list was however disclosed in the application), knowledge of all products, services, pricing, quotation packages, discounting structures and profit margins (the difference between the second applicants landed costs of stock and the second applicant's selling prices) of the second applicant, cost of stock from the second applicant's suppliers and the creditworthiness and historical sales of their customers.

[46] It is difficult on the papers in these proceedings to make a finding on each and every item of information the applicants claim is confidential and in which they

thus have a protectable interest. This is especially since the first respondent contests each of these claims.

[47] The first respondent's denials are not all untenable. Some of the information seems easily ascertainable in the field by a person, such as the first respondent, who has been in the security industry throughout her working life. Product knowledge and services provided by security suppliers would fall into this category.

[48] If by creditworthiness of customers, the applicants mean any formal defaults in payment as opposed to lateness, this is also objectively determinable without too much effort.

[49] The fact that some information was kept in the applicants' password protected computer system does not, on its own, render it confidential. There is also no allegation that the first respondent removed this information from the computer system.

[50] However, it stands to reason that, at least, the second applicant's pricing, discounting structures, profit margins and historical sales constitute the kind of knowledge the first respondent cannot tenably and plausibly deny is confidential information. It is also information into which she most likely had good insight while working at the applicants.

[51] Having said that, the first respondent did demonstrate that information used to process quotations and prices changed over time. In this regard, she made reference to an email from the office manager of the second application which records that due to the volatility of the rand against the dollar, quotations are only valid for 48 hours from the time of quoting. Accordingly, the value of any information relating to landing costs or quoted prices dissipates with time and would be of little value to the respondents at this stage.

[52] Historical sales information, as I understand it, may provide a competitor with certain information about the second applicant's customers' needs, for instance when they buy stock and how much. How useful this may be to a

competitor, it is difficult for this court to say on the papers, but it does seem to constitute confidential information.

[53] This then leaves profit margins and discounting structures which, together with historical sales information, seem to make up a list of confidential information in which the applicants do have a protectable interest.

Interest Prejudiced

[54] I find that an interest of the applicants is being prejudiced by the first respondent. This is not in the actual sense that the first respondent has imparted confidential information to the second respondent. I respectfully align myself with the view of the court in *Reddy* that the prejudice includes the "risk of disclosure" of information that a former employee working at a competitor may openly or even unconsciously impart to his or her new principals. This, however, does not end the matter.

Balancing Interests

[55] In applying the next part of the test set out in *Basson v Chilwan*, a court will inevitably use the accepted evidence to make a value judgment. This value judgment must chart a way between competing policy objectives and be sensitive to constitutional values, as set out earlier on.

[56] The crisp question at this point is how the applicants' protectable interest weighs up, qualitatively and quantitatively, against the interest of the first respondent that she should not be economically inactive and unproductive for twelve months?

[57] It seems to me that, where a company has competitors, adjustments to its profit margins and discount packages will be made fairly often. Unlike a 'secret recipe', the exact amount of profit a company sets out to make or gives up by way of discount to attract business on any given deal is not an immutable piece of information. Likewise, knowing this information does not give a competitor a permanent advantage.

[58] If the second respondent were to come to know this information, there is nothing to suggest that it would be able to better the prices the applicants already offer their customers. While it is not ideal that a competitor knows the applicant's exact mark-up, it strikes me that undercutting, itself, is a routine business threat.

[59] It is difficult to calculate the applicants likely prejudice should their historical sales to the other 18 customers the first respondent dealt with be disclosed the second respondent. It seems to me that the value of this information would principally be to alert a competitor when a customer's stock was low or equipment needed replacement. While undoubtedly confidential, this information is unlikely to be a deciding issue in winning customers away.

[60] On the other hand, considering the interests of the first respondent, the terms of the restraint of trade would exclude her from the sector of the economy in which she has worked since entering the labour market. The geographic extent of the restraint is throughout the whole South Africa and the period of the restraint is for 12 months.

[61] The applicants contend that a period of twelve months would allow for the second applicant to replace the first respondent and for the usefulness of the information within the knowledge of the first respondent to diminish. I do not agree. Twelve months considerably exceeds, in my view, the period during which any intelligence she has about the applicants would be of much use to the second respondent. I also do not see a competitive applicant choosing a replacement who will need an entire year to replace the first respondent. The 12 month period thus unreasonably restricts the first respondent's freedom of occupation.

[62] A quantitative balancing of interests is also instructive. If the restraint were to be enforced, it is quite conceivable that the first respondent will remain without any income for at least twelve months before she may re-enter the sector in which she has specialised. Enforcing the restraint could thus cause her to lose 100% of her possible income over twelve months. I am satisfied that the

applicants' interests are, proportionally, unlikely to be affected by nearly as much should the restraint not be enforced.

[63] In assessing the relative harm to the interests of both parties in enforcing the restraint, I pause to note that, had the applicants, in order to obtain agreement to the restraint, offered the employee financial compensation which meaningfully lessened the financial prejudice of her compliance upon leaving the applicants' employ, the applicants' prospects of successfully obtaining interdictory relief would have been strengthened.

[64] The reasoning in *Medscheme* to the effect that hard bargaining, even to the point of threatening harm or economic ruin, does not necessarily constitute duress is, with respect, correct. However, when the applicants drove so hard a bargain with the first respondent as they did, they perhaps did not realise that, while she could not, in a contract law sense, avoid compliance with the restraint, the reasonableness of that restraint may nevertheless later be tainted by the manner in which it was procured.

[65] I do so find in this case. The first respondent was not a job seeker being confronted with a 'take it or leave it' contract of employment with a restraint of trade. She had an employment contract with the applicants. They wanted to alter the terms of their agreement with her entirely to their benefit. They informed her that if she did not sign the contract of employment incorporating the restraint of trade she would not be paid her salary. Although not duress, this high-handed threat of a potentially unlawful action had the desired effect. However, the one-sided terms of the restraint agreement is an important factor affecting the balancing of interests that this court must perform.

[66] I do not wish to suggest that the freedom to contract will usually bend its knee to the freedom of occupation. It is very important that people are held to agreements that they enter into. Predictability and accountability in commercial activity is a social value not lightly to be subordinated to the specious claims to 'freedom' by rule breakers. However, on the facts of this case, considering how the restraint of trade agreement came into existence in the first place, it does sound rather strange in the mouth of the applicants to

complain about the first respondent's attempt to unilaterally vary the terms of an existing agreement, entirely in her favour.

[67] I therefore find that, notwithstanding the existence of a protectable interest as well as a threat to that interest posed by the first respondent taking up employment with the second respondent, the nature of the interest established on the papers is ephemeral and the countervailing interests of the first respondent outweigh those of the applicants, such that it would be unreasonable to enforce the restraint.

[68] I award costs against the applicants, not only because of my findings but also because at the commencement of these proceedings they refused to accept a 'with prejudice' undertaking from the respondents that they will abide with the terms of the restraint in respect of the applicants' customers.

Order

[69] The application is dismissed with costs.

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Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Adv L Hollander
Instructed by:	M J Hood & Associates
On behalf of the Respondent:	Adv NPG Redman SC
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