IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – GQEBERHA)

CASE NO.: 4202/2024
Matter heard on: 12 November 2024
Judgment delivered on: 3 December 2024

In the matter between: -

SOBRALIA BELEGGINGS (PTY) LTD t/a ACDC EXPRESS PORT ELIZABETH	First Applicant
ACDC DYNAMICS (2024) (PTY) LTD	Second Applicant
and	
STANTON MARLON HUMAN	First Respondent
EP ELECTRICAL DISTRIBUTORS (PTY) LTD	Second Respondent

JUDGMENT

ROSSI AJ :

[1] In this urgent application, in which condonation is sought terms of uniform rule 6(12), the applicants seek relief directing the first respondent to comply with clauses

24 and 26 of his employment contract with the first applicant, which *inter alia* include the following:

(a) That the first respondent is not employed at any business that competes directly or indirectly with the applicants within a radius of 100km's from 14 West Street, Newton Park, Gqeberha, and/or within a 100km radius of the applicants' constituent companies within the Republic.

(b) That the first respondent is to not directly or indirectly solicit, entice and/or make any attempts to solicit and/or entice, be it for his benefit or for the benefit of others, any of the persons and/or entities that were the applicants' customers as at 30 August 2024. Those customers who purchased products and/or contracted with the applicants during the 12 months preceding 30 August 2024[1] and/or those prospective customers with whom the applicants have communicated within a period of 12 months preceding 30 August 2024 who had the intention of entering into a transaction with the applicants.

(c) The aforesaid shall include the customers appearing on the list annexed as 'RR7' to the founding affidavit.

(d) The aforesaid prayers shall operate as an interdict until 30 August 2025.

(e) That, in addition to the aforegoing, the first respondent is ordered to not directly or indirectly utilise any of the applicants' confidential information whether it be for his own benefit or the benefit of others.

(f) That the first respondent be ordered to pay the costs of the application including the costs of counsel on scale C.

[1] At the time of hearing this application the unexpired portion of the restraint is some 9 months.

[2] The application is opposed by the first respondent.[2] The question of urgency is disputed.

[3] From the outset I shall discuss the background facts which culminated in the present urgent proceedings.

(a) The first applicant[3] is a business that sells a wide array of electrical equipment and products, including, *inter alia*, alternative power products such as solar panels, batteries, and grommets, trunking, all types of cable ties, heat shrink products, insulation tape, cable markers, copper lugs, tools, tool bags, power tools and the like.

(b) The second respondent is a direct competitor of the first applicant and its branch is located 5.5 km's from the first applicant; an aspect to which I shall return.

(c) The first applicant's target market spans industrial, commercial, automotive, original equipment manufacturers and residential sectors.

(d) During September 2023 the first respondent commenced his employment with the first applicant. He was initially employed on a fixed term contract, but his position was made permanent on 1 July 2024 when he entered into an employment contract with the first applicant. It is this employment contract which the applicants seek to enforce.

(e) According to the employment contract the first respondent was employed as a Key Account Associate earning a basic monthly salary of R22 880.99, in addition to a vehicle allowance, fuel card and work issued

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[2] The second respondent has not entered the fray.

[3] The first applicant in its current form has been in business since 2017 but is part of a larger group of companies which have been conducting business of this nature since 1994. The second applicant is what the deponent refers to as the *'mother company'* of the group. The applicants share a chief executive officer and chief financial officer.

mobile phone and airtime. His total cost to company was R28 880.00 per month (gross).

(f) In terms of clause 5 of the employment contract under sub-heading *'job description'* an annexure 'A' which purports to set out the first respondent's duties and responsibilities are incorporated into the contract. Annexure A has not been attached to the papers. The deponent comprehensively details over a course of 26 subparagraphs these duties and responsibilities, which are not disputed by the first respondent subject to his qualification *'(T)he allegations in this paragraph are correct in so far as it was agreed at upfront when I commenced employment that my role in the employ of the [first] applicant would include the functions referred to in these paragraphs. Unfortunately, that did not occur and that is why I left the employ of [first applicant].'*

(g) I shall name a few of the stipulated duties and responsibilities: meeting monthly targets; update cost to company reports weekly; building a strong and sustainable relationship with existing and prospective customers; analysing the marketplace and designing a market strategy as well as analysing competitor activities and reporting to senior management; generating new leads and developing existing customers; communicating suggestions for improvement of processes; and quotation formulation and customer account maintenance.

(h) The deponent states further that the first respondent held a strategic role for the purpose of achieving and increasing revenue, which entailed that he held a key role in expanding the first applicant's overall market presence and business goals.

(i) This entailed that he worked closely with the first applicant's branch manager, Mr Bernard Heritage; a further aspect to which I shall return.

(j) Clauses 24 and 26 of the employment contract contain confidentiality and restraint provisions respectively and are replicated below:

‘24. CONFIDENTIALITY

24.1 During the period of employment of the employee and subsequent thereto, the employee shall keep confidential and shall not disclose any of the employee’s secrets or confidential information[4]…other than to persons authorised by the employer or those employed by the employer who are required to know such confidential information…

24.2 The employee acknowledges that whilst the employee is in the employer’s employ, the employee shall have access to employee’s price lists, customer lists, suppliers lists and various confidential documents and other information that is sufficient to safeguard.

…

24.6 The obligations in this clause shall survive the termination of this contract and the employee shall at no time thereafter disclose any such information until, that information has become public knowledge as a result of deliberate disclosure by the employer. The employee accepts the onus to demonstrate this.

…

26. RESTRAINT

26.1 The employee acknowledges that:

[4] Defined in clause 24.3 including subparagraphs 24.3.1 to 24.3.7 as *‘any and all information which is stated confidential, or imparted or received in confidence, or, by its nature, intended to be kept confidential, including particulars of the employer’s: customers or suppliers and arrangements made by them. Products and their application. Operating methods, operating processes, financial arrangements, marketing strategies and marketing techniques. Patents, trademarks, and trade secrets. Computer and information technology programs. Databases and the contents thereof. Inventions.’*

26.1.1. The following expressions bear the meanings assigned to them hereunder and cognate expressions bear corresponding meanings, namely:

26.1.2 "Prescribed goods and services" means the goods and/or services involving the business conducted by the company as at the date of signature hereto and within the restraint territory;

26.1.3 "Prescribed customers" means any persons.

26.1.4 Who is or was a customer of the company at the termination date, or:

26.1.5 Who was or is a prospective customer of the company at the employee's termination of employment date which customer or prospective customer has communicated with or approached the company within a period of 12 months preceding the employee's termination date with the intention of entering into or enquiring into any transaction with the company;

26.1.6 Who purchased/contracted for prescribed goods and services from the company within a period of 12 months preceding the termination date;

…

26.1.8 "Restraint Period" means the period during which the employee is employed by the company and a period of 12 (twelve) months from the termination date.

26.1.9 "Restraint Territory" means a 100km radius of each of the constituent companies in the Republic of South Africa where the company has business concerns, as well as or has an interest in a business.

26.1.10 "Termination date" means the date on which employee's engagement with the company ceases or is terminated for any reason whatsoever;

26.2 The employee acknowledges that:

26.2.1 In the course of the employee's duties, the employee will acquire considerable know-how and will learn the techniques of the company relating inter alia to marketing strategies, pricing, supplies and sales information;

26.2.2 in the course of the employee's engagement with the company, the employee will gain access to the names of the customers and suppliers with who the company does business whether embodied in written form or otherwise;

26.2.3 in the course of the employee's engagement with the company, the employee will have the opportunity of forging personal links with potential and other customers and/or suppliers of the company, as well as the specific contact persons working for customers and/or suppliers;

26.2.4 in the course of the employer's engagement with the company, the employee will generally have the opportunity of learning and acquiring trade secrets, business connections, organisational working, files, systems, financial information, production processes, methods of operation and other confidential information appertaining to the business of the company.

26.3 The employee acknowledges that the only effective and reasonable manner in which the rights of the company in respect of its business secrets, customer connection and supplier connection can be protected in terms of the restraints imposed upon the employee in terms of this clause.

26.4 The employee undertakes in any capacity whatsoever … directly or indirectly, [not to] take up employment with, contract or consult to, be associated or concerned with or interested or engaged in any restricted business or entity carrying on any restricted business in the restraint territory whether for reward or not.

…

26.7 The employee further agrees that the above clauses are valid and binding and that these restraints are fair and reasonable in all respects.

26.8 In addition, you acknowledge and agree that the business of the company is such that the matters referred to in these clauses are legitimate interests which require protection.'

(k) On 6 August 2024 the first respondent submitted a letter of resignation to Mr Bernard Heritage. His last day of employment was 30 August 2024. In the said letter he expressed his gratitude for the valuable experience and offered to assist in the transitioning process.

(l) According to the deponent, the first applicant came to learn of the first respondent's employment with the second respondent on or about 15 October 2024 when he was observed working at the second respondent's branch.

(m) After acquiring this knowledge, the first applicant addressed a letter to the first respondent on 18 October 2024. A response from the first respondent's attorney was received on 21 October 2024. Further correspondence ensued between attorneys on 22 and 23 October 2024. Ultimately the application was prepared, issued and served on the first respondent care of his attorneys on Monday, 28 October 2024.[5] The respondents were afforded an opportunity until close of business, Thursday, 31 October 2024 to file their notice of opposition and answering affidavit. A period of 3 calendar/court days. The aspect of urgency shall be addressed momentarily.

(n) When the first applicant gained knowledge of the first respondent's new employment, which forms an integral component of the grounds for urgency, is placed in dispute. What is said regarding the observation made on 15 October 2024 must be read in conjunction with a later paragraph which states that the first respondent 'informally conveyed to our branch manager, Mr Heritage, that <u>he was to leave our employ in favour of one of our customers</u>. He did not specify at the time who that might be. It was only <u>during the first week of September 2024 that Mr Heritage became aware that the first respondent was employed with the second respondent</u>. Mr Heritage did not convey this fact to either the applicants' human resources department, its CEO or me.'[6]

<u>Urgency</u>

[4] The contended grounds for urgency can be traced to a single paragraph in the founding affidavit. Essentially as the restraint is limited to 12 months, the longer the application takes to be adjudicated, the more it would negate enforcing the restraint. Furthermore, as applications of this nature are inherently urgent, a hearing in the ordinary course would not afford substantial redress to the applicants.

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[5] The application appears to have been received at 15:10 on 28 October 2024.
[6] My own emphasis is added.

[5] First respondent contends that the applicants have imposed arbitrary and grossly unreasonable time limits. If one accepts the more favourable timeline to the applicants,[7] they still took 13 calendar days to bring their application.[8] This still stands in stark contrast to the first respondent's 3 calendar/court days. Even if regard is had to the attorneys' engagement until 23 October 2024, this can only but illustrate that the applicants did not deem the matter as urgent as they now contend; a period of 8 calendar days were used for correspondence.

[6] It is unequivocal from the first letter received from the first respondent's attorney[9] that the enforcement of the restraint, and any threatened application would be opposed. These were not genuine settlement negotiations.[10] After receipt of this letter, the applicants took a further 8 calendar days to bring their application, which period similarly goes unexplained. This period must be weighed against the *dies* afforded to the respondents.

[7] But there is a further component in opposition to urgency. It is undisputed that on 6 August 2024 the first respondent informed Mr Heritage, a shareholder[11] and director[12] of the first applicant (and not merely a branch manager as alleged in the founding affidavit) of his intention to take up employment with a customer. On the applicants' version, Mr Heritage knew from the first week of September that this was the second respondent. To my mind the identity of the competitor is immaterial. It is not the applicants' case that it was because of the specific involvement of the second respondent that they decided to launch this application (as opposed to another competitor). It is their case that Mr Heritage did not convey this information to the CFO or CEO because his portfolio does not include the enforcement of restraints.

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[7] Gaining knowledge of the first respondent's employment on 15 October 2024.
[8] From 15 to 28 October 2024.
[9] Dated 21 October 2024.
[10] The present matter is thus distinguishable from *Blue Crest Holdings (Pty) Ltd* v Body Action Health Clubs [2020] ZAGPJHC 407 (14 December 2020) paras 14 to 15.
[11] In reply the applicants admit that Mr Heritage and his father are minority shareholders of the first applicant.
[12] A CIPC search attached to the founding affidavit marked 'RR1' confirms this to be accurate.

[8] The first respondent argues that the trigger moment was 6 August 2024, and not mid-October. Leaving aside that *Plascon-Evans*[13] favours the first respondent, it is difficult to accept that Mr Heritage, a shareholder and director, would not escalate the matter to the responsible personnel, if the consequences flowing from the breach were indeed as dire as the applicants contend. After all, he is director and shareholder of the first applicant. The applicants' retort of Mr Heritage's portfolio and corporate governance does not detract from the bottom line. Any loss suffered by the first applicant is tantamount to his own loss. Mr Heritage's generic affidavit in confirmation of the replying affidavit is of little assistance. The only comfortable conclusion to be drawn is that Mr Heritage did not consider it necessary to restrain the first respondent. This finding informs not only urgency but talks to the merits as well.

[9] A qualified concession is made in reply. The applicants contend that the highwater mark of the urgency objection is a delay of about a month[14] and that even if such a finding is made, it would still not disqualify an urgent hearing. The essential question being whether the applicants can be afforded substantial redress in due course. I disagree with their application of these principles.

[10] It is apposite to reiterate the cautionary words of Kroon J in *Caledon Street Restaurants CC v D'Aviera,*[15] which judgment was referred by Mr Friedman for the first respondent:

> *'In the assessment of the validity of a respondent's objection to the procedure adopted by the applicant the following principles are applicable. It is incumbent on the applicant to persuade the court that the non-compliance with the rules and the extent thereof were justified on the grounds of urgency. The intent of the rules is that a modification thereof by the applicant is permissible only in the respects and to the extent that is necessary in the circumstances. The applicant will have to demonstrate sufficient real loss or*

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[13] *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5. See also *National Director of Public of Prosecutions v Zuma* 2009 (2) SA 277 (SCA) par 26

[14] The computation of this one-month period is not clear.

[15] *Caledon Street Restaurants CC v D'Aviera* [1998] JOL 1832 (SE) at page 7.

damage were he to be compelled to rely solely or substantially on the normal procedure. The court is enjoined by rule 6(12) to dispose of an urgent matter by procedures "which shall as far as practicable be in terms of these rules". That obligation must of necessity be discharged by way of the exercise of a judicial discretion as to the attitude of the court concerning which deviations it will tolerate in a specific case. Practitioners must accordingly again be reminded that the phrase "which shall as far as practicable be in terms of these rules" must not be treated as pro non scriptio. The mere existence of some urgency cannot therefore necessarily justify an applicant not using Form 2(a) of the first schedule to the rules. If a deviation is to be permitted, the extent thereof will depend on the circumstances of the case. The principle remains operative even if what the applicant is seeking in the first instance, is merely a rule nisi without interim relief. A respondent is entitled to resist even the grant of such relief. The applicant, or more accurately, his legal advisors, must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is merited and must in all respects responsibly strike a balance between the duty to obey rule 6(5)(a) and the entitlement to deviate therefrom, bearing in mind that that entitlement and the extent thereof, are dependent upon, and are thus limited by, the urgency which prevails. The degree of relaxation of the rules should not be greater than the exigencies of the case demand (and it need hardly be added these exigencies must appear from the papers). On the practical level it will follow that there must be a marked degree of urgency before it is justifiable not to use Form 2(a). It may be that the time elements involved or other circumstances justify dispensing with all prior notice to the respondent. In such a case Form 2 will suffice. Subject to that exception it appears that all requirements of urgency can be met by using Form 2(a) with shortened time periods or by another adaptation of the Form, eg advanced nomination of a date for the hearing of the matter, or omitting notice to the registrar accompanied by changed wording where necessary. Adjustment, not abandonment, of Form 2(a) is the method.'[16]

[16] My own emphasis is added.

[11] Whilst there is no departure from Form 2(a) of the first schedule of the rules, the *ratio* above finds equal application not only to the context of such departure, but also in respect of the extent to which Form 2(a) is adapted to meet the specific demands of each case, for example, by truncation of the time periods set out in rules 6(5)(b), 6(5)(d), 6(5)(e) and 6(5)(f) and/or the nomination of an advanced date for hearing.[17]

[12] Or put differently by Lowe J in *Tekoa Engineers (Pty) Ltd v Alfred Nzo Municipality and others:*[18]

> '(T)here are degrees of urgency of course. An Applicant must set out explicitly the circumstances which render the matter urgent so as to justify the curtailment of the Rules, procedures and time periods adopted. That there will be a loss of substantial redress, if not heard on the basis chosen, must be shown.'

[13] In a matter such as this, having regard to the extremely truncated time periods imposed on the first respondent, one would have expected the circumstances rendering the matter urgent to this degree to have been explicitly dealt with against the background of the applicants' delays. The applicants have not done so.

[14] Urgency is dealt with in generic terms referencing the provisions of the employment contract and the expiry of the restraint period. In argument, Mr Steenkamp for the applicants submitted that matters such as these are inherently urgent.[19] Whilst I do not disagree, these factors are neutralised to some extent by the effluxion of time which the applicants have allowed to run prior to the launching of these proceedings. After all there are degrees of urgency. Having regard to the extent to which the applicants seek a relaxation of the rules, one would have

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[17] *Ascon Trading CC t/a Ascon Civil Engineering v Wilson & one other* [2023] ZAECQBHC 2 (17 January 2023) para 21.
[18] *Tekoa Engineers (Pty) Ltd v Alfred Nzo Municipality and others* [2022] ZAECMKHC 84 (22 October 2022) para 32.
[19] John Saner SC, Agreements in Restraint of Trade in South African Law, 15.25. See also *Boomerang Trade CC t/a Border Sheet Metals v Groenewald [*2012] JOL 29426 (ECG) para 36.

expected more, or a commensurate time to have been afforded to the first respondent. If they had done so, the opposition to urgency would be less persuasive. But they have not.

[15] An applicant cannot content itself to merely sit back and delay the assertion of his or her rights, and by doing so, create his or her own urgency. Such conduct does not amount to urgency justifying the determination of the matter in accordance with rule 6(12).[20]

[16] Accordingly, I am of the view that the degree to which the applicants seek to rely on urgency is unjustified and largely self-created. Furthermore, the procedures and time periods adopted by the applicants are unjustified and unsupported by the grounds in support of urgency.

[17] It is trite that in the event of a finding that the matter is not of sufficient urgency to warrant being entertained in accordance with rule 6(12), the appropriate order is generally to strike the matter from the roll without engaging on the merits.[21] I am however minded not follow the general principle and proceed to engage the merits, as this application suffers from further difficulties.

Legal principles applicable to restraints of trade

[18] The legal principles applicable to restraints of trade were summarised in *Magna Alloys and the Research (SA) (Pty) Ltd v Ellis***.**[22] A translation of these principles is gleaned from the insightful local decision of *Smart Office Connexion EC (Pty) Ltd v Van der Merwe and other*[23] per Ronaasen AJ which I quote hereunder:

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[20] *Lindeque and others v Hirsch and other, in re: Prepaid24 (Pty) Ltd* [2019] ZAGPJHC 122 (3 May 2019) and *Ascon Trading CC supra* at para 24.
[21] *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* 2006 (4) SA 292 (SCA).
[22] *Magna Alloys and the Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 897F-898E.
[23] *Smart Office Connexion EC (Pty) Ltd v Van der Merwe and other* (Case No. 847/2019), unreported judgment, Eastern Cape Division Port Elizabeth (as it then was), dated 7 May 2019.

‘15.1 there is nothing is our common law which states that a restraint of trade agreement is invalid or unenforceable;

15.2 it is a principle of our law that agreements which are contrary to the public interest are unenforceable. Accordingly, an agreement in restraint of trade is unenforceable if the circumstances are such, in the view of the court, as to render enforcement of the restraint prejudicial to the public interest;

15.3 it is in the public interest that agreements entered into freely should be honoured and that everyone should as far as possible to able to operate freely in the commercial and professional world;

15.4 the enforceability of a restraint should be determined by asking whether the enforcement will prejudice the public interest;

15.5 when someone alleges that he is not bound by a restraint to which he is a party in terms of a contract, he bears the onus of proving that enforcement would be contrary to the public interest.’

[19] This entails a balancing act which the court is required to undertake to determine the reasonableness or otherwise of the restraint. In *Basson v Chilwan and others*[24] the test was set out as follows:

(a) is there an interest of the one party which is deserving of protection at the termination of the agreement;

(b) is such interest being prejudiced by the other party;

(c) if so, does such interest weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive;

[24] *Basson v Chilwan and others (‘Basson’)* 1993 (3) SA 742 (A) at 797G-H.

(d) whether there is another facet of public policy, which has nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected.

[20] There are two accepted forms of proprietary interests capable of protection:

(a) The relationship with customers, potential customers, suppliers and others that make up what is described as trade or customer connections of the business, being a vital aspect of the incorporeal property known as goodwill; and

(b) All confidential matter which would be *useful* for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage, generally referred to as trade secrets.[25]

[21] According to the applicants' deponent, the protectable interests *'mostly consist of confidential information. I use this term in the wide sense of the word, which is, in fact, made up of several subcategories…There can be no doubt that the first respondent had access to the applicants' confidential information. It was, after all, recorded in the employment contract…'.*

[22] Essentially the confidential information comprises of the applicants' customer lists (which includes historical data, such as, products purchased by customers, customer contact details and addresses) and the ACDC main catalogue. The first respondent had access to this information in both hard copy and electronic format.

[23] The potential harm to the applicants if the restraint of trade is not enforced was explained as follows:

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[25] *Experian South Africa (Pty) Ltd v Haynes and another ('Experian')* 2013 (1) SA 135 (GSJ) para 17.

‘35. Being armed with this sort of information is unbelievably valuable. Most of our customers are repeat customers. Many of our customers are also large enterprises. To cold call these customers for business will likely not yield any success. If, however, one knows who to speak with and what that person’s contact details are, gives one a foot in the door, so to speak. It will allow the first respondent to know how much the customers have spent previously and how much customers are willing to spend in future.

36. What is further of significant value is the fact that, because the first respondent knows what products and services were purchased by the customers previously and what they paid for them, he is placed at an unfair advantage. Not only does he know what customers he should be contacting to solicit sales from (i.e. those who are most likely to be repeat customers), but he also knows, based on their historic purchases, what products they would most likely be interested in.

37. The risk for the applicants runs even deeper. The first respondent knows what sort of prices the first applicant would likely quote its customers and has insight into profit margins. This is invaluable information, for it allows the first respondent in his new endeavour to simply undercut the applicants’ prices. This does not make for a fair bidding process…

38 Armed with the aforesaid information, the first respondent will gain an unfair, and, indeed, unlawful advantage over the applicants.

39 …

40 The customer database aside, the first respondent was quite often the face of the first applicant when dealing with customers and reported directly to the first applicant’s branch manager. He, therefore, built up a significant rapport with the customers or at least maintained that rapport with the customers, which is a stand-alone protectable interest. We fear that the first respondent will use the customer rapport which he

has built up to induce the customers to the benefit of the second respondent.'

[24] The basis of the first respondent's opposition can be summarised as follows:

(a) Despite a lapse of 2 months from his resignation, the applicants do not aver the loss of a single customer or revenue transaction.

(b) Notwithstanding the impressive title of Key Account Associate, in reality he spent 90% of his time on the shop floor attending to walk-in customers at the retail outlet. He explains further '(F)rom time to time, I recognised a customer as somebody I had met in the past, a friend, or a friend of a friend, but certainly had no personal customer relationships with any person walking through the front door, other than as an acquaintance, or somebody I knew.' He has no personal relationships with any of the customers mentioned on annexure RR7.

(c) As such he denied that he had any customer/trade connections. Elsewhere in his affidavit, he explains:

'36.2 There were occasions that I attended on those customers [those cited in Annexure DD7], mostly as a cold call by way of delivery. Only on limited occasions did such orders emanate from such visits.

…

36.5 Other than to make deliveries to some of the customers listed and have some minor engagements, I have no personal relationship with the listed customers. Precisely for that reason, Bernard Heritage was not concerned that I was going to work for the second respondent when I advised him of my resignation.'

(d) During his employment with the first applicant, he had limited exposure to confidential information, which essentially comprises a customer list, but

that this confidential information cannot be used to benefit his current employer. He was not privy to discount structures. He explained:

> '38.1 It is so that historical data can be assessed as and when required. I did not have unfettered access to any of ACDC's historical data.
>
> 38.2 If a customer wanted an item and had previously purchased it, it was possible to access the system to find out what it was.
>
> 38.3 Other than to utilise the ACDC's system for the conduct of business in the ordinary course, I have never accessed the system for any other reason.
>
> 38.4 ACDC has a sophisticated back-up system and is able to monitor whatever transactions or queries are called up on its system.
>
> 38.5 Despite this, ACDC, other than to allege I had access to the system, do not and cannot make an allegation that I have ever used is electronic system for anything other than ordinary business. I deny any allegation or inference that I have accessed ACDC's confidential information.'

(e) Customers, whether account customers or walk-ins, were only concerned about price. Inevitably, they checked other suppliers for price and purchased at the cheapest price. There was no relationship. Price was the determining factor.

(f) Although he is a skilled electrical salesman,[26] understanding the business and its specific requirements, he does not have the means,

[26] Having worked in the industry for a number of years.

inclination, influence or power to lure customers away from the first applicant.

(g) The first applicant's catalogue and pricing structure are on its website and in the public domain.

(h) In addition to the second respondent, there are several other competitors within a 5km radius from the first applicant's branch, which is located in an industrial area.

[25] In *Rawlins and another v Caravantruck (Pty) Ltd*[27] the Appellate Division authoritatively set out the legal position where an employer contends a risk of harm to its trade connections and customers:

'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 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 the 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 contract" 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*

[27] *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (AD) at 541D-H.

apprentice), if competition were allowed, to take advantage of his employer's trade connection…"

This statement has been applied in our Courts (for example, by Eksteen J in Recycling Industries (Pty) Ltd v Mohammed and Another *1981 (3) SA 250 (E) at 256C-F). Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of the contract between him and the customers; where such contract takes place; what knowledge he gains of their requirements and business; the general nature of the relationship (including whether an attachment is formed between them, the extend 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, the type of product being sold; and whether there is evidence that customers were lost after the employee left…"*[28]

[26] In *Den Braven SA (Pty) Ltd v Pillay and another*[29] the following important qualification is made:

'In considering the facts of a particular case it must always be borne in mind that a protectable interest in the form of customer connections does not come into being simply because the former employee has contact with the employer's customers in the course of their work. 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 to the new business.'

[27] It suffices for the applicants to show that trade connections through customer contact exist and can be exploited by the former employee if employed by a

[28] My own emphasis.
[29] Den Braven SA (Pty) Ltd v Pillay and another ('Den Braven') 2008 (3) SA 229 (D) par 6 – my own emphasis added. See also Walter Mc Naugthan (Pty) Ltd v Schwartz and others 2004 (3) SA 381 (C) at 390D.

competitor.[30] The first respondent would then bear the onus on a balance of probabilities to prove that those connections do not exist, that he did not acquire any significant influence over the applicants' customers and therefore enforcement would be unreasonable.[31]

[28] The applicants contend that the onus rests on the first respondent to persuade the court that the restraint of trade provisions are unreasonable and that they ought not to be enforced. In this regard they rely on *Experian.*[32] In the applicants' heads of argument it is submitted that although the applicants 'bore no onus in this regard, they nonetheless comprehensively set out their protectable interest in its founding affidavit'.

[29] With respect, the applicants have reversed the sequence and the role that it plays in the onus. The applicants have missed the qualification set out in *Den Braven*, which evidently is endorsed in *Experian*.[33] It is for the applicants to establish that the customer/trade connections are such that the former employee can induce them into following him.[34] It is only once this has been met, that we enter the second level of the enquiry.[35]

[30] Once the applicants establish a commercial interest deserving of protection at the termination of the agreement, the onus then shifts to the second respondent. But as I see it, we are not there yet.

Application of the legal principles to the facts

[31] The starting point is the acceptance that the applicants have a large customer base; the second respondent is a direct competitor, competing in the same market; first respondent is a skilled salesman with experience in the field; and had access to

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[30] Den Braven supra par 17.
[31] Basson supra at 776H-777B.
[32] *Experian supra* par 20.
[33] *Ibid.*
[34] *Den Braven supra* par 17 and 19.
[35] *Basson supra* at 776H-777B.

the first applicant's confidential information (although not to the extent suggested by the applicants).[36]

[32] It is incumbent on the applicants to show that they have trade connections through customer contact that can be exploited by the first respondent and further that the connection must be such that it will probably enable the first respondent to induce the customers to follow him.[37]

[33] An analysis of the founding affidavit demonstrates several shortcomings:

(a) There is a paucity as to the frequency and duration of contact between the first respondent and the applicants' customers.

(b) Nor are the locations where such contact primarily took place detailed.

(c) Although there are allegations that the first respondent was aware of the requirements of the applicants' customers by reason of his access to the customer lists and data base (the confidential information), there are no allegations as to whether an attachment was formed between the first respondent and any particular customer or the extent to which the customers relied on the first respondent and how personal his association with the customers were.

(d) There is a lack of evidence as to how many sales the first respondent made and to how many customers.

(e) There is a lack of evidence as to whether the first respondent could induce the applicants' customers to follow him, other than a generic

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[36] Although not on affidavit in the first respondent's attorney's letter it is said that *'(P)rior to commencing employment with yourselves, he was employed by ABB for 6 years and prior thereto, by CBI for 11 years.* These aforesaid positions were all in electrical sales. It is apposite to record that it [is] doubtful [that] there is any potential customer of note in the area of restraint that my client has not had dealings with in the past 17 years. That is why he was employed by yourselves' – annexure "RR12" to the founding affidavit.

[37] *Den Braven supra* par 6, 17 and 19 and *Experian supra* par 47.

allegation that first respondent had *'built up a significant rapport with the customers'.* Furthermore, the allegation that *'he is a person of significant influence over the customers'* stands in contrast to his rather modest salary.[38]

(f) There is no evidence that customers or revenue were lost due to the first respondent's departure from the first applicant's business.

(g) There is no evidence as to how competitive the rival businesses are in the industry.

[34] One cannot simply divorce the aspect of trade connections from the confidential information. The two are interlinked. The confidential information is of no use in the hands of the former employee if he does not have the trade connections to accompany it.[39] The founding affidavit fails to provide sufficient facts to establish a protectable interest in the form of trade connections or the risk of disclosure of confidential information. The facts must justify the legal conclusion sought to be drawn. After all, *Rawlins* tells us that it is essentially a question of fact in each case, and in many, one of degree.[40] As I read *Smart Office Connection*[41] that is similarly the basis upon which Ronaasen AJ approached the matter.

[35] In argument, the applicants sought to rely on an unreported decision concerning the second applicant where the restraint of trade was enforced.[42] To my mind the case is distinguishable in several respects. The former employee, who had been in the employ of the second respondent for almost 5 years, had held senior positions, such as, sales specialist, category manager and national product manager. He was involved in the preparation of the company's catalogue of products

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[38] Which does not include a commission structure.
[39] After all confidential matter must be useful for the carrying on of a business and which could therefore be used by a competitor, if disclosed to him, to gain a competitive advantage – *Micros SA and Others v Kleynhans and Others* [2023] ZAGPPHC (01 September 2023) par 17. See also *Aranda Textile Mills (Pty) Ltd v Hurn and Another* [2000] 3 All SA 183 (E) par 30.3.
[40] *Rawlins supra* 541D-H
[41] *Smart Office Connexion EC (Pty) Ltd v Van der Merwe and other* (Case No. 847/2019), unreported judgment, Eastern Cape Division Port Elizabeth (as it then was), dated 7 May 2019.
[42] *ACDC Dynamics (2024) (Pty) Ltd v Van Staden* (Case No. 2024/077866), unreported judgment, South Gauteng Division dated 21 August 2024.

and was responsible for the entire product offering of the second respondent. He had also tried to divert an established customer away from his former employer. It was not the former employee's case that he did not have connections.

[36] Accordingly, I am not satisfied that the applicants have established that the first respondent has built up a particular relationship with any of the customers which would enable him to easily induce them to follow him to the second respondent nor that there is a risk of disclosure of confidential information.[43] The first respondent has discharged his onus. In the circumstances enforcement as sought by the applicants would indeed be unreasonable. The application thus fails.

[37] Regarding the issue of costs, I see no reason to depart from the ordinary rule that costs should follow the result. I am not of the view that a punitive cost order is unwarranted and in accordance with Mr Friedman's suggestion shall award costs on scale B.

[38] I accordingly issue the following order:

1. The application is dismissed with costs on scale B.

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T ROSSI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicants:	Mr JS Steenkamp Applicants' counsel Instructed by: Thotharam Attorneys

[43] For this reason, a determination on whether there are disputes of fact is unnecessary.

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