THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no. J 2096 / 19

Case no. J 2037 / 19

In the matter between:

AJ CHARNAUD & COMPANY (PTY) LTD	**Applicant**
and	
RUBEN VAN DER MERWE	**First Respondent**
REINHARDT VERMAAK	**Second Respondent**
CORNE VERMAAK	**Third Respondent**
ANDRE DE WET	**Fourth Respondent**
JOOSTE POTGIETER	**Fifth Respondent**
DROMEX CC	**Sixth Respondent**

Heard: **5 December 2019**

Delivered: **7 January 2020**

Summary: **Restraint of trade – restraint provisions considered – determination as to what constitutes restraint provisions in restraint agreements – restraint not prohibiting employment with competitor *per se* – no**

protection of trade connections – breach of restraint provisions not shown to exist

Restraint of trade – onus on applicant to prove breach of the contractual terms giving rise to restraint – breach of contract not proven – if breach not proven not necessary to consider whether enforcement of restraint reasonable

Determination of factual dispute – application of *Plascon Evans* principle – applicant has proper onus to prove existence of restraint agreement and breach of such agreement – factual dispute and undertaking by respondents destructive of applicant's case

Urgency – principles relating to urgency in restraint applications considered – urgency shown – application to be considered as one of urgency

Restraint application – applicant failing to prove conclusion of restraint agreement and breach of the restraint – application dismissed with costs

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JUDGMENT

SNYMAN, AJ

Introduction

[1] Out of the hundreds of standard urgent restraint of trade enforcement applications that come before this Court every year, this matter, I must confess, is somewhat different. The reason why it is different because in this case, unlike most restraints, the very contractual provisions giving rise to the restraint obligations, are in dispute. In most cases, when a restraint enforcement application comes before Court, the parties are *ad idem* that the former employee has acted in contravention of the restraint of trade covenant as defined and set out in the employment (restraint) contract, and the only issue for determination is whether the enforcement of such restraint would be reasonable. However, and where the parties are not on common ground in this regard, determining whether the contract had been breached in the first place

is not the same enquiry as determining whether the enforcement of a restraint of trade is reasonable. This issue will be dealt with in this judgment, below.

[2] In the current application, the applicant has sought to enforce restraint of trade agreements against the first to fifth respondents, in the form of an interdict prohibiting these respondents from utilizing the confidential information of the applicant, and in particular, from being employed with the sixth respondent in this context. The applicant seeks final relief in this regard. The sixth respondent has been joined in the application, at its own request, on the basis of having an interest in the matter, and due to the fact that it currently employs the first to fifth respondents. The respondents have opposed the application.

[3] The matter first came before me on 29 November 2019, where a number of preliminary issues were dealt with. The applicant had brought two separate applications for ultimate final relief. The application against the first and second respondents was brought under case number J 2037 / 19, and the application against the third to fifth respondents under case number J 2096 / 19. Both these applications were then consolidated into one matter, and it was requested that the matter be disposed of on such basis. Also, the sixth respondent sought to intervene as an interested party in the proceedings, as certain allegations were made about its conduct and its motives, by the applicant. This application for intervention (joinder) was opposed by the applicant, and after hearing argument by the parties, I made an order granting the sixth respondent leave to intervene as a party to the proceedings, and directed that the founding affidavit in its joinder application serve as its answering affidavit in the applicant's main application. The current third, fourth and fifth respondents also sought leave to submit a further affidavit, following the filing of the applicant's consolidated replying affidavit, and I granted such leave. Finally, I gave the applicant leave to file a replying affidavit to the sixth respondent's answering affidavit, which it did. The application was then postponed to an agreed hearing date of 5 December 2019, for argument on the merits.

[4] After hearing argument from all parties on 5 December 2019, I reserved judgment. What follows is my judgment in this application.

[5] Where is comes to urgency, this was in reality not in issue when this matter was argued. Very little was said in the course of argument by the parties as to the urgency of the matter. In particular, all the parties appeared to be *ad idem* that it was in the interest of all the parties that this matter be finally disposed of with expedition, so all the parties know where they stand. Overall considered, I am satisfied that the applicant met all the requirements of urgency in this matter.[1] The applicant became aware of what it considered to be a breach of the first to fifth respondents' restraint undertakings in separate restraint agreements concluded by them, at various point in time in the course of October 2019. What followed was initial letters of demand sent to the various respondents and when this did achieve the result the applicant wanted, the two applications followed. This course of action is appropriate, as it is advisable that parties first try and find an alternative way to secure compliance with the restraint, before resorting to litigation.[2] Considering the nature of the relief sought, and the purpose sought to be achieved by the enforcement of a restraint of trade, there is also no other form of substantial redress in due course.[3] Applications to enforce restraints of trade also carry with them an inherent quality of urgency.[4]

[6] Further, 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.[5] I will now to deciding whether the applicant has satisfied these requirements, by first setting out the relevant background facts.

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[1] For the requirements of urgency see *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* (2016) 37 ILJ 2840 (LC) at paras 20 – 26, and in particular where it comes to restraint of trade applications *Vumatel (Pty) Ltd v Majra and Others* (2018) 39 ILJ 2771 (LC) at paras 4 – 5; *Ecolab (Pty) Ltd v Thoabala and Another* (2017) 38 ILJ 2741 (LC) at para 20.

[2] In *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 21 it was said that: *'… 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. …'*

[3] See *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

[4] See *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* (2009) 30 ILJ 1750 (C) at 1761; *Vumatel* (*supra*) at para 4.

[5] *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. In particular, and where it comes to restraint applications, see *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another* (2011) 32 ILJ 601 (LC) at para 38 – 40; *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 26; *Experian SA (Pty) Ltd v Haynes and Another* (2013) 34 ILJ 529 (GSJ) at para 59; *Jonsson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC) at para 54; *FMW Admin Services CC v Stander and Others* (2015) 36 ILJ 1051 (LC) at para 1.

The factual matrix

[7] Because the applicant is seeking final relief in motion proceedings, any factual dispute must be resolved in line with the normal principles established in *Plascon Evans Paints v Van Riebeeck Paints*[6]. In summary, these principles entail that the facts as stated by the respondent together with the admitted facts or facts in the applicant's founding affidavit that are not denied, constitute the factual basis for making a determination, unless the dispute of fact is not real or genuine or the denials in the respondent's version are bald or not creditworthy, 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.[7] Admitted facts include facts that, though not formally admitted, simply cannot be denied.[8] The factual matrix set out below is arrived at applying these considerations.

[8] For ease of reference in this judgment, I will refer to the first respondent as 'Van Der Merwe', the second respondent as 'Reinhardt', the third respondent as 'Corne', the fourth respondent as 'De Wet', and the fifth respondent as 'Potgieter'. Reference to the first to fifth respondents collectively will be made by referring to them as 'the individual respondents'.

[9] The applicant manufactures and distributes personal protective clothing and safety equipment. The applicant offers eight what is called 'head to foot' protective clothing ranges, and its customer base includes international and local customers. The applicant has two main local competitors, being BBF Safety Group (Pty) Ltd, and the sixth respondent ('Dromex').

[10] Van Der Merwe commenced employment with the applicant on 1 September 2017, Reinhardt on 14 November 2016, Corne on 2 July 2018, De Wet on 1 February 2016, and Potgieter on 12 September 2011.

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[6] 1984 (3) SA 623 (A) at 634E-635C.
[7] See *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; *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another* 2009 (3) SA 187 (W) para 19; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) para 38; *SA Football Association v Mangope* (2013) 34 *ILJ* 311 (LAC) at para 12.
[8] *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another* (2016) 37 ILJ 902 (LAC) at para 16.

[11] All the individual respondents, save for one of them, signed written contracts of employment. In terms of clause 13 of these contracts of employment, it was required that the individual respondents sign a separate restraint of trade and confidentiality agreement (hereinafter referred to as the 'restraint agreement').

[12] Potgieter disputed that he ever concluded a restraint agreement with the applicant. It is undisputed that the applicant was unable to produce such a signed document. The applicant however contended that it is 'standard practice' that all employees must sign such a restraint agreement and Potgieter 'would have' signed the same when he commenced employment. As to all of the other individual respondents, the applicant did produce signed restraint agreements, which were all identical in form and content. Van der Merwe signed his restraint agreement on 12 September 2016, Reinhardt on 14 November 2016, Corne on 12 July 2018, and de Wet on 14 December 2015.

[13] The restraint agreement defined '*confidential information*' as: '*Subject to clause 5, shall mean all data, drawings, documentation, technical specifications, formulae and formulations, processes, trade secrets, know how, accounts, computer readable data (including but not limited to any software or program) and all information in whatever form, tangible or intangible, pertaining to the Business …*'. In terms of clause 3.1 thereof, any information received by the employee in confidence shall be deemed to be confidential information, unless it is excluded in terms of clause 5. Clause 4 contains an obligation to keep all confidential information confidential, and not to use or disclose any such information. Clause 5 provides that excluded from confidential information shall be information that is available to the general public or part of the public domain, information that the employee is required to disclose pursuant to a legal obligation, information already in possession of the employee prior to conclusion of the restraint agreement, or information where it is indicated by the employer that the information is free of restriction.

[14] Of importance in the current application is clause 7 of the restraint agreement. It is the clause that deals with restriction on other employment. Considering

the issues raised by the respondents, it is important to specifically quote the relevant parts thereof. Clause 7.1 reads:

> 'The Employee shall not, during the course of any other full or part time employment, whether during the currency of this agreement or subsequent to its termination for whatever reason, use the Confidential information in the conduct of that employment.'

Next, clause 7.2 provides:

> 'For a period of one year after the term (sic) of the Employee's employment with AJC, the employee shall not accept employment with any third party if that employment is reasonably likely to require the Employee to make use of any part of the Confidential information.'

[15] Clause 7.3 applies where the employee assists in the formation of or acquiring all or part of a business that was reasonably likely to compete with the business of the applicant. This was not the case of the applicant in this matter, and this clause thus would not apply. In any event, Dromex was an established and competitor to the applicant, and the respondents were only employed by it as employees and where not shareholders.

[16] All of the individual respondents were employed in the applicant's sales department. Potgieter was the sales manager, and the other individual respondents were all sales representatives. As sales manager, Potgieter managed a total of seven sales consultants, which included the other individual respondents.

[17] Each sales representative was responsible to sell the applicant's protective clothing products in a particular allocated area / region of South Africa allocated to such sales representative. Their duties included the establishment, development and maintenance of relationships with customers, calling on customers, generating new business, attending to customer queries, and preparing and submitting sales reports. The sales reports were not in the form of detailed reports, but done by logging sales activity on the applicant's Sales Force system, to which everyone in the applicant had access. It is

reports pulled from this system that is submitted to the applicant's senior management.

[18] Considering that all the individual respondents in this case were responsible for all aspects of the sales of the applicant's product, I will accept that they had access to at least some confidential information relating to the applicant's customer base and particulars, pricing, and customer requirements. This would obviously include customer lists and customer spending / order patterns. However, the restraint agreement did not contain an obligation prohibiting the exploitation of trade connections by employees upon leaving the employment of the applicant.

[19] According to the individual respondents, they as sales representatives spent the bulk of their time 'on the road' calling on customers in their respective regions, promoting the sales of the applicant's products. Van der Merwe and Reinhardt stated that they spent '99%' of their time selling the electric and flash protective wear range, and the sales activity included 'sizing' the employees of customers to ensure that the products ordered were of the correct size.

[20] The sales representatives were not involved in the preparing and submission of tenders. This was the responsibility of another employee (Cindy Du Plessis) based at the Johannesburg office of the applicant. The sales representatives also did not develop any marketing materials.

[21] Importantly, the sales representatives did not prepare quotes for customers. They only obtained information on what the customer needed to order, and these requirements were then passed on to the applicant's own internal sales department, who would then prepare the quote and send it directly to the customer. Once the quote was accepted, it would mostly be passed on directly the applicant's factory in Ladysmith, without even being sent to the internal sales department. The sales representatives were not involved in determining or negotiating prices or discounts. Potgieter was however in the position to determine discounts, but this had to be approved by senior management. The sales representatives however did have access to internal price lists, so as to give customers an indication of the possible cost of the order. But these price

lists changed annually. The individual respondents further stated that these general price lists are in any event not secret, but readily available in the market place, and the sales representatives had no knowledge of special pricing arranged with individual customers.

[22] The individual respondents were not involved in the design, development, or manufacture of the applicant's products in any way. The fabric used by the applicant is in any event not manufactured by the applicant, but purchased from the same suppliers overseas, as where other competitors purchase their fabrics. The technical specifications of the applicant's products are published on its web site. The sales representatives also do not have access to any other kind of technical information or specifications relating to the applicant's product or business.

[23] According to Van der Merwe and Reinhardt, their relationship with the applicant started breaking down on November 2018, when they were short paid the actual commission that was due to them. Potgieter and de Wet also complained about short payment of commission in November 2018. There was no reason for any of these short payments, and they were never consulted by the applicant on it. In December 2018, there were unilateral deductions made from the salaries of Van der Merwe, Rienhardt and Potgieter, purportedly for overpaid commissions and 'unpaid leave', again without cause or reason, and without them being consulted. All queries brought to the applicant to explain all of these issues went unanswered. Even the assistance of Potgieter as sales manager to try and resolve this, proved fruitless. Corne's complaint was that he was appointed on a small basic salary for six months, after which he was supposed to have earned commission. He was however never put on a commission structure. Despite attempts at resolving this issue for more than a year, it was never resolved. The answering affidavits also referred to other abusive conduct of the directors of the applicant towards sales representatives in sales meetings and in interactions with them, which according to them rendered working conditions intolerable.

[24] As a result of all the difficulties experienced by them, the individual respondents lodged a grievance. In this grievance, complaints were raised about unlawful deductions, the changing of account codes on the system to

house accounts so the consultants do not earn commission, and that the consultants were no longer receiving back order reports so they could monitor commissions due to them, which were only paid upon completion of orders. The applicant refused to engage with them about the grievance, prompting a referral of a dispute to the Commission for Conciliation, Mediation and Arbitration ('CCMA') on 19 August 2019.

[25] Potgieter was dismissed on 22 August 2019. According to the applicant, he was dismissed for 'moonlighting' for his wife's transport business (Bluefin Transporters) during his hours of employment at the applicant and using the applicant's resources. According to Potgieter, however, he was dismissed without cause or reason, or any prior process, because he was seen to have instigated the grievance and being some kind of trouble maker. The applicant in fact specifically said on reply that Potgieter 'orchestrated' this grievance. The individual respondents viewed the dismissal of Potgieter as devastating. They looked up to him, and believed that he was the only one capable of protecting their interests. It is at this point that they decided to leave the employ of the applicant, but this did not take place as a unitary or concerted exercise.

[26] It does appear from the evidence that after referring the dispute to the CCMA, the applicant did engage with the sales representatives, and some of the difficulties raised were resolved. Most of the sales representatives in fact withdrew the grievance, even though everything was not resolved. It however seemed that the resentment remained.

[27] Van Der Merwe resigned on 1 October 2019, indicating that he did so with a heavy heart, but he had to stand up for what was right and what was wrong. He was referring to the unresolved disputes referred to above. He accepted, only after resigning, an offer of employment made to him by Dromex, on 4 October 2019. Corne and De Wet also resigned on 1 October 2019, and were offered and took up employment with Dromex on 1 and 4 October 2019 respectively.

[28] According to Reinhardt, he was 'utterly disillusioned' with the applicant and resigned on 12 September 2019, stating in his resignation that he did not know what his future held for him in the applicant, that his loyalty had been

tested, and his relationship with the applicant could not be recovered. He met with the applicant's directors on 25 and 26 September 2019, where he explained all his difficulties, and they tried to convince him not to resign, undertaking to resolve these difficulties. He considered their proposals, but in the end decided not to retract his resignation. When Reinhardt resigned, he had no alternative employment, and was offered and accepted employment with Dromex only on 4 October 2019.

[29] As touched on above, it was undisputed that all the individual respondents ultimately became employed by Dromex in the course of October 2019. The applicant suggested that this was part of some grand conspiracy, in which Dromex and all the individual respondents with Potgieter as their leader, conspired to in essence hijack part of the business of the applicant for Dromex.

[30] This allegation of a conspiracy is founded on a recent decision of Dromex to actively enter the market with a range of protective clothing, protecting the wearer against electrical arcs. According to the applicant, this mirrored the applicant's 'Arc range'. The applicant stated that Dromex became active in selling these garments into the market place some three to four months prior to the individual respondents becoming employed by it. According to the applicant, it thus had to be more than pure coincidence that such a significant part of the applicant's sales force would go across to Dromex at more or less the same time, and when Dromex was seeking to expand its interest into this market. The applicant also made much of the fact that Potgieter was responsible for employing all the other individual respondents, that they had some or other loyalty towards him, and that this loyalty was used to harm the applicant by taking away the bulk of its sales force.

[31] All the respondents disputed the existence of such a conspiracy. Potgieter was dismissed, on the applicant's own version, for misconduct which had nothing to do with advantaging a competitor. The other sales representatives explained that they resigned because of payment disputes, and intolerable working conditions. Most of the individual respondents resigned without even having been offered employment by Dromex. Reinhardt resigned before Potgieter was even offered employment by Dromex.

[32] In turn, Dromex has explained that it developed and went to market with its own Arc protection products long before the individual respondents became employed by it, being about three years earlier. Interestingly, it presented photographs where it exhibited virtually identical products in a stand right next to the stand of the applicant, at an AOSH exhibition in May 2019. Dromex has always had its own design, standards and certification department, managed by an employee with 17 years' experience in the industry, and in the course of 2017 designed and tested its own Arc protection products for itself. It only entered the market with this product when it satisfied itself that it was up to standard. As to customers, Dromex had its own established customers list, several of which it in fact shared with the applicant.

[33] Dromex came to hear about the dismissal of Potgieter on 24 August 2019, when it was informed of this by one of its existing customers. The customer indicated that Potgieter was a 'good ambassador' for Arc if Dromex was interested to employ him. It was then that Dromex came into contact with Potgieter, who was still unemployed at the time. Potgieter then mentioned to Dromex that the other individual respondents were unhappy in their employment at the applicant and intended resigning. Potgieter also informed Dromex that he did not have a restraint, but he was aware that the other individual respondents (save for Corne who he could not recall having signed one) did have restraints.

[34] Potgieter and Corne were only offered employment by Dromex on 1 October 2019. It then considered the restraint agreements of the other individual respondents, and because the restraint provision only prohibited employment if they were likely to use confidential information, it decided to employ them as well, but only after first taking legal advice on the matter. The reason given for the decision to employ them was that Dromex had no interest in any of the confidential information of the applicant, and thus it was satisfied that their employment was not prohibited if each of these employees signed a warranty not to use confidential information and Dromex did not utilise any of the information of the applicant (which it was in any event not interested in). The other individual respondents were then offered employment on 4 October 2019.

[35] All the individual respondents, even including Potgieter and Corne who disputed they were subject to a restraint, gave warranties that they would not utilize the applicant's confidential information, and this was provided to the applicant. This was done at the insistence of Dromex, who also instructed them not to utilize any confidential information of the applicant they may have.

[36] The applicant made much in its affidavits about the individual respondents sending what it considered to be confidential information to their private e-mail addresses or e-mail addresses of spouses. On 3 October 2019, the applicant accessed the work e-mail accounts of the individual respondents. According to the applicant, what it found proved that the individual respondents breached their confidentiality undertakings by sending customer lists, product pricing, product specifications and sales reports, and other forms of confidential technical specifications to these e-mail addresses, and then also deleting content from their work e-mail accounts. In summary, the particulars in this regard as alleged by the applicant are as follows:

36.1 On 19 February 2019, Van Der Merwe sent two e-mails to his private gmail address attaching images, fabric designs, styles, colours, weight and thickness of garments for a customer, Tshwane Municipality. According to the applicant, this information is relevant to the submissions of tenders. On 6 November 2017, he sent the Tshwane tender documents to his wife's e-mail address. On 16 May 2018, he sent SANS 724 Survive Arc documents to his wife's e-mail address, which document relates to the national standards for personal protective equipment. There were also two further e-mails sent to his wife's e-mail address on 12 March and 16 May 2018 respectively, attaching a new customer list and price list. On 26 October 2017 he sent the 'Black Ginger' quotation to his wife's email address. And finally, on 2 October 2019, he sent to his wife's e-mail address a list containing the details of the applicant's customers.

36.2 Reinhardt forwarded two items to his personal e-mail address on 2 and 3 October 2019 respectively. The one item related to information concerning the Fabric Systems A and B of the applicant used in arc

protective clothing, dating back to November 2017, whilst the other document was a back order and invoicing schedule dating back to January, March and April 2018.

36.3 Potgieter sent an e-mail to Reinhardt's personal e-mail, prior to him even commencing employment with the applicant, containing fabric particulars and a customer list, on 4 November 2016. On 16 January 2019, he sent a number of documents to his wife's e-mail address. This included a customer list, a new product development request from a customer (Sasol), prices quoted by the applicant to resellers who were in turn quoting Eskom for protective clothing, and market research done by the applicant for specific provinces. On 25 January 2019, he sent an email to his wife's email address containing information about a customer, Select PPE. He sent an e-mail to De Wet on 28 January 2019 containing the invoicing and back order reports for another sales representative, Ria Louw.

[37] Van der Merwe provided explanations for the emails he sent to his wife's personal email address. He explained that the email of 2 October 2019 was sent as being part of the evidence he needed to pursue his claims for salaries due and deductions made, which was still not resolved. As to the other emails, these dated back more than a year earlier, and were sent so that his wife could print the documents for him to use in the normal execution of his duties, and in particular, meetings with customers. He did so because he spent most of his time on the road seeing customers and did not always have time to go to the office to do the printing, so he simply did it at home. He also provided a comprehensive explanation why a substantial part of this information was in any event not confidential. Lastly, he said that he only deleted his private emails.

[38] Reinhardt explained that when he accessed his emails after he had decided not to retract his resignation, he found that his email account had been accessed by someone else and in particular, the applicant had deleted all the information he had therein about back orders that had been placed prior to December 2018, being the period relating to his commission and deduction dispute, which had still not been resolved. He needed the back order

document as part of his proof in claiming back the deduction, and that is why he sent the back order document he still had to his personal email on 2 October 2019. He explained that the Fabric Systems document sent on 3 October 2019 to his private email address was sent in error, and information relating to these fabrics in any event belong to suppliers and not the applicant. The emails he did delete were of a personal nature.

[39] Potgieter explained that he sent the information contained in the email of 4 November 2016 to Corne, before he actually started working, so as to better prepare him even before he started working. He also said that he sent some information to himself as evidence for his own unpaid commission and unlawful deduction claim, as well as to support the grievance brought against the applicant to the CCMA. Other documents were sent to his wife for the purposes of printing it out, as part of his preparation for his 2019 sales strategy. He explained that the information he shared with other sales representatives was a normal part of the duties of a sales manager providing information to sales representatives. Potgieter also added that a lot of this information was simply outdated, of little use to a third party, and in fact not confidential at all, giving proper explanations for these contentions. Lastly, Potgieter indicated that it was practice for sales representatives to keep a hard copy of a list of all the customers in their region, to ensure that they did all their visits.

[40] Van der Merwe and Reinhardt explained that when they accepted employment at Dromex, it was made clear to them that Dromex had no interest in any confidential information of the applicant they may have had. They were in fact required by Dromex to sign a warranty that they would not make use of such confidential information. These warranties were given and also provided to the applicant, before it launched litigation.

[41] According to the applicant, the individual respondents received extensive sales and product training. The individual respondents dispute this, contending that they received limited product training and very little general sales training. They earned commission only and were left very much up to their own devices in discharging their duties of selling products to customers in their respective areas.

[42] In the end, and in response to various letters of demand emanating from the applicant's attorneys, the individual respondents disputed that they were acting in breach of the restraint agreements, and indicated that they would be willing to provide undertakings that they would not in any manner utilize any confidential information they had access to whilst employed at the applicant, but were not willing to leave the employment of Dromex. The applicant was unwilling to accept this state of affairs, leading to the current litigation.

Analysis

[43] I will first deal with the dispute of fact concerning the issue as to whether Potgieter in fact signed a restraint agreement. As said, no signed document could be produced by the applicant. According to the applicant, the denial by Potgieter that he signed such an agreement was far-fetched to the extent that it can be rejected, for a number of reasons. The first is that Claude Langman ('Langman'), the HR manager at the applicant at the time and who had since left, confirmed in correspondence to the applicant that Potgieter signed such an agreement. The second is that it was 'standard practice' that all employees had to sign such an agreement. The third is that because Potgieter was senior, and he signed the restraint agreements of other employees on behalf of the applicant, he must have signed one himself. Finally, the fact that a restraint agreement was contemplated is evidenced by the applicant's rules requiring that employees must sign a restraint agreement. According to the applicant, Potgieter had access to his personnel file and therefore he must have removed the signed restraint agreement.

[44] Potgieter candidly stated that he could not recall exactly what he signed when he commenced employment. He stated that he did recall receiving a contract of employment. He however disputed that he signed a restraint agreement and that one signed by him even existed. He added that if he signed the same, it is inconceivable that the original and all copies would be lost. Potgieter also pointed out that there was an anomaly in the letter by Langman confirming that he signed a restraint agreement, in that he appeared to consider the employment contract and restraint agreement as one and the same document, when it was actually separate documents. He specifically disputed that he

removed the restraint agreement from his personnel file, calling the allegation 'untrue and opportunistic' and without any factual basis. Finally, he stated that he in any event did not have access to his personnel file.

[45] There accordingly exists a material and directly contradictory dispute of fact. This being so, the insurmountable difficulty the applicant has is that the basis of denial by Potgieter, in the absence of a signed document, is not so unlikely or far-fetched that it can be rejected on the papers. The situation is exacerbated by the fact that Langman did not depose to a confirmatory affidavit, despite the applicant indicating in the founding affidavit that it would be provided. In fact, and in the consolidated replying affidavit, the applicant had to concede that Langman actually refused to sign a confirmatory affidavit. All that the applicant could then produce was a confirmatory affidavit by Fiona Charnaud, one of the applicant's directors and shareholders, who purportedly had a telephone discussion with Langman in which he told her that Potgieter signed a restraint, which is not only hearsay, but entirely insufficient as establishing any kind of proper proof of this allegation.

[46] As to what possibly could have happened to the signed restraint agreement of Potgieter, if it existed, the applicant's explanation that Potgieter had access to his personnel file, and thus must have removed the signed restraint agreement, and is nothing but pure speculation and without any factual basis. It falls far short of establishing any kind of legitimate basis to contradict Potgieter's denial in this regard.

[47] In my view, nothing that the applicant has put up is sufficiently convincing to contradict the denial by Potgieter that he ever signed a restraint agreement, with the applicant being unable to produce such a signed document. It is just as probable, for example, that the applicant omitted to have Potgeieter sign a restraint agreement. There is no proper evidence of any kind, with only pure speculation, that Potgieter removed his signed restraint agreement.

[48] The current matter has many similarities with the judgment in *TIBMS (Pty) Ltd t/a Halo Underground Lighting Systems v Knight and Another*[9]. In *TIBMS*, the issue similarly was that the employee disputed having signed a restraint of

[9] (2017) 38 ILJ 2721 (LAC).

trade where such a signed document could not be produced, and the employer contended, based on a number of factual considerations, that this denial should be rejected. The facts involved the employee being part of a plot to create a new competing business, which would market and sell a competing product using the employee's intimate knowledge of customers' needs. The Court called this *'… the most egregious actions calculated to sabotage Halo's business…*'[10]. According to the employer party, the missing signed restraint was explained as follows:[11]

> 'Bezuidenhout says he can positively state the agreements indeed exist because he signed them after being presented with them, bearing the respondents' signatures, in 2013. He offers a manifestly weak corroborating affidavit by his sister, Fritz, who claims she was present when the documents, signed by the respondents, were bandied about. She does not say when this occurred; supposedly, sometime in 2013, some three years prior to her recollection. Moreover, she does not hint at how or why she might remember the event after that elapse of time. In addition, emphasis was placed on the common cause fact that in 2013, fresh contracts for the entire staff were composed, a point thought to bolster the averment of the signing of restraint agreements at that time. …
>
> The sole reason alleged by Bezuidenhout why the documents cannot be produced is that the two respondents, in mid-October 2016, took the documents from the company records and destroyed them. …'

[49] The employee party in *TIBMS supra* answered the aforesaid contentions of the employer by disputing the existence of any restraint of trade agreement, in the form of firstly raising points about the appearance of the draft unsigned document attached to the employer's founding affidavit and suggesting its provenance was in doubt, and secondly by 'flatly' denying the version of the employer concerning the destruction of the signed document.[12] Whilst the Court ultimately rejected the employee's contention about the draft unsigned document not being genuine,[13] it however held as follows:[14]

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[10] Id at para 8.
[11] Id at paras 15 – 16.
[12] Id at para 17.
[13] Id at para 18.
[14] Id at para 26.

> '… Whilst the denial of the existence of the agreements is not wholly convincing, that is never sufficient, on paper, to justify an outright rejection. The denial is not bald nor unsupported by allegations of fact nor are the allegations of fact inherently implausible.'

The Court in *TIBMS* concluded:[15]

> 'The dispute of fact in this matter cannot be resolved on paper, even on a robust approach, as whatever nuances may nibble at the edges of either version, neither can be dismissed out of hand. Credibility is only capable of being addressed on paper when the assertions are palpably absurd or demonstrably false. The threshold that had to be cleared is 'wholly fanciful and untenable'. Moreover, the appetite to resolve paper contests by reference to the probabilities, though ever present, is not appropriate. On the allegations canvassed on the record, the threshold was not cleared.'

[50] A similar fate must befall the applicant's case concerning the signature of a restraint agreement by Potgieter. The significant comparisons between the case advanced by the applicant *in casu* and the case advanced by the employer in *TIBMS supra* are undeniable. In particular, there was reliance on a plot, a similarly weak supporting affidavit deposed to by Fiona Chandler of Potgieter having been seen signing a restraint agreement, and the fact that it was required by the applicant's rules that all employees must sign the restraint agreement. However, and even worse than the case in *TIBMS*, the applicant was unable to offer an actual explanation as to what happened to the missing signed document, other than pure speculation. None of the factors relied on by the applicant thus render the denial by Potgieter that he ever signed such a document to be, as said in *TIBMS*, '*palpably absurd or demonstrably false*'.

[51] Insofar as the applicant may argue that probabilities establish that such a restraint of trade was signed, it is not appropriate to resolve material disputes of fact in motion proceedings based on probabilities.[16] In the end, Potgieter raised a genuine dispute of fact that cannot be resolved on paper, and as

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[15] Id at para 29.
[16] See also *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another* 2011 (1) SA 8 (SCA) at para 20.

such, has to be decided in his favour. As held in *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another*[17]:

> '… In the face of a real, genuine and bona fide dispute of facts put up by the respondent, which amounted to a substantiated and clear defence, the Labour Court, on an application of the relevant principles, could not properly have granted the relief sought by the appellant. …'

[52] I therefore conclude that the applicant has failed to discharge the onus that rested upon it to prove that Potgieter signed a restraint agreement. On this basis alone, the application as against Potgieter must fail.

[53] This then leaves the restraint agreement signed by all the other individual respondents. Whilst it is true that Corne also disputed signing the restraint agreement, stating that he could not remember signing the document and alleging impropriety where it comes to the signed document actually produced by the applicant, I do not intend to resolve this factual controversy. I will simply accept, simply based on the production of the restraint agreement purportedly signed by Corne, that he did sign a restraint agreement, as a result of the basis upon which I have decided to deal with all the restraint agreements in this judgment.

[54] In my view, the applicant has unfortunately shot itself in both feet where is comes to the proper interpretation to be attached to clause 7.2 of the restraint agreement. The clause is, even generously considered, so poorly worded that it simply cannot be said that by taking up employment with Dromex, the individual respondents acted in violation of this clause in the first place. The reasons for this conclusion now follow.

[55] As a matter of general principle, restraint of trade covenants should be properly defined and worded. The employer should make it clear what conduct of an employee would be considered to be in violation of the restraint undertaking. The cause / reason for the restraint being required should be identified in the agreement as well. For example, most restraint clauses specifically prohibit employment with a competing employer and/or the

[17] (2016) 37 ILJ 902 (LAC) at para 20.

solicitation of the custom of the customers of the former employer. In the case of such a properly defined restraint, all the employer would need to show in order to establish the *prima facie* breach of the restraint is that the employee either took up employment at a competitor or approached a customer of the employer after leaving employment, or both. Once that is established, then only does the reasonableness consideration relating to enforcement thereof arise, which was set out in *Ball v Bambalela Bolts (Pty) Ltd and Another*[18] as follows:

> '... the reasonableness of a restraint could be determined without becoming embroiled in the issue of onus. This could be done if the facts regarding reasonableness have been adequately explored in the evidence and if any disputes of fact are resolved in favour of the party sought to be restrained. If the facts, assessed as aforementioned, disclose that the restraint is reasonable then the party, seeking the restraint order, must succeed, but if those facts show that the restraint is unreasonable, then the party, sought to be restrained, must succeed. …'

[56] In short, the logical sequence that applies in the case of an employer (the applicant) seeking to enforce a restraint against an employee, is to firstly prove the existence of a restraint obligation that applies to the employee. Secondly, and if a restraint obligation is shown to exist, the employer must prove that the employee acted in breach of the restraint obligation imposed by the restraint. Finally, and once the breach is shown to exist, the determination then turns to whether the facts, considered as a whole, show that the enforcement of the restraint would be reasonable in the circumstances. The reasonableness enquiry, once applicable, involves answering five questions, being whether a party has an interest that deserves protection after termination of the agreement, is that interest threatened by the other party, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive, is there an aspect of public policy having nothing to do with the relationship between the parties that

[18] (2013) 34 ILJ 2821 (LAC) at para 14. See also *Reddy v Siemens Telecommunications (Pty) Ltd* (2007) 28 ILJ 317 (SCA) at para 14; *Labournet (Pty) Ltd v Jankielsohn and Another* (2017) 38 ILJ 1302 (LAC) at para 40.

requires that the restraint be maintained or rejected, and whether the restraint goes further than necessary to protect the relevant interest.[19]

[57] As dealt with above, the applicant failed at the first hurdle where it came to Potgieter, being unable to prove the existence of a restraint obligation. Next, and insofar as it concerns the other individual respondents, and before it can even be considered whether or not the restraint as contained in clause 7.2 of the restraint agreement is reasonable or unreasonable, it must be established whether the employment of the individual respondents with Dromex contravened (breached) the clause in the first place. It is in this respect where the applicant's case unfortunately goes off track. In effect, the applicant tries to establish a breach of the restraint by focussing on establishing that it has a protectable interest and that this interest has been breached by the individual respondents' employment with Dromex. That is putting the cart before the horse, for the simple reason that if the restraint obligation in terms of clause 7.2 does not prohibit employment with Dromex in the first place, the issues of evaluating whether the applicant has a protectable interest or whether such interest is being infringed simply do not arise. In short, the reasonableness determination cannot serve to establish a breach, but it is the breach that leads to the reasonableness enquiry.

[58] The point can perhaps be best illustrated by way of proper example. A protectable interest in a restraint of trade can be found in one or both of two considerations, being confidential information (trade secrets), or trade connections.[20] In *Labournet (Pty) Ltd v Jankielsohn and Another*[21] the Court held:

> '… A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The list

[19] See *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767G-H; *Jonsson* (*supra*) at para 44; *Medtronic (Africa) (Pty) Ltd v Van Wyk and Another* (2016) 37 ILJ 1165 (LC) at para 15; *Esquire* (*supra*) at paras 50 – 51; *Labournet* (*supra*) at para 42; *Vox Telecommunications (Pty) Ltd v Steyn and Another* (2016) 37 ILJ 1255 (LC) at paras 28 – 29.

[20] *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (2008) 29 *ILJ* 1665 (N) at para 32; *Basson (supra) at* 769 G – H; *Bonnet and Another v Schofield* 1989 (2) SA 156 (D) at 160B-C; *Hirt and Carter (Pty) Ltd v Mansfield and Another* (2008) 29 ILJ 1075 (D) at para 37; *Esquire* (*supra*) at para 27; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502E-F; *Medtronic* (*supra*) at para 16 – 17; *FMW (supra)* at para 36; *Vox* (*supra*) at para 30.

[21] (2017) 38 ILJ 1302 (LAC) at para 41.

> of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. …'

In casu, it was undisputed that clause 7.2 of the restraint agreement contains no trade connection protection obligation. So, and in simple terms, if any of the individual respondents took up employment with Dromex and sought to call upon the customers they dealt with whilst employed at the applicant, to solicit their custom for and on behalf of Dromex, this would not be prohibited by the restraint obligation in the first place. It follows that it is then simply not necessary to determine whether it is reasonable to protect that which is not prohibited.

[59] It is thus critical to determine exactly what obligation is imposed on the individual respondents by clause 7.2 of the restraint agreement. This determination calls for a proper interpretation of the restraint agreement. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[22] the Court said:

> '… Interpretation is the process of attributing meaning to the words used in a document … having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. …'

[60] Having referred with approval to the above *dictum* in *Endumeni Municipality,* the Court in *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk*[23] added the following:

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[22] 2012 (4) SA 593 (SCA) at para 18.
[23] 2014 (2) SA 494 (SCA) at para 12.

> '…. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.

[61] Applying the approach as set out above, and considering the restraint agreement as a whole, I accept that 'confidential information' as defined in the restraint agreement may include information concerning identities, particulars, requirements, pricing, and contact persons, of the applicant's customers, that were dealt with by the individual respondents during their course of employment with the applicant. Such an interpretation would in any event be in line with the legal position that this kind of information can be seen to be confidential information susceptible to protection under a restraint of trade.[24]

[62] However, the definition of 'confidential information' should not be considered in isolation. It must apply in a proper context. The context must be that it is confidential information as part and parcel of a restraint obligation. It must be information that, as said in *Labournet supra*,[25] that meets the following qualifications:

> 'It is well-accepted that for information to be confidential 'it must *(a)* be capable of being applicable in trade or industry, that is, it must be useful; not be public knowledge and property; and *(b)* it must be known only to a restricted number of people or a closed circle, and *(c)* be of economic value to the person seeking to protect it'

[63] It is in this context that clause 7.2 is fraught with shortcomings where it comes to establishing a basis of an obligation relating to confidential information. First and foremost, the clause does not prohibit employment of the employee with a

[24] See *SPP Pumps (SA) (Pty) Ltd v Stoop and Another* (2015) 36 ILJ 1134 (LC) at para 37; *Ball* (*supra*) at para 20; *Continuous Oxygen* (*supra*) at para 40.
[25] Id at para 48. See also *Esquire* (*supra*) at para 29; *Experian* (*supra*) at para 19; *Jonnson* (*supra*) at paras 46 – 49.

competitor. Secondly, the clause does not protect against the exploitation of trade connections or impose any obligation on the individual respondents in this regard. Therefore, and as a matter of principle, clause 7.2 as it stands, permits as a point of departure, the employment of the individual respondents with Dromex, and does not stand in the way of the individual respondents soliciting the custom of the applicant's customers. So, and as a simple example, if the individual respondents took up employment with Dromex and solicited the custom of the applicant's customers using the personal knowledge of and close working relationship they built up whilst employed at the applicant, there is nothing the applicant could do about it.

[64] The protection afforded by clause 7.2 only applies if the applicant can show that the individual respondents, in the course of their employment with Dromex, was '*reasonably likely to require*' the employee to make use of confidential information. This cannot include relying on the existence of trade connections or customer relationships, which is an issue distinct and separate from confidential information. It follows that the applicant has to prove, on the facts, that the individual respondents were possessed of confidential information that would be of use and value to Dromex and which information would likely be utilized by the individual respondents in executing their duties as sales representatives with Dromex.

[65] In seeking to prove such a case, the thrust of the applicant's case is focussed on the individual respondents forwarding what it described as confidential information to either their private e-mail addresses or the e-mail addresses of family members. The applicant's confidential affidavits set out in detail the information, which I have dealt with above. In my view, and even considering the applicant's own version, this quest for confidential information to rely on seemed to be closer than a witch hunt to try and justify a case against the individual respondents, than genuine concerns. This is evident from the fact that a bulk of the information dates back more than a year, and appears even on face value outdated. The lapse of time diminishes the value of confidential information.[26]

[26] See *Vumatel* (*supra*) at para 38.

[66] In any event, the individual respondents have provided proper explanations, with sufficient particularity attached to those explanations, for this conduct. This included gathering evidence for their unpaid commission and deduction claims and the grievance, and for printing documents at home to be used in the normal execution of their duties on the road. In my view, there is nothing implausible or far-fetched or so unlikely in these explanations offered, which can justify a conclusion that it must be rejected.[27] Most of the explanations actually make sense, and certainly do not constitute mere bald denials. Even if this *modus operandae* adopted by the individual respondents in sending these kind of documents to other e-mail addresses is open to criticism, it simply does not follow that it was done with the intention to in effect misappropriate this information from the applicant, which is what the applicant actually suggests.[28]

[67] In the end, I consider all these e-mails sent by the individual respondents, as referred to above, as nothing more than a red herring, which simply does not assist the case of the applicant. It serves as camouflage, by trying to attach a clandestine and malicious intent to the individual respondents so they can be visited with censure, and so in effect hide the patent shortcomings in the restraint itself. The individual respondents are sales representatives. They sell protective clothing to customers. The restraint needed to prohibit their employment with a competitor such as Dromex per se, or at the very least prohibit them from soliciting the custom of the customers they dealt with whilst employed at the applicant. A general confidentiality undertaking in this context simply cannot serve to prohibit the employment of the individual respondents with Dromex.

[68] For the same reason relating to the application of the *Plascon Evans* test as set out above, the is no reason to reject the explanation offered by the individual respondents that they simply did not have access to, nor dealt with, so-called technical information. They were not involved in manufacturing, design, quality or any trade secrets relating to the applicant's protective clothing range.[29] They only knew what was necessary to sell it, which is information that is in the public domain in any event. Further, and considering Dromex had already developed its own Arc product range long beforehand,

[27] Compare *Jonsson* (*supra*) at para 11.
[28] Compare *TIBMS* (*supra*) at para 27.
[29] Compare *Jonsson* (*supra*) at para 38.

which is primarily at stake in this case, and long before the individual respondents joined it, no information in this regard the individual respondents may have will be of any use or value to Dromex. I also take into account the nature of the product, and the fact that the applicant does not manufacture its own materials with all competitors in effect buying from the same suppliers. In *Jonsson Workwear (Pty) Ltd v Williamson and Another*[30] this Court also dealt with an application to enforce a restraint of trade brought by an employer in the workwear industry, which is comparable to the business of the applicant *in casu*. The employer in *Jonsson supra* raised similar issues as to the employee having access to confidential information, as raised by the applicant in the current matter. The Court held:[31]

> 'The nature of clothing is such that it is not possible to keep as 'confidential' any makeup of the clothing. As the first respondent points out, anyone in the clothing industry can take any garment and readily and easily determine how it was made and what materials have been used. Added to this is the fact that once the clothing is sold, it is in the public domain and cannot attract any 'confidentiality' thereafter, even if it is accepted that it had some or other form of confidentiality in the first place.'

[69] But whatever current confidential information the individual respondents may have had in their possession when joining Dromex, this is entirely mitigated by the undertakings given by them in this regard, as set out above. All the individual respondents confirmed in writing that they had not in any way utilized the applicant's confidential information, nor did they intend to ever do so. Van Der Merwe and Reinhardt confirmed on affidavit that they had returned all property and information of the applicant they had in their possession, to the applicant. Added to this, and even though there would be no obligation on it to do so, Dromex has made common cause with these undertakings, and confirmed that it will not require the individual respondents to utilize any confidential information they may have about the applicant. In my view, that is a complete answer to any allegation of breach of the obligation the individual respondents may have in terms of clause 7.2 of the restraint agreement.

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[30] (2014) 35 ILJ 712 (LC).
[31] Id at para 29.

[70] The applicant contended that it could not be expected of it to trust the respondents' undertakings not to use the confidential information, and in effect 'cross its fingers' and hope for compliance. No doubt, this argument is based on the many authorities to the effect that an employer cannot be expected to trust an undertaking by an employee who already has acted in contravention of a restraint obligation and that the providing of an undertaking in such circumstances cannot avoid the enforcement of the restraint.[32] The current matter is however different, because there is no breach of the restraint obligation in the first place. In the case where a restraint has been breached, the undertakings given cannot remedy the breach and an employer would be justified in not trusting an undertaking by an employee that has already breached. In such a case, the undertaking at best would simply be part and parcel of the reasonableness evaluation. However and where it must be decided if a breach exists in the first place, as is the case *in casu*, such undertakings can legitimately serve to prove that no breach exists. This is the unfortunate result of the manner in which the restraint obligation is defined in the restraint agreement in the current matter.

[71] The above being said on the facts, it is my view that from a principle point of view, one has to ask what possible value can confidential information about customer particulars, pricing, or buying patterns have ,if it does not go hand in hand with a trade connection protection restraint covenant? Surely, and considering that it is the primary duty of a sales representative to establish, maintain, and cultivate a close working relationship with customers, it has to be logical that any information in this regard is in the head of the sales representative, so to speak. This information cannot be extracted out of the mind of the sales representative, and attaches to him or her as a person.[33] As said in *Rawlins and another v Caravantruck (Pty) Ltd*[34]:

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[32] See *Ball* (*supra*) at para 22; *Reddy* (*supra*) at para 20; *Medtronic (Africa) (Pty) Ltd v Kleynhans and Another* (2016) 37 ILJ 1154 (LC) at para 40.

[33] See *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) at para 15 where the Court held: *'…Mr Pillay's simple response in his affidavit is to say that he is an excellent salesman. No doubt that is true and it is equally true that he is entitled to take his qualities and skills as a salesman to another employer …'*

[34] 1993 (1) SA 537 (A) at 541D-I. See also *Esquire* (*supra*) at para 27; *Continuous Oxygen* (*supra*) at paras 34 – 36; *FMW* (*supra*) at para 45.

> '… 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, the type of product being sold …'

[72] Where it comes to protecting a customer base, the confidential information must be tied to a non-solicitation restraint obligation. To describe it as simply as possible, if there is nothing prohibiting the sales representative from pursuing the customers he or she dealt with, after taking up employment at his or her new employer, what point can the protection of customer information possibly serve? In short, the value of the information is directly linked to the obligation associated with it. If there is no obligation, then there can be no commercial value attached to the information, thereby rendering it confidential. That is why the existence of a protectable interest is evaluated, in the case of the prohibition of employment with a competitor, based on the confidential information the employee had access to and had knowledge of, or in the case of prohibition of solicitation of the custom of customers, based on the existence of protectable trade connections.

[73] *In casu*, employment of the individual respondents with Dromex is not prohibited, nor is solicitation of custom of the customers of the applicant. It follows that here can be no breach of the restraint agreement where it comes to customer information. That has to be the common sense, businesslike and sensible interpretation, with the restraint agreement being holistically considered, based on the actual language of clause 7.2.

[74] I accept that the situation may have been different if the individual respondents were employed in the echelons of senior management where business strategies and sensitive business and financial information are formulated, assessed, evaluated, decided, and strategic business decisions are made.[35] The employment of an employee who occupied such a position in a

[35] See *L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another* (J1990/2014) [2014] ZALCJHB 353 (16 September 2014) at paras 25 and 76; *Stratosat Datacom (Pty) Ltd v Vermaak and Another* (J583/2018) [2018] ZALCJHB 203 (14 June 2018) at para 53.

comparable position with a competitor such as Dromex, may well make it reasonably likely that the employee will be called upon to utilize such information. In my view, what was envisaged by clause 7.2 of the restraint agreement was this kind of scenario. There was no intention to protect a customer case. It is evident from the definitions of 'confidential information' which specifically identifies the kind of information normally associated with these kind of occupations (positions). The lack of any specific reference to customer information in the definition is telling. This interpretation is also apparent from a consideration of clause 7.3, which prohibits acquiring or establishing a competing business, and evaluating it in conjunction with clause 7.2.

[75] However, none of the individual respondents occupied the kind of positions as set out above. They were simply a sales manager with a team of sales representatives, doing what all sales persons ordinarily do. There would be no need to impart on them the kind of strategic, financial and proprietary information that could possibly bring the prohibition in clause 7.2 into play. The individual respondents have in any event denied having access to any of this kind of confidential information and applying the provisions of the *Plascon Evans* test, there is no basis upon which to gainsay this denial. Comparable is the following *dictum* in *Labournet supra*:[36]

> 'Jankielsohn did not just baldly deny that he had access to confidential information, but he explained in the context of the nature of his duties, why he did not have and did not require such access. He states in effect that the confidential information was information in the possession of 'the proprietors' of Labournet's business and was never imparted to him. He states that all the documents that were used while he was in the employment of Labournet were retrieved from the Internet and they were thus available to the public. Bearing in mind his relatively junior employment status, his version cannot be rejected as 'far-fetched' or 'clearly untenable' or 'palpably implausible'. His work was to render relatively basic kinds services to clients of Labournet — as were assigned to him by his managers …'

[76] This only leaves the issue of the conspiracy. I am alive to the respondents' complaint that this was raised for the first time by the applicant on reply, but I

[36] Id at para 49.

will nonetheless, for the sake of being complete, consider it.[37] That being said, what is on face value an appealing argument by the applicant, fades into nothingness upon a proper consideration of the facts in this case. I accept the version by Dromex on how it came to offer employment to Potgieter after he had been dismissed by the applicant in August 2019. This had nothing to do with Dromex conducting an all-out pursuit of the applicant's sales force to get its new Arc product range going off the back of the applicant's business and customer base. It was in fact a third party that drew Dromex's attention to the fact that Potgieter was no longer employed by the applicant and available. Potgieter did not even seek out employment at Dromex. It may well be that after becoming employed with Dromex, Potgieter appeared to be instrumental in Dromex offering employment to his former sales team at the applicant. However, there was nothing prohibiting this.[38]

[77] I also take a dim view of a completely absurd allegation made by the applicant in the founding affidavit in the application relating to the third, fourth and fifth respondents, to the effect that Potgieter '*hired his bulle*' (referring to the other individual respondents) from the outset to '*purposefully and progressively*' harm the applicant. As Potgieter explained, he in the past thought the applicant was a 'happy and comfortable' place to work, and would always recommend employment there, but this unfortunately changed in 2018 / 2019, resulting in an exodus of staff. This allegation of impropriety by the applicant is simply ridiculous and without foundation, and shows the lengths the applicant would go to in order to create a case.

[78] All the individual respondents explained that they were dissatisfied with their working conditions at the applicant. There were issues with their commission paid and payable. They also explained that they were a close nit group, and viewed Potgieter as their mentor. Each individual respondent explained that he of his own accord decided to resign from the employment of the applicant, because they were not willing to work there any longer. The motivation for their resignations were not to take up employment with Dromex. Most of them

[37] See *Jonsson* (*supra*) at para 20.
[38] Normally, restraint of trade covenants contain a prohibition on the former employee seeking to solicit the employment of other employees at his or her erstwhile employer, for the new employer. The restraint agreement *in casu* contained no such prohibition.

resigned without an actual offer of employment from Dromex in place. Reinhardt and Corne in any event resigned before Potgieter even took up employment at Dromex. There is simply nothing untoward in these versions necessitating rejection of the same, and these versions effectively dispel the notion of some grand conspiracy. It should also be considered that there were about 40 resignations from the applicant in the last two years, giving some support to the individual respondents' view of intolerable working conditions.

[79] Therefore, and where it comes to the individual respondents other than Potgieter, the applicant has been unable to prove that these respondents acted in contravention of the restraint agreement by taking up employment at Dromex. The restraint agreement does not prohibit such employment, per se, and it is simply not reasonably likely that the individual respondents would utilize any of the applicant's confidential information in the course of the discharge of their duties as sales representatives at Dromex. The situation is exacerbated by the material shortcomings in the restraint provision itself, which failed to put the necessary prohibitions in place.

[80] I am convinced that what the applicant was trying to do is to prevent the individual respondents from exploiting the trade connections they obtained in the course of their employment with the applicant, in favour of their new employer, Dromex. Due to the material inadequacy of the applicant's own restraint agreement, the applicant however failed to provide for this eventuality. The current applications are nothing but a contrived process to achieve this result, and so cover for this failure. This cannot be ascribed to.

[81] For all the reasons as set out above, the applicant's applications must fail, without the need to consider whether or not the enforcement of the restraint agreement would be reasonable, for the simple reason that there was no breach of the same in the first place.

Conclusion

[82] In summary, and firstly, the applicant has failed to prove that Potgieter signed a restraint agreement, and as such, he has no restraint obligations towards the applicant. Secondly and as to the other individual respondents, the applicant has failed to prove that the current employment of these respondents with

Dromex constitute a breach of the restraint obligations as contained in their respective restraint agreements. In the end, the applicant only has itself to blame for the predicament it finds itself in. The restraint obligation it sought to rely upon was poorly drafted, entirely deficient, and susceptible to being defeated by the provision of the undertakings such as those provided by the individual respondents in this instance. The applicant's case thus does not come out of the starting blocks, and it is therefore not necessary to even consider whether enforcement of the restraint agreement would be reasonable. As matters stand, the applicant's consolidated application falls to be dismissed.

[83] However, and when this matter was argued, counsel for all the individual respondents indicated that the individual respondents, despite the basis of their attack on the enforcement of the restraint agreements, were willing to agree to an order interdicting and restraining them from using the applicant's confidential information or imparting it to any person for any purpose whatsoever. This was basically just an extension of the warranty and undertakings already given. In my view, this gesture of good faith is the best the applicant can get in this case. If the respondents are prohibited of their own volition from utilizing the confidential information of the applicant, there would be nothing standing in the way of their continued employment with Dromex. I shall therefore grant such an order.

[84] Finally, there is the issue of the interim relief granted by Mahosi J and Baloyi AJ respectively, under case numbers J 2037 / 19 and J 2096 / 19. This relief falls to be discharged as a result of the final determination of the applicant's consolidated application in this judgment.

Costs

[85] This then leaves only the issue of costs. There is no reason why costs should not follow the result, for the reasons to follow. Firstly, all parties suggested that costs follow the result. However, and despite this position adopted by the parties, I must nonetheless exercise the wide discretion I have in terms of section 162(1) where it comes to costs.[39] In this case, I consider the fact that

[39] See *Long v SA Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) at paras 28 – 29.

the applicant's application was faced with a number of challenges from the outset due to the poor and defective nature of the restraint provisions in the restraint agreements, and should in reality not have been pursued by the applicant. Also, and as far as I am concerned, the real reason for the application was to stifle competition, and not really to protect a legitimate protectable interest, which simply did not exist because there was no breach in the first place. Another factor is that the applicant sought to substantially supplement its case on reply, which is deserving of some censure. Finally, the applicant should have given serious consideration to not proceeding with this matter, after Dromex had filed its answering affidavit. Overall considered, this is a case where fairness dictates that the respondents should have their costs.

[86] For all the reasons as set out above, I make the following order:

Order

1. The applicant's applications are heard as one of urgency.

2. The application against the fifth respondent, Jooste Potgieter, is dismissed.

3. The first, second, third and fourth respondents are interdicted and restrained from using the applicant's confidential information or disclosing or imparting it to any person for any purpose whatsoever.

4. Save only for the order granted in terms of paragraph 3 of this order, the applicant's applications against the first, second, third and fourth respondents are dismissed.

5. The interim order granted by Mahosi J on 11 October 2019 under case number J 2037 / 19 is discharged.

6. The interim order granted by Baloyi AJ on 28 November 2019 under case number J 2096 / 19 is discharged.

7. The applicant is ordered to pay the costs of the respondents, which shall include the costs associated with the applications for interim relief.

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S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate I Miltz SC together with Advocate S Schwartz
Instructed by:	Cliffe Dekker Hofmeyr Inc Attorneys
For the First and Second Respondents:	Advocate P Bosman
For the Third to Fifth Respondents:	Advocate A J Daniels SC together with Advocate C T Vetter
Instructed by:	Shepstone & Wylie Attorneys