THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J442/20

In the matter between:

A.I.G SALES (PTY) LTD **Applicant**
(Registration Number: 2006/008210/07)

and

KELLY ANNE HUTT **First Respondent**
(Identity Number: 860[…])

QUALITY TUBE SERVICES CC **Second Respondent**
(Registration Number: 1985/014996/23)

Heard: **26 November 2020**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 17 December 2020.**

Summary: **Restraint of trade – confidential information no longer ecumenically viable to warrant protection – threat of soliciting customers diminished by final interdict against new employer – *rule nisi* discharged.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] This is application concerns the enforcement of the by the applicant, A.I.G sales (Pty) Ltd (A.I.G), of the restraint of trade provisions contained in the contract of employment and separate restraint of trade agreement concluded between A.I.G and the first respondent, Ms Kelly Ann Hutt (Ms Hutt). The matter served before Coetzee AJ on 13 August 2020 and he issued an order in the following terms:

> '1. The applicant's failure to comply with the forms, service requirements and the time periods provided for the in the Uniform rules of court is condoned and the application is heard as one of urgency;
>
> 2. The second respondent is interdicted from directly or indirectly:
>
> 2.1. employing the first respondent; and/or
>
> 2.2 mandating the first respondent to act as its agent or to act on its behalf in any other capacity; and/or
>
> 2.3 causing any entity in which the second respondent has an interest or over which it has control, to employ the first respondent or to mandate the first respondent to act as agent or in any other capacity on behalf of such entity, until and including **11 August 2021**.
>
> 3. A rule *nisi* is hereby issued on the **26 NOVEMBER 2020** calling upon the first respondent to show cause why, a final order should not be granted in the following terms:
>
> 3.1 the first respondent is interdicted and restrained from being employed by, acting as an agent for, or having any direct or indirect
> or indirect interest in the second respondent (including as a director, shareholder, employee, financier, partner or otherwise), or any business, firms or companies which compete with the applicant until **11 August 2021**.
>
> 3.2 The first respondent is interdicted and restrained from soliciting or attempting to solicit business from any of the customers of the applicant until 11 August 2021.

4. Pending the return date, the above rule nisi shall operate as an interim interdict with the effect that: the first respondent is interdicted and restrained from performing any of the acts set out in paragraphs 3.1 to 3.2 above pending the final determination of the matter on the return date.

5. The first respondent is directed to:

5.1 deliver up to the applicant all physical copies printed by the first respondent from applicant's SAGE 1000 system and to destroy any electronic copies of any information retained by the first respondent from the applicant's SAGE 1000 system or the applicant's external quoting platform; and

5.2 to file an affidavit under oath, within 10 days of this court order, confirming that she has complied with 5.1 above.

6. The first respondent is ordered to pay the costs of this application and there is no order as to costs against the second respondent.' ('order of 13 August 2020')

[2] It is clear from the order of 13 August 2020 that I need not concern myself with the following issues: First, urgency, as the matter has been dealt with on urgent basis; second, a final interdict has been granted which prevents the second respondent, Quality Tube Services CC (Quality Tube) from employing, mandating, or causing any entity which it controls or in which it has an interest to employ or mandate, Ms Hutt; and third, Ms Hutt has since delivered an affidavit in terms of paragraph 5 of the order of 13 August 2020.

[3] In that affidavit she asserts that she is not in possession of any of the documents referred to in paragraph 5.1 of the order of 13 August 2020, nor does she have any electronic copies of same as all such copies, whether physical or electronic, if any, had been returned to A.I.G, alternatively, deleted prior to her leaving the employ of A.I.G. Even though Mr Hutt is adamant that, by filing the affidavit, she does not concede that A.I.G has proprietary interest over the information, as the delivery of the affidavit constitutes compliance with paragraph 5.2 of the order of 13 August 2020.

[4] In the circumstances, the only issues which fall to be determined in these proceedings are whether the first respondent has shown cause why a final order should not be granted in the following terms:

4.1. Interdicting and restraining Ms Hutt from being employed by, acting as an agent for, or having any direct or indirect interest (including as a director, shareholder, employee, financier, partner or otherwise), in –

4.1.1. Quality Tube (to the extent that this differs from the relief already determined under paragraph 2 of the court order), or

4.1.2. any business, firms or companies which compete with A.I.G until 11 August 2021; and

4.2. Interdicting and restraining Ms Hutt from soliciting or attempting to solicit business from any of the customers of A.I.G until 11 August 2021.

[5] Ms Hutt is opposing the confirmation of the *rule nisi* on the following grounds:

5.1 The approbation and reprobation by A.I.G in respect of the agreement;

5.2 The lack of reciprocity in respect of the restraint;

5.3 The A.I.G's failure and/or refusal to pay the difference in the amounts actually paid (salary/wages) and amounts paid by TERS; and

5.4 The *contra bonos mores* effect of the restraint should it be enforced.

<u>Background</u>

[6] A.I.G conducts business in the steel and pipe fitting industry in business for over 35 years; mainly supplying and manufacturing of steel piping, pipe fittings, flanges and steel fabricated products. Its main customers are in the mining and construction sectors. A.I.G trades throughout the Republic of South Africa. Quality Tube competes in the same industry and supplies largely the same products as A.I.G.

[7] A.I.G is one of the smaller players in the steel and pipe fitting market, which was traditionally dominated by large businesses such as Macsteel. The emergence of smaller players and competition in the market has driven down profit margins in the last 5 years and necessitated an increase in volume to sustain revenue growth. The market is thus regarded as a volume-based business. The market is shrinking, and the high level of competition has resulted in only low margins being attained. Due to the nature of the market, the companies serving the market compete largely on price, and, pertinently, the discounts which they are able to offer and customers are highly cost-sensitive.

[8] A.I.G contents that every competitive advantage is of crucial importance. As such, if one market participant has knowledge of the costing structure of another, it can easily poach the customers of the other market participant by approaching its clients and offering a superior discount. Hence A.I.G has an interest in protecting the confidential information that highly sensitive and its exploitation by a competitor is likely to be devastating to it.

[9] Ms Hutt concedes that she was employed as an Internal Sales Agent and that she established relationships with some of A.I.G's customers. It is also common cause that:

9.1 A.I.G markets its products through internal sales agents such as the first respondent.

9.2 Each internal sales agent is allocated a list of customers to service and performs their job function by developing a relationship with representatives from that customer who are responsible for procurement.

9.3 The sales agents have access to the A.I.G computerised business management system, which contains all of the relevant and confidential information pertaining to customers allocated to each sales agent.

9.4 The sales agents such as Ms Hutt are responsible for negotiating the terms of sale (in relation to quantity and price) for the products and concluding the transaction on behalf of A.I.G.

9.5 The sales agents such as Ms Hutt make use of the confidential information contained on A.I.G's system in order to compute pricing and offer a suitable and attractive discount in order to conclude the sale.

[10] Ms Hutt also does not refute that the she had established relationships with the A.I.G customers whom she spoke to on the phone; save that it was a professional relationship. Those customers would deal exclusively with her to facilitate and promote the sale of A.I.G's products and she would use the A.I.G's costing and discount structure to send quotes to them in order to make sales for A.I.G. In essence, she was the direct link between A.I.G and 85 customers which had been allocated to her.

[11] Also, despite her disavowal that she possessed A.I.G proprietary information, she conceded that during the Alert Level 5 COVID-19 National Lockdown (Lockdown) in terms of the Disaster Management Act[1] (DMA) A.I.G implemented an external quoting platform, comprising of spreadsheet which was saved on a flashdrive to enable Ms Hutt to prepare quotes for the A.I.G;s customers from home. It is common cause that the said platform incorporates snapshots of A.I.G's database and populates the applicant price list and customer information into an excel spreadsheet. Ms Hutt made use of this platform during the Lockdown. Even though, she has returned the flashdrive to A.I.G, clearly she had access to confidential information which could be copied with ease and be of use to A.I.G's competitors.

[1] Act 57 of 2002.

Restraint Provisions

[12] There is no controversy in relation to the restraint provisions contained in the employment contract and the restraint of trade agreement which include, *inter alia,* the following:

12.1 Included in Ms Hutt's cost-to-company package, was an amount of R100 per month as a 'restraint payment' for 12 months, being compensation for the restraint of trade to which the first respondent agreed to be bound.[2]

12.2 Ms Hutt shall not have a direct or indirect interest as, *inter alia*, an employee of the companies listed in clause 15.1 of the employment contract, including Quality Tube, when she ceases to be an employee of the applicant, for a period of 12 months from the date of termination of the employment agreement.[3]

12.3 Ms Hutt will not have any direct or indirect interest as an employee or otherwise in any business, firm or company which carries on, directly or indirectly, business similar to that of the applicant or any of its affiliates in the areas in which A.I.G and/or its affiliates have done business in the past or is doing business when A.I.G ceases to be the employer of Ms Hutt, for a period of 12 months from the date of termination of the employment agreement.[4]

12.4 Ms Hutt shall not at any time, either for her own account or for any person, firm or company, solicit, interfere with or endeavour to entice away from the applicant or any of its affiliates, any person, firm or company who at any time were clients of, or were dealing with the applicant or delivering services on behalf of A.I.G for the stipulated time period, notwithstanding termination of the employment contract in any way whatsoever.[5]

[2] See: Employment contract, clause 14, page 53.
[3] Ibid, clause 15.1.
[4] Ibid, clause 15.2, page 53.
[5] Ibid at clause 15.3.

12.5 Ms Hutt agreed that by virtue of her association with the applicant, she has become possessed of and has had access to A.I.G.'s trade secrets, trade connections and confidential information, including, inter alia –

12.5.1 knowledge of and influence over the customers, suppliers and business associates of A.I.G and knowledge of the needs and requirements of such customers, suppliers, and business associates;

12.5.2 contractual arrangements between A.I.G and its business associates; and

12.5.3 financial details of the relationship between A.I.G to its business associates.[6]

12.6 Ms Hutt acknowledged that, if, on termination of her employment with A.I.G for any reason whatsoever, she took up employment with a competitor of A.I.G, its proprietary interest in its trade connections, trade secrets and confidential information would be prejudiced.[7]

12.7 Ms Hutt will not after the period of employment divulge any confidential or secret information concerning the business or finances of A.I.G or any of their dealings or transactions which may come to her knowledge during the course of her employment.[8]

12.8 Ms Hutt undertakes after her employment with A.I.G not to at any time, directly or indirectly divulge or disclose to others any of A.I.G's connections or trade secrets.[9]

[6] Restraint of trade agreement, clause 3.1, page 58.
[7] Ibid, clause 3.2.
[8] Ibid, clause 3.4, page 59.
[9] Ibid, clause 4.1.1, page 59-60.

12.9 Ms Hutt shall not for a period of one year after the date of termination of her employment with A.I.G –

12.9.1 persuade or attempt to persuade any person whom, during her employment with the applicant was a supplier or customer of the applicant, to cease doing business with the applicant or commence doing business with anyone else; or

12.9.2 solicit or attempt to solicit the business or customers of the aforementioned persons.[10]

12.10 Ms Hutt will not for a period of one year after termination of her employment for any reason whatsoever, assist, be interested in, engage in or concern, directly or indirectly as inter alia as an administrator, employee or otherwise, in any business, company or concern which carries on business in competition with the applicant within the Republic of South Africa and all countries having a border with it.[11]

12.11 Ms Hutt acknowledged and agreed that the restraints imposed upon her in terms of the restraint of trade agreement are reasonable in all respects to the subject matter, period and territorial limitation and are no more than are reasonable, necessary, and required by the applicant and its shareholders to protect the proprietary interest, goodwill, trade secrets, trade connections and confidential information of the applicant.[12]

[13] Ms Hutt resigned her employment with A.I.G effectively from 11 August 2020, in order to take up employment with Quality Tube. Obviously, the 12-month period during which the restraint provisions operate would only come to an end on 11 August 2021.

[10] Ibid, clause 4.1.3, page 60.
[11] Ibid, clause 4.1.4.
[12] Ibid, clause 5, page 61.

Approbation and reprobation

[14] Ms Hutt contends that A.I.G unilaterally elected to reduce her salary by 30% and, subsequent to her complaint, undertook to pay the difference through COVID-19 Unemployment Insurance Fund (UIF) Temporary Employee Relief Scheme (TERS) monthly payments. A.I.G failed to honour its undertaking to effect the TERS payments. According to Ms Hutt when she challenged the breach of this undertaking, she was advised that she was 'free to seek employment elsewhere'.

[15] To her, she asserts, when she was advised that she was free to seek employment elsewhere, A.I.G in essence provided her with confirmation that she was not bound to accept the terms of the employment contract that were unilaterally changed and communicated in a manner that convinced her that she may freely seek alternative employment with no limitation. Therefore, A.I.G is bound by that election.

[16] Clearly this objection falls afoul of the principle of approbation and reprobation, also known as the principle of election. In *Feinstein v Niggli and Another*,[13] Trollip, JA stated that 'election generally involves a waiver in the sense that one right is waived by choosing to exercise another right which is inconsistent with the former, and pointed out that election and waiver have been equated as being species of the same general legal concept. Hence the learned judge concluded that no reason exists why the same rule about the overall onus of proof applicable in waiver should not also apply to election mutatis mutandis'.[14]

[17] It is a trite legal principle that waiver of a right is never presumed, that clear proof thereof is required. It must be shown that the party concerned had full knowledge of its rights and that its conduct was irreconcilable with continued

[13] 1981 (2) SA 684 (A) 698.
[14] See: *Thomas v Henry and Another* [1985] ZASCA 56; [1985] 2 All SA 416 (A) at para 8.

existence of such rights or with the intention of enforcing them.[15] The onus of proving a waiver is on the party who raises it.[16]

[18] In the present matter, being so unclear, Ms Hutt's statements above cannot constitute an election and do not engage the principle of approbation and reprobation.

Lack of reciprocity in respect of the restraint and A.I.G's failure to pay TERS amounts

[19] Notwithstanding the concession that Ms Hutt agreed to be paid an amount of R100.00 per month as restraint payment which was indeed honoured, she seems to suggest that she should be absolved from her obligations under the employment contract and restraint of trade agreement because A.I.G reduced her salary by 30% consequent to a mandatory layoff due to the Lockdown and the economic impact of the Covid-19 pandemic. In essence, she is relying on the *exceptio non adimpleti contractus* to resist the enforcement of the restraint provisions.

[20] In *Megafreight Services (Pty) Ltd v Bezuidenhout and* Another,[17] this Court, per Van Niekerk J, confronted with *exceptio non adimpleti contractus* defence, endorsed the principles expounded in several authorities are cited in *Universal Storage Systems (Pty) Ltd v Crafford and Others,*[18] that 'where in a covenant in restraint of trade certain consideration has been promised to the party restrained (the respondent), the obligation to abide by the restraint is reciprocal to the obligation of the party in whose favour the restraint operates (the applicant) to render the promised consideration, and the latter obligation has to be performed first. As long as something remains which has to be performed by the applicant, the respondent may raise the *exceptio non*

[15] See: *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A) at 704; *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at para 16.
[16] See: *FirstRand Bank Ltd v Soni* 2008 (4) SA 71 (N) at 77.
[17] [2019] JOL 45747 (LC) at para 4.
[18] 2001 (4) SA 249 (W).

adempleti contractus as a defence to any attempt by the applicant to enforce the restraint'.[19]

[21] In the present matter, *exceptio non adimpleti contractus* defence is misplaced. The Lockdown resulted in forced layoffs which saw reduction in salaries and, as a result, eligible employers could claim the TERS on behalf of affected employees. It is therefore not correct that the reduction of Ms Hutt's salary was due to A.I.G 'jumping on the proverbial bandwagon of many other companies who legitimately could not afford to pay their employees their full salaries' as contended by Ms Hutt.

[22] As correctly argued by A.I.G, the reduction of Ms Hutt's salary was due to reduction of work and consequent to compliance with the COVID 19 Regulations. It is trite that reciprocity could only arise in circumstances where the performance and counter-performance are so closely linked that the one was undertaken in return for the other.

[23] Likewise, Ms Hutt contention she is not obliged to honour the restraint undertaking up until A.I.G pays her TERS claim in full is untenable. Ms Hutt does not dispute the fact that the Unemployment Insurance Fund (UIF) may have incorrectly calculated TERS payments and, as such overpaid the employees. If indeed Ms Hutt was overpaid in terms of TERS, then UIF could institute a claim against A.I.G to be reimbursement accordingly. Clearly, until the UIF confirms that the payments were correctly calculated, the total quantum due to Ms Hutt in terms of TERS is obviously up in the air. Ms Hutt had a duty, if she wished to challenge the correctness of the TERS calculation by A.I.G, to raise a dispute and cause it to be submitted to the UIF.[20]

Is the restraint trade unreasonable or otherwise *contra bonos mores*?

[19] See: *International Executive Communications Ltd t/a Institute for International Research v Turnley and Another* 1996 (3) SA 1043 (W) at 1047F; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 491H.

[20] *International Executive Communications, supra* at page 1050; see also Maltz v Meyerthal 1920 TPD 338 at 341.

[24] That brings me to a consideration of the main issue, namely the question whether A.I.G has any protectable interest.[21] The principles applicable to restraint covenants are trite. In *Labournet (Pty) Ltd v Jankielsohn and Another*[22] referred to by Airconduct, the Labour Appeal Court (LAC) succinctly captured them as follows:

> '[39] According to the decision in *Magna Alloys and Research SA (Pty) Ltd v Ellis*, ("Magna Alloys") restraints of trade are enforceable unless they are proved to be unreasonable. Because the right of a citizen, to freely choose a trade, occupation, or profession and to practice such, is constitutionally protected, the onus to prove "the reasonableness" of a restraint might well have been affected.
>
> [40] In *Reddy*, the Supreme Court of Appeal preferred not to become embroiled in the issue of onus and adopted a pragmatic approach, which according to it, was consistent with an approach where there was a direct application of the Constitution to restraint agreements. This approach was specifically adopted in respect of motion proceedings for the enforcement of restraints where the issue for determination was the reasonableness of the restraint. In terms of that approach, where the facts, concerning the reasonableness, had been canvassed in the affidavits – genuine disputes of fact are to be resolved in favour of the party sought to be restrained by applying the so-called Plascon-Evans rule. If the accepted facts show that the restraint is reasonable, then the applicant must succeed, but if they show that the restraint is unreasonable then the respondent in those proceedings must succeed.

[21] In light of the fact that the restraint provisions and the breach thereof are not in dispute, Ms Hutt bears an onus to demonstrate, on a balance of probabilities, that the restraint provisions are unenforceable because they are unreasonable. See: *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135; *Basson v Chilwan and Others 1993* SA 742 (A) at 7761I-J; *Magna Alloys and Research (SA) (Pty) Ltd v 486* (SCA) at [10] to [14], pp 493E/F to 496D; *Sibex Engineering Services (Pty) Limited v Van Wyk and Another* 1991 (2) SA 482 (T) at 502D-F; *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others* 2004 (4) SA 156 (W) at 167 B-C; *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (aka Baghas) and Another* 2004 (4) SA 174 (W) at 178E-F, para [17]; *Reddy v Siemens Telecommunications (Pty)* Ltd 2007 (2) SA 406 (SCA); *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D).

[22] (2017) 38 ILJ 1302 (LAC)

[41] The enquiry into the reasonableness of the restraint is essentially a value judgment that encompasses a consideration of two policies, namely the duty on parties to comply with their contractual obligations and the right to freely choose and practice a trade, occupation or profession. 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 of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. To seek to enforce a restraint merely in order to prevent an employee from competing with an employer is not reasonable.

[42] According to the Appellate Division in *Basson v Chilwan and Others*, the following questions require investigation, namely, whether the party who seeks to restrain has a protectable interest, and whether it is being prejudiced by the party sought to be restrained. Further, if there is such an interest – to determine how that interest weighs up, qualitatively and quantitatively, against the interest of the other party to be economically active and productive. Fourthly, to ascertain whether there are any other public policy considerations which require that the restraint be enforced. If the interest of the party to be restrained outweighs the interest of the restrainer – the restraint is unreasonable and unenforceable.

[43] It is now clear from, inter alia, *Basson* and *Reddy* that the reasonableness and enforceability of a restraint depend on the nature of the activity sought to be restrained, the rationale (purpose) for the restraint, the duration of the restraint, the area of the restraint, as well as the parties' respective bargaining positions. The reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced. With reference particularly to the facts of this matter, it is an established principle of law that the employee cannot be interdicted or restrained from taking away his or her experience, skills or knowledge, even if those were acquired as a result of the training which the employer provided to the employee.

[44] Even though it is acknowledged that it is difficult to distinguish between the employee's use of his or her own knowledge, skill and

> experience, and the use of his or her employer's trade secrets, it is accepted that an employee cannot be prevented from using what is in his, or her, head.' (Footnotes omitted and Emphasis added)

[25] Ms Hutt takes no issue with the assertion that she did engage 80 of A.I.G's customers base that had been allocated to her even though she disputes the extent of the connection she had with them. In fact, she staged a tepid denial that she was the main contact between A.I.G and its customers who used to contacted her directly in order to make further purchases from the applicant; which extended to resolving issues relating to non-payment by some customers. It is also not disputed that she used her mobile phone to connect with the A.I.G customers when she worked from home during the hard Lockdown.

[26] Nonetheless, four months has passed since the issuing of the Order of 13 August 2020. Even if Ms Hutt has knowledge of confidential and sensitive pricing information and the identity of A.I.G's customers, the question that inevitably arise is whether such information still require protection. As mentioned above, Ms Hutt has disavowed under oath that she is in possession of any of the documents referred to in paragraph 2.5 of the Order of 13 August 2020 or have electronic copies of the said documents and to the extent that she had been in possession of any physical or electronic, she has returned them to A.I.G, alternatively deleted them upon leaving the employ of A.I.G.

[27] I doubt that the pricing information could still be commercially viable given the lapse of time. As such the threat or risk of such information being used by Ms Hutt has seriously diminished. Confidentiality is not always absolute, nor is the protection always permanently available.[23] In *Pinnacle Technology Shared Management Services (Pty) Limited and Another v Venter and Another*,[24] where this Court, per Whitcher, J, dealing with the potential prejudice associated with confidential information stated that:

[23] See: *Handico (Pty) Ltd t/a Hardware Centre v Vallabh and Another* (19/06422) [2019] ZAGPJHC 90 (15 March 2019) at para 25.
[24] [2015] ZALCJHB 199 at paras 57 - 59.

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

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

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

[28] As such, the applicant failed show that its confidential information still require protection.

Weighing up the interest of the parties

[29] In weighs up, qualitatively and quantitatively, the proprietary interest of A.I.G against that of Ms Hutt to be economically active and productive, it is apparent that Ms Hutt's protestation is mainly pegged on an undertaking she has tendered not to solicit A.I.G's customers for the duration of the restrained period, precisely stating that:

> 'Given the aforesaid, and to bring an end to the unnecessary litigation, I am prepared to give my written undertaking not to approach or solicit any of customers (of which I have knowledge) for a period of 12 months from the date of acceptance of the undertaking, provided I am allowed to take up employment at any company, and I will further not proceed with any CCMA claims …'

[30] A.I.G rejected the above half-hearted tender as it shows that Ms Hutt is hell-bent to take up employment with competitors and the threat of her soliciting its customers is not farfetched, it is further agued. I disagree. Ms Hutt cannot take up employment Quality Tube as it has consented to a final order restraining it from employing her. As correctly concedes by A.I.G, the threat of Ms Hutt offending the restraint provisions has dissipated.

[31] Yet, A.I.G contends that since Ms Hutt maintains that she may take up employment with its competitors, she is in breach of her restraint provision. Clearly, A.I.G is grasping at straw as this allegation cannot constitute well-grounded apprehension of risk for the purpose of the final relief sought. The Court cannot give opinions on future events. In any event, Ms Hutt has undertaken not to solicit A.I.G's customers during the restraint period.

[32] In my view, quantitatively and qualitatively, the interest of the Ms Hutt surpasses that of A.I.G. While it is true that public policy requires contracts to be enforced, the restraint covenants in the present matter are against public policy and should not be enforced as the terms are unreasonable. A.I.G seeks to prevent Ms Hutt from being economically active in a constrained economic climate and labour market that is bleeding jobs on the terms that overtly far-reaching given the diminished, if not extinct, threat to its proprietary interest.

Conclusion

[33] In all the circumstances, A.I.G has not made a case for the confirmation of the *rule nisi* issued on 13 August 2020.

Costs

[34] This Court has a wide discretion in awarding costs in line with principles of law and fairness. Additionally, in *Ball*[25] the LAC gave the following guidance in cases of restraint of trade:

> 'Restraints of the kind being considered, constitute a limitation on a citizen's right, in terms of section 22 of the Constitution, which, arguably, requires justification… In constitutional matters, the general rule that costs follow the result, does not apply. In such matters costs orders are generally eschewed out of concern that they may produce a 'chilling effect', in that litigants may be deterred from approaching a court to litigate concerning an alleged violation of their Constitutional rights for fear of being penalised with costs if they are unsuccessful… If constitutional matters are raised or defended in good faith and not vexatiously and the issues raised have merit or are important, like the violation of a right guaranteed in the Bill of Rights, and the proceedings that ensued, resolved those issues, the party complaining of the violation, even if unsuccessful, would, generally, not be ordered to pay the costs…'

[35] In the present matter, I am satisfied that each party should pay its own costs.

[36] In the circumstances, I make the following order:

1. The *rule nisi* issued by Coetzee AJ on13 August 2020 is discharged.
2. There is no order as to costs.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the Respondent: Advocate Matthew Clark

[25] *Supra* n 13 at para 30.

Instructed by: Telfer Inc.