THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 1178/21

In the matter between:

GLOBEFLIGHT WORLDWIDE EXPRESS SA (PTY) LTD **Applicant**

and

JO-ANN GRACE **First Respondent**

SKYNET SOUTH AFRICA (PTY) LTD **Second Respondent**

Heard: 22 October 2021

Delivered: 29 October 2021

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 29 October 2021.

JUDGMENT

PRINSLOO, J

Introduction:

[1] The Applicant commenced its operations in 1998 and provides a full spectrum of transport and logistics services, which include the delivery and collection of a wide range of items and parcels. Its focus is on turnkey transport and logistics solutions, customised to suit its customer's needs, on both national and international level.

[2] The First Respondent (Ms Grace) commenced employment with the Applicant in June 2006. She had signed an employment contract on 20 July 2006, which contained confidentiality and restraint of trade clauses. On 22 July 2006 and 2 April 2013 respectively Ms Grace signed a 'memorandum of restraint of trade agreement', wherein the parties agreed that in order to protect the Applicant's interests, Ms Grace would not act contrary to what was specifically agreed to during the course of her employment and for a period of one year after the date of termination of her services with the Applicant. The area of the restraint was agreed to as the Gauteng area and later as a 50 kilometre radius of the Applicant's registered office and all offices situated in South Africa, the United Kingdom and any other country that the Applicant's offices are situated.

[3] Ms Grace resigned from the Applicant's employ in August 2021 and on her own version, she occupied the position of 'National Sales and Marketing Director' as at the time of her resignation. Her last day of service with the Applicant was 31 August 2021.

[4] Ms Grace took up employment with the Second Respondent (Skynet) on 1 September 2021. Skynet operates a road transportation, express road freight distribution, courier and warehousing business. It is undisputed that Skynet is a direct competitor of the Applicant.

[5] On 23 September 2021 the Applicant launched an urgent application to enforce Ms Grace's confidentiality and restraint of trade undertakings.

<u>The relief sought</u>

[6] In its notice of motion, the Applicant seeks the following relief:

1. That the Applicant's non-compliance with the time frames specified in the rules of court in terms of Rule 8 of the Annotated Rules of the Labour Court be condoned and that the application be heard as one of urgency.

2. Interdicting and restraining the First Respondent for a period of 12 months from 31 August 2021, from:

2.1. taking up employment with or remaining in the employ of the Second Respondent;

2.2. either alone or jointly or together with or as an agent for any other person, assist, be interested, engaged or concerned, directly or indirectly, whether as principal, proprietor, shareholder, partner, representative, member, consultant, advisor, director, financier, administrator, employee or otherwise in any business, company or concern which carries on business in competition with the Applicant within Gauteng;

2.3. persuading or attempting to persuade any person whom, during her employment with the Applicant, was a banker, financier, supplier or customer of the Applicant, to cease doing business with the Applicant or commence doing business with anyone else

2.4. soliciting or attempting to solicit any business or custom of the Applicant or inducing them to terminate or restrict their business relationship with the Applicant in any way; and

2.5. persuading, inducting, soliciting, encouraging or procuring any employee employed by the Applicant to cease such employment or to undertake employment with or have any interest in any other business.

3. Interdicting and restraining the First Applicant from directly and/or indirectly using or disclosing the confidential information and/or proprietary interests of the Applicant in any manner or for any reason or purpose whatsoever without the prior written consent of the Applicant.

4. That the First Respondent is ordered to surrender to the Applicant all property of the Applicant which she has possession of or control over without retaining any copies or extracts thereof and to permanently delete and/or destroy any property of the Applicant which she may have in her possession or control over in electronic format, without retaining copies or extracts thereof.

[7] In the papers before this Court, issue was taken with urgency. During argument the issue of urgency was left in the hands of this Court. I have considered the issue and in light of the facts placed before me as well as the nature of the application, I am inclined to deal with the matter as one of urgency.

[8] Ms Grace provided certain undertakings to the Applicant, prior to the hearing of this application. Mr Cassim, for the Respondents, indicated during argument that the relief sought in prayers 2.3 – 2.5 and 3 of the notice of motion, which accords with Ms Grace's undertakings, may be made an order of Court.

[9] Ms Erasmus for the Applicant abandoned prayer 4 of the notice of motion.

[10] The issue to be decided by this Court was narrowed significantly and is limited to the relief sought in prayer 2.1 and 2.2 of the notice of motion.

[11] The Applicant's case is that Ms Grace's employment with Skynet is in breach of her restraint of trade agreement, which is disputed by the Respondents.

The applicable legal principles

[12] The general principles applicable to restraint agreements are well-established. In *Massmart Holdings v Vieira and another*[1] *(Massmart)* the Court summarised them as follows:

> [4] Restraint agreements are enforceable unless they are unreasonable (see *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)). In general terms, a restraint will be unreasonable if it does not protect some proprietary interest of the party seeking to enforce a restraint. In other words, a restraint cannot operate only to eliminate competition. The party seeking to enforce a restraint need only invoke the restraint agreement and prove a breach of the agreement, nothing more. The party seeking to avoid the restraint bears the onus to establish, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable (see 2013 (1) SA 135; *Magna Alloys and Research (SA) (Pty) Ltd* supra; *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D)).
>
> [5] One of the most influential statements of the law in regard to the determination of the reasonableness or otherwise of a restraint of trade agreement is that in *Basson v Chilwan and others* 1993 SA 742 (A). In that judgment, the court established the following test:
>
> 1. Is there an interest of the one party, which is deserving of protection at the termination of the agreement?

[1] Unreported Labour Court case J1945-15.

2. Is such interest being prejudiced by the other party?
3. If so, does such interest weighs up qualitatively and quantitatively against the interests of the latter party that the latter should not be economically inactive and unproductive?
4. Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

[13] In *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and another*[2] the position with regard to restraints of trade in our law, having considered the position before and after the constitutional dispensation, has been summarised as follows:

1. Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work.

2. Insofar as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case.

3. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time the enforcement is sought.

4. Where the onus lies in a particular case is a consequence of the substantive law on the issue.

5. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.

6. A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint:

[2] *(*2011) 32 ILJ 601 (LC).

6.1. The first is that the public interest required that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*.

6.2. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions.

[14] In view of the *dicta* referred to *supra*, the point of departure is that restraint of trade agreements are valid. The restraint of trade clause will be enforceable if there is an interest that requires protection and insofar as it is reasonable.

[15] In an application such as this one, the party seeking to enforce a restraint of trade is required to invoke the restraint agreement and prove a breach thereof. If the restraint is reasonable, it will be enforceable.

[16] The party seeking to avoid the restraint, bears the onus to show that on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable.[3]

The issues to be decided

[17] The contract of employment Ms Grace had concluded in July 2006 with the Applicant, included a restraint of trade undertaking. It provided that for a period of one year after termination of her employment, for any reason whatsoever, she should, in short, not be involved in any capacity, with a competitor of the Applicant. Ms Grace further signed memoranda of restraint of trade agreement in July 2006 and April 2013 respectively (the memoranda). The Applicant seeks to invoke the restraint agreement against Ms Grace as she acted in breach thereof by taking up employment with Skynet, a competitor of the Applicant.

[18] The Applicant seeks to interdict and restrain Ms Grace, for a period of 12 months from 31 August 2021, from firstly taking up employment with or remaining in the employ of the Skynet and secondly from being involved in any capacity in any

[3] *Basson v Chilwan and Others* 1993 SA 742 (A) at 7761I-J; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 486 (SCA) at [10] to [14], pp 493E/F to 496D; *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); *Experian South Africa (Pty) Ltd v Haynes and another* 2013 (1) SA 135;

business, company or concern which carries on business in competition with the Applicant within Gauteng.

[19] Although Ms Grace took issue with the terms of the restraint undertakings in her opposing papers, it was abandoned during argument. There is no dispute as to what is contained in the contract of employment and the subsequent memoranda signed by Ms Grace, with specific reference to the restraint of trade which the Applicant seeks to enforce.

[20] Ms Grace has raised several defences in her opposing affidavit. The main issue is whether the Applicant has a protectable interest and if so, whether there is still an interest to protect. I will deal with these issues in turn.

Ms Grace was forced to seek alternative employment

[21] It is evident from Ms Grace's opposing affidavit that part of her defence is that the Applicant and DSV had pushed her to a position where she had no choice but to seek alternative employment elsewhere. This defence is not supported by the facts placed before this Court. Ms Grace was assured that the sales and marketing team would remain intact, notwithstanding the merger with DSV and she was even offered a retention bonus to stay on board. The purpose of the retention bonus was to reward the Applicant's employees who remained in its employ until February 2022, after the finalisation of the transition period of the merger with DSV. It was communicated to Ms Grace that her continued service was of great importance.

[22] This defence also has no merit in law.

[23] The restraint of trade clause, as per Ms Grace's contract of employment, provides that the restraint of trade applies for a period of 12 months after the termination of the her services with the Applicant "*for any reason whatsoever".*

[24] In *Reeves and another v Marfield Insurance Brokers CC and others*[4] the Appellate Division (AD) has settled the question whether the phrase 'for any reason whatsoever' in the restraint clause is to be given a restricted meaning so

[4] 1996 (3) SA 766 (A) at 771H-773A

as to exclude any wrongful termination of the contract of employment by the employer. The AD held:

[25] Firstly, that such words do not exclude termination by virtue even of the unlawful conduct of the employer, stating "*in my view there is no ambiguity. The words 'ceases to be employed' indicate an intention that the restraint is to operate once there is no longer an employment relationship between employer and employee. The words that follow, i.e. 'for any reason whatsoever', make it clear that the circumstances in which the employment relationship comes to an end or the underlying cause of its termination are irrelevant to the operation of the restraint provision. There is accordingly no justification for the limited meaning which counsel urged should be given to the phrase.*"[5]

[26] Secondly, by examining whether such a provision would be *contra bonos mores*, stating[6] that "[*t]he legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end. The need for the protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs in consequence of a breach by the employer. Such a breach may, of course, take many forms. It may be committed by the employer in good faith and be of a technical nature only. There may be fault on both sides. It is difficult to imagine that in such circumstances it would be against good morals to recognise the restraint and that the employer should have to forfeit the protection which the parties have agreed he should have regardless of how the employment relationship is ended. Even where the breach on the part of the employer is less innocent, it must be remembered that the employee is always free to pursue his contractual or statutory remedies against the employer. Where there is provision for the giving of notice the damage suffered by the employee may not amount to much. On the other hand, the loss to an employer in consequence of holding the restraint to be invalid may be considerable. In appropriate circumstances… an employee may be entitled to have his damages assessed on the basis of the existence of the restraint. I*

[5] At 771J-772B
[6] At 772F-773A

can accordingly see no justification for regarding a provision such as the one in issue as contra bonos mores."

[27] Lastly, that "*there would seem to be no reason in principle why the existence of such a provision in the restraint agreement and the circumstances in which the employment relationship came to be terminated should not be included in what Botha JA in the Basson case … at 777D, described as 'the multitude of factors to be taken into account in the inquiry as to the reasonableness of the restraint'. In the absence of fraud or a wilful wrongdoing the termination of the contract of employment in consequence of a breach or an unfair labour practice on the part of the employer would not on its own, I think, ordinarily carry much weight.*"

[28] In *Bonfiglioli SA (Pty) Ltd v Panaino*[7] *(Bonfiglioli)* the Labour Appeal Court (LAC) confirmed that a contract in restraint of trade is one that prevents an employee from exercising his or her trade, profession or calling, or engaging in the same business venture as the employer for a specified period, and within a specified area after leaving employment. The restraint agreement is therefore geared at protecting the employer's proprietary interest after the employee has left the employer's employment. The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end. The need for the protection exists therefore independently of the manner in which the contract of employment is terminated.

<u>The applicable test</u>

[29] In *Experian SA (Pty) Ltd v Haynes and another*[8]*(Experian)* it was held that:

> 'The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint, bears the *onus* to demonstrate on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.'

[7] (2015) 36 ILJ 947 (LAC).
[8] (2013) 34 ILJ 529 (GSJ).

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

i. is there an interest of the one party, which is deserving of protection at the termination of the agreement?

ii. is such interest being prejudiced by the other party?

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

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

[31] In seeking to avoid the enforcement of the restraint, Ms Grace bears an onus to show that the restraint against her should not be enforced because to do so would be, on an application of the test in *Basson v Chilwan (Basson)*, unreasonable and contrary to public policy.

Protectable interest

[32] The first issue to be decided is whether the Applicant has a proprietary interest, deserving of protection, which will be threatened by Ms Grace's employment with Skynet.

[33] Insofar as the first leg of the test in *Basson* is concerned, it is well established that the proprietary interests that can be protected by a restraint agreement are essentially of two kinds, namely –

i. all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as *"trade secrets"*; and

ii. the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to

[9] 1993 SA 742 (A) at 767C-H.

as the "*trade connection*" of the business, being an important aspect of its incorporeal property known as goodwill.[10]

[34] Whether information constitutes a trade secret is a factual question. For information to be confidential it must be –

i. capable of application in trade or industry, that is, it must be useful and not be public knowledge and property;

ii. known only to a restricted number of people or a closed circle; and

iii. of economic value to the person seeking to protect it.[11]

[35] As to customer connection, the need of an employer to protect its trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with a customer so that when she leaves the employer's service she could easily induce the customers to follow him to a new business.

[36] Ms Grace's defence is that the Applicant does not have any proprietary interests worthy of protection. She submitted that both the Applicant's and Skynet's success or failure is the ability to render their services efficiently and at a competitive rate. There is nothing unique about the Applicant's business methodologies other than the fact that these are businesses that have developed over a period of time, rendering services on a reliable and cost-effective basis. Ms Grace stated that clients are very moved by the services rendered to them and her success as an employee is her ability to go out of her way to nurture and attend to the client's interests. Her case is further that she does not possess any proprietary or confidential information of the Applicant, she had conducted a comprehensive handover and she is not engaging with the Applicant's clients.

[37] The Applicant's case is that it has proprietary interests worthy of protection and that its protectable interests lie in both customer connections and confidential information. The Applicant therefore has a clear right to enforce the restraint and

[10] Sibex Engineering Services (Pty) Limited v Van Wyk & Another 1991 (2) SA 482 (T) at 502D/E-F
[11] Townsend Productions (Pty) Ltd v Leech & Others 2001 (4) SA 33 (C) at 53J-54B; Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd [1999] 3 B All SA 321 (W) at 333F.

confidentiality undertakings provided by Ms Grace when she signed and agreed to the terms contained in her contract of employment and the memoranda.

Analysis

[38] The party seeking to enforce a restraint need only invoke the restraint agreement and prove a breach of the agreement, nothing more. A restraint of trade can be enforced and *"it is sufficient for the applicant to show that the customer contact exists and that they can be exploited by the former employee.*[12]*"*

[39] In *New Justfun Group (Pty) Ltd v Turner and Others*[13]*(New Justfun)* it was held that:

> 'Proprietary interests that are legitimately capable of protection by a restraint agreement extend both to confidential matters which are useful for the carrying on of the business and which could be used by a competitor, if disclosed, to gain a relative competitive advantage, and to relationships with customers, potential customers, suppliers and others that go to make up what is referred to as the 'trade connection' of the business. The second kind of proprietary interest capable of protection is that which comprises confidential matter useful for the carrying on of the business, and which could be used by a competitor, if disclosed, to gain a relative comparative advantage. These are referred to as 'trade secrets' (see *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T)).'

[40] In *Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and another*[14] the Court, in considering the question whether there was indeed a protectable interest, held that:

> 'As I pointed out in *Esquire Technologies*, a restraint is valid if there is a proprietary interest which justifies protection. Those interests are usually in the nature of trade secrets, know-how, pricing or customer connections. Therefore, a restraint would be an enforceable restriction on the activities of an employee who (for example) had access to the company's customers and could use

[12] *New Justfun Group (Pty) Ltd v Turner and Others (*2018) 39 ILJ 2721 (LC).
[13] Ibid fn 9.

[14] (2012) 33 ILJ 629 (LC).

his/her relations with the company's customers to the advantage of a competitor and to the detriment of the company.'

[41] As was held in *Massmart "a restraint will be unreasonable if it does not protect some proprietary interest of the party seeking to enforce a restraint."*

[42] It is not disputed that Ms Grace signed a restraint agreement, that she had resigned from the Applicant's employ and that she had taken up employment at a competitor of the Applicant. In order for Ms Grace to escape enforcement of the restraint, it is incumbent on her to establish that the restraint agreement is unreasonable. *In casu* it will be unreasonable if it does not protect a proprietary interest. Ms Grace had not taken issue with the duration or area of the restraint in challenging the reasonableness thereof.

[43] In considering the question as to whether the Applicant has a protectable interest, it is prudent to consider Ms Grace's position at the Applicant and responsibilities she had and executed in her position as an employee of the Applicant.

[44] Ms Grace was the Applicant's national sales and marketing director. It was undisputed that her duties and responsibilities encompassed the managing of sales and marketing, identifying current and prospective sales opportunities, evaluating the capability of operations to handle all new business operational requirements, visiting existing customers to build, strengthen and maintain relationships, expanding profitability by achieving and exceeding sales targets, addressing customer and employee feedback, concerns and dissatisfaction promptly, monitoring the fleet inventory of the branch, identifying resource needs, managing agreements with external product and service providers . Ms Grace was part of all sales related calls between the national sales and marketing director and the sales management team, she was privy to decision making and strategy sessions relating to sales and marketing. She was also aware of client rates as well as clients lost or clients the Applicant was on the edge of losing.

[45] It was also not disputed that Ms Grace was trained in the new E-Commerce sales partner plug-in, she received training on the UPS system, transit times and that she was instrumental in the implementation of the 'Business Intelligence' (BI) Tool. Ms Grace was involved in the marketing of the Applicant

on a national level, which included the building of relationship with current, potential and at risk clients. She was also responsible for the employment of the Applicant's sales representatives and she was privy to their remuneration packages, skill sets etcetera. Ms Grace was privy to information pertaining to the Applicant's operations, prospective plans, debtors, creditors, strategies, mergers, acquisitions and financial information and she had full access to the Applicant's systems and information by virtue of the position she held.

Customer connections

[46] It is trite that not every contact between an employee and the employer's customers constitutes or forms the basis of a protectable interest in the form of customer connection. The need of an employer to protect a trade connection arises where the employee has access to customers and is and in a position to build up a particular relationship with the customer.

[47] In *Rawlins v Caravan Truck (Pty) Ltd*[15] *(Rawlins)* it was held that the need of an employer to protect its trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers, and could easily induce the customers to follow him or her to a new business. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant if its former employee would take up employment becomes apparent. It was held that:

> 'Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left.[16] '

[15] [1992] ZASCA 204; 1993 (1) SA 537(A) at 541 C-D.
[16] At 541D-I.

[48] *In casu* the facts placed before me show that Ms Grace had close contact with the Applicant's customers, that she was involved in the marketing of the Applicant on a national level, which included the building of relationship with current, potential and at risk clients. On Ms Grace's own version the success of the Applicant and Skynet lies in their ability to render efficient services at a competitive rate and clients are 'very moved by the services rendered to them'. She stated that *"my success as an employee was my ability to go out of my way to nurture and attend to the client's interest. For this I cannot be punished…"*

[49] It is evident that Ms Grace established relationships with the Applicant's clients, she knew and understand their needs and interests and that made her successful as an employee of the Applicant. The risk of harm in her taking up employment with a direct competitor, is apparent.

Confidential information

[50] Whether confidential information is properly the subject of protection is a factual question.

[51] All that the Applicant needs to show is that there is confidential information to which Ms Grace had access and which in theory she could transmit to Skynet or any other new employer should she desire to do so. The Applicant does not have to show that Ms Grace has in fact utilised information confidential to it - it is sufficient to show that she could do so. The very purpose of the restraint agreement the Applicant seeks to enforce, is that the Applicant does have to rely on the *bona fide's* or lack of retained knowledge on the part of Ms Grace, of the confidential information it seeks to protect.

[52] Ms Grace's case is that there is nothing unique about the business methodologies of the Applicant. This may be so, but that is not the only issue to be considered in deciding the question as to whether the Applicant has a protectable interest. Ms Grace's stance about the lack of uniqueness of the Applicant's business methodologies, is over simplistic and almost naïve in view of the authorities referred to herein *supra.* The concept 'protectable interest' is much wider than unique business methodologies.

[53] It remains ultimately for Ms Grace to establish that she had no access to confidential information and that she never acquired any significant personal

knowledge of, or influence over, the Applicant's customers while she was in the Applicant's employ or of any other information, not in the public domain, which might be useful to a competitor of the Applicant, while in its employ.

[54] The undisputed facts placed before this Court show that Ms Grace, in her capacity as national sales and marketing director, was required to *inter alia* manage sales and marketing, to identify current and prospective sales opportunities, to visit existing customers to build, strengthen and maintain relationships, to expand profitability. She was privy to decision making and strategy sessions relating to sales and marketing.

[55] In her opposing affidavit Ms Grace conceded that she was privy to some confidential information, but she has no intention to disclose it. The reality is that Ms Grace is employed by a direct competitor of the Applicant and she is in a position to use or disclose the Applicant's confidential information to the benefit of her new employer and to the Applicant's detriment.

[56] Ms Grace's defence that since her departure from the Applicant she no longer has access to its systems and the information contained thereon, is of no moment. She had left the employ of the Applicant on 31 August 2021 and commenced employment with Skynet on 1 September 2021. The very next day after leaving the Applicant, she took up employment with Skynet and as such, the customer connections Ms Grace had as an employ of the Applicant, had certainly not cooled down or disappeared, nor did the information she had access to, became worthless to a competitor.

[57] In addition to the aforesaid, Ms Grace was prepared to give an undertaking, which is to be made an order of Court in the following terms:

> *'Interdicting and restraining the First Applicant from directly and/or indirectly using or disclosing the confidential information and/or proprietary interests of the Applicant in any manner or for any reason or purpose whatsoever without the prior written consent of the Applicant.'*

[58] Ms Grace denies that the Applicant has any protectable interest, but in the same breath gives an undertaking not to disclose same. The undertaking is nothing but an admission that she had access to confidential information and that the Applicant has proprietary interests that are worthy of protection.

[59] The following dicta in *New Justfun*[17] is applicable *in casu:*

> 'The undertakings given by Turner and underwritten by the second respondent (effectively consenting to an order in terms of prayers 3 and 4 of the notice of motion with some minor modification, and an undertaking not to deal with the applicant's customers with whom Turner had dealt - specifically, Shoprite, Baby Boom, Baby City and Toy Kingdom) would ordinarily address any legitimate concern by the applicant, especially in relation to the confidentiality of information. However, my understanding of the relevant authorities is that once the applicant has shown that there is confidential information to which the applicant had access and which in theory Turner could transmit to the applicant should she desire to do so, then the applicant is entitled to the protection afforded by the restraint. The enforcement of a restraint, the purpose of which is to protect confidential information, cannot be defeated by an undertaking that the employee will not divulge the information if he or she is permitted, contrary to the restraint, form entering into employment with a competitor.'

[60] Ms Grace stated in her opposing affidavit that she had been privy to confidential information during her employ, but she had not breached any confidentiality undertakings towards the Applicant and she had undertaken to continue not to disclose any confidential information. The undertaking provides nothing more than cold comfort. The authorities make clear, the very purpose of a restraint agreement is to relieve the enforcing party from the obligation to police undertakings such as those given by Ms Grace.

[61] Where the ex-employer seeks to enforce against its ex-employee a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has in fact utilised information confidential to it - merely that the ex-employee could do so. The very purpose of the restraint agreement is that the Applicant does not wish to have to rely on the *bona fides* or lack thereof on the part of Ms Grace.

[62] The Applicant should not have to content itself with crossing its fingers and hoping that Ms Grace would act honourably or abide by the undertakings that she has given. It does not lie in the mouth of the ex-employee who has breached a restraint agreement by taking up employment with a direct

[17] At para 20.

competitor to say to the ex-employer *'Trust me: I will not breach the restraint further than I have already been proved to have done*.'[18]

[63] In my view the information Ms Grace had access to as an employee of the Applicant as well as the customer connections she had built up during her employment, constitute a protectable interest.

[64] Ms Grace failed to show that she had no access to confidential information or that she had not forged customer connections. It is not unreasonable to assume or to fear that should she leave and take up employment with one of the Applicant's competitors, she would be in a position to take advantage of these connections or use the information for the benefit of the competitor and to the Applicant's detriment.

[65] Ms Grace's defence that the Applicant does not have a protectable interest, has to fail.

The enforcement of the restraint of trade agreement

[66] The Applicant was acquired by DSV South Africa (Pty) Ltd (DSV) and on 26 April 2021 the Competition Tribunal of South Africa approved the merger between the Applicant and DSV, subject to the conditions attached to the approval. The implementation date is the date, occurring after the approval date, on which the last condition precedent to the sale agreement is fulfilled or waived, as the case may be.

[67] Ms Grace's case is that pursuant to the merger, the Applicant will cease to exist, alternatively it will collapse as a brand and operationally its business will be absorbed by DSV and its employees will be employed by DSV. This will happen with effect from 1 November 2021 and as such, the relief sought by the Applicant will become academic. This is so because even if the Applicant were to contend that Ms Grace's employment would have transferred to DSV from 1 November 2021, in terms of the provisions of section 197 of the Labour Relations Act[19] (LRA), only contracts of employment are transferred. Restraint provisions embodied in a separate restraint agreement that are less favourable to an

[18] IIR South Africa BV (Incorporated in the Netherlands) ta Institute for International Research v Tarita & Others 2004 (4) SA 156 (W) at 166H-167C; IIR South Africa BV v Hall (aka Baghas) 2004 (4) SA 174 (W) at 179 para [13.2];
[19] Act 66 of 1995, as amended.

employee than the Basic Conditions of Employment Act[20](BCEA), are not terms in a contract of employment and therefore do not transfer in terms of section 197 of the LRA. Ms Grace submitted that the restraint agreement could never transfer to the merged entity in circumstances where she will not be an employee of the merged entity when the section 197 transfer takes place by operation of law on 1 November 2021.

[68] Mr Cassim submitted that at the time of the hearing of this application, all the clients with whom Ms Grace had a relationship whilst in the employ of the Applicant, are being serviced by DSV and the Applicant's business will cease to exist after October 2021, alternatively will cease to operate and will effectively be a shell, especially where its employees have been onboarded by DSV. There is no contractual nexus between Ms Grace and DSV and the granting of the relief sought by the Applicant, will become moot one week after the hearing of the application, as no restraint of trade agreement will exist after 30 October 2021.

[69] In support of his argument Mr Cassim referred to *Laser Junction (Pty) Ltd v Fick*[21]*(Laser Junction)* where it was held that only contracts of employment are transferrable under section 197 of the LRA.

[70] The Applicant on the other hand submitted that it goes without saying that, unless otherwise provided, section 197 of the LRA is applicable to mergers and acquisitions. The Applicant and DSV will be merging and the business of the Applicant will transfer to DSV, but that process is not completed as yet. 1 November 2021 was initially anticipated as the date on which the Applicant would have been able to wind down and all conditions to the sale agreement would have been fulfilled or waived, however this date has been moved and it is not certain when all the conditions will be met and when the final implementation date will be. According to the Applicant, this date is in any event irrelevant. During the Applicant's engagement with Ms Grace, she was informed throughout that the entire sales and finance team would remain intact. The Applicant's case is that irrespective of whether Ms Grace is still in its employ or not as at the effective date of the transfer, section 197(2)(b) of the LRA makes

[20] Act 75 of 1997, as amended.
[21] (2017) 38 ILJ 2675 (KZD) at paras 21 -23.

it clear that all rights and obligations of Ms Grace transfers to DSV, as the new employer and anything done by or in relation to the Applicant, is considered to have been done by or in relation to the new employer, DSV.

[71] In support of her argument that Ms Grace has misconstrued the concepts 'contract of employment' and 'rights and obligations', Ms Erasmus referred to the minority judgment of the Constitutional Court (CC) in *Horn and others v LA Health Medical Scheme and another*[22]*(Horn)* where the interpretation of section 197 was dealt with.

Analysis

[72] The gist of the question is whether the restraint of trade Ms Grace had agreed to as an employee of the Applicant, would be enforceable beyond the merger between the Applicant and DSV.

[73] Ms Grace's case is that it would not be because as she was not an employee at the time of the merger, her contract of employment was not transferred to DSV, thus after the merger, when the Applicant will cease to exist, the relief sought in this application, will become academic. In support of this, Mr Cassim relies on *Laser Junction* where it was held that only contracts of employment and not a restraint of trade agreement, are transferrable under section 197 of the LRA.

[74] Section 197(2) of the LRA provides that:

> (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) -
>
> *(a)* the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
>
> *(b)* all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

[22] 2015 (7) BCLR 780 (CC)

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.'

[75] The argument is that in terms of section 197(2)(a), the new employer is substituted in the place of the old employer, but only in respect of contracts of employment in existence immediately before the date of the transfer. In *Laser Junction* the court considered the question whether agreements are transferable by operation of law under section 197 of the LRA and found that where a contract of employment was transferred because section 197 of the LRA expressly provides for it, the same cannot be said for the restraint agreement. In *Laser Junction*[23] it was held that:

> 'Only contracts of employment are transferrable under s 197 of the LRA. What is a contract of employment? Section 4 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) stipulates that contracts of employment may contain basic conditions of employment as provided in the BCEA or a sectoral determination, and any law or term in a contract that is more favourable to the employee. The corollary of this is that a restraint that is less favourable than the BCEA to an employee cannot be a term in a contract of employment. Whether a restraint agreement is less favourable must be determined case by case. If it is less favourable and therefore excluded from a contract of employment as defined then it cannot be transferred by operation of law under s 197.
>
> Is the restraint in this case less favourable to the respondent? Neither the Constitution of the Republic of South Africa, 1996 nor our labour laws recognise a right to work. Similarly conventions of the International Labour Organisation from which the LRA draws sustenance, recognises fundamental rights *at* work but not the right *to* work. By signing the restraint agreement the respondent acquired the right to work. And with that right came all the protections of an employee under s 23 of the Constitution. However, the restraint agreement also constrains the respondent's other rights including rights to freedom of trade,

[23] At paras 21 – 23.

> occupation and profession in s 22. The respondent could have acquired the right to work in a contract of employment as workers usually do if that was the only purpose of concluding an agreement. It was not. In the hands of Laser CNC and now the applicant who relies on it the real and only purpose of the restraint agreement was to wield it as a weapon to discourage him from leaving and when he did to constrain his new employment to its advantage. As such the restraint was not merely less favourable but manifestly unfavourable to the respondent; therefore it did not meet the definition of a contract of employment. Consequently it could not be transferred to the applicant by operation of law.
>
> For these reasons I find on the facts that the restraint agreement fell away in 2013 when the applicant became the employer and concluded a new agreement with the respondent, otherwise it fell away when he was promoted to procurement. As a matter of law s 197 of the LRA does not permit a transfer of agreements that were not contracts of employment, i.e. agreements favourable to an employee, which the restraint agreement was not. Consequently no valid restraint agreement existed between the parties. This finding is dispositive of the application. However, if it transpires that the restraint agreement still exists, the further questions raised in my introduction will be relevant.'

[76] There are a number of difficulties with the application of the dicta of *Laser Junction in casu.* Firstly, the factual matrix is distinguishable from the facts before this Court. In *Laser Junction* the employee had signed a contract, including a restraint of trade, with his employer. When the applicant (Laser Junction) took over the business as a going concern, the employee had signed a new contract of employment with the applicant, which did not include a restraint of trade. In addition, the employee was promoted and where the restraint agreement was specifically addressed to him in his previous capacity, the court found that if the restraint had existed at all, it fell away when the employee was promoted to a different position to which the restraint of trade did not apply. That is not the case *in casu.*

[77] Secondly, in *Laser Junction* the court held that only contracts of employment are transferrable under section 197 of the LRA. The court considered what a contract of employment is and answered the question with specific reference to section 4 of the BCEA, which stipulates that contracts of employment may contain basic conditions of employment, as provided for in the BCEA, or a sectoral determination, or any law or term that is more favourable to the

employee. The court concluded that the corollary of this is that a restraint that is less favourable than the BCEA to an employee cannot be a term in a contract of employment. If it is less favourable and therefore excluded from a contract of employment as defined, then it cannot be transferred by operation of law under s197.

[78] I am not inclined to follow the aforesaid *dicta* as it is wrong. The BCEA is the principal statute giving effect to statutory minimum terms and conditions of employment. The stated purpose of the BCEA is to advance economic development and social justice by establishing and enforcing minimum conditions of employment and by defining the circumstances in which these minimum standards may be varied.

[79] The BCEA provides a default set of conditions of employment. When a contract of employment or a wage-regulating measure (such as a sectoral determination or collective agreement) is silent about a basic condition of employment provided for in the BCEA, the particular statutory condition is automatically included in the contract. On the other hand, should the contract of employment or wage-regulating measure provide for more favourable terms and conditions, these trump any minimum condition set by the BCEA.

[80] The BCEA uses the mechanism of a 'basic condition of employment' to fix minimum standards. Section 4 of the BCEA provides that a basic condition of employment constitutes a term of any contract of employment, except to the extent that: any other law provides for a more favourable term, or where the basic condition has been replaced, varied or excluded in terms of the Act, or where a term of the contract of employment is more favourable to the employee than the basic condition of employment[24].

[81] Section 4 of the BCEA does no more than to provide for basic conditions of employment and to set out circumstances in which these minimum standards may be varied. To interpret and apply section 4 to mean that if a restraint of trade agreement is less favourable to an employee than the BCEA, it is excluded from a contract of employment and can therefore not be transferred by operation

[24] *Law @ work*, A van Niekerk et al, LexisNexis, 4th edition 2018, p 105 -107.

of law under section 197 of the LRA, is wrong and is not to be followed by this Court.

[82] The parties to an employment contract are free to regulate their respective rights and duties, subject to the requirements of the law. If the contract is silent on particular terms and conditions laid down in applicable legislation or collective agreement, the provisions of the legislation or collective agreement will be read into the contract as if the parties have agreed to them. The conclusion of such a contract, creates reciprocal rights and obligations between an employer and an employee. The parties are free to agree to a restraint of trade in the contract of employment. A contract of employment is transferrable under the provisions of section 197 of the LRA, including all the terms agreed to between the parties.

[83] A restraint of trade agreement concluded between an employer and employee and included in a contract of employment, is transferable under section 197 of the LRA.

[84] The question is whether Ms Grace's restraint of trade agreement will transfer to DSV. She submitted it will not as she will not be an employee at the time of the transfer and there is no contractual nexus between her and DSV. The Applicant's case is that it matters not, because the right it acquired and the obligation Ms Grace had agreed to in the restraint of trade undertaking, exists for a period of 12 months after the termination of her employment and that right and obligation will transfer to DSV, irrespective of whether or not she was an employee as at the time of the merger.

[85] In *Horn* the minority judgment of the CC considered the interpretation of section 197(2)(a-d) of the LRA. The majority declined to consider the interpretation of section 197 of the LRA. It was held that:

> '[62] In the light of paragraphs (a) and (b) of subsection (2) the answer to the question whether the alleged obligation was not taken over by Discovery upon the transfer of the administrative division must be that it was. If that obligation was part of the appellants' contracts of employment, then it was taken over by reason of paragraph (a) of subsection (2). If the alleged obligation was not part of the contracts of employment but was, nevertheless, an obligation affecting the employment relationship, then it was taken over by reason of paragraph (b) of subsection (2). The language used in paragraph (b) is very wide. The

paragraph says that, if a business is transferred as a going concern, unless otherwise agreed in terms of subsection (6)—

"all the rights and obligations between the old employer and an *employee* at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the *employee*.[25]"

[63] If the obligation was in existence at the time of the transfer, it continued in force beyond the transfer but, after the transfer, it was borne by Discovery, the business transferee. If the obligation was not in existence at the time of the transfer but arose after the transfer, then that obligation can only be enforced against the business transferee and not the business transferor[26].

[66] Apart from that, the language used in section 197(2)(b) is very wide and is not qualified other than by the requirement that the rights and obligations be "between the old employer and an employee at the time of the transfer". Other than that, section 197(2)(b) says that all the rights and obligations between the business transferor and each employee at the time of the transfer continue in force as if they were rights and obligations between the business transferee and each employee. A suggestion that the obligation that the appellants seek to enforce falls outside the ambit of section 197(2)(b) would require a justification as to how that is possible in the light of the wide language used in paragraph (b). The appellants have failed to proffer such a justification. In my view there is no exception provided for in section 197(2)(b) and, therefore, the obligation sought to be enforced by the appellants falls within the ambit of section 197(2)(b).[27]

[84] In my view the provision of section 197(2)(b) means what it says. That is that the reference in section 197(2)(b) to "all the rights and obligations in existence at the time of the transfer between the [business transferor] and each employee at the time of the transfer" is a reference, without exception, to all the rights and obligations in existence at the time of the transfer between the business transferor and every employee and all those rights and obligations continue after the transfer as if they had been rights and obligations between the business transferee and the employee. This interpretation is consistent with

[25] At para 62.
[26] At para 63.

[27] At para 66

> the European Court of Justice's decisions in *Beckmann* and *Martin*[28]. (Own underlining)'

[86] *In casu* Ms Grace agreed to a restraint of trade for a period of 12 months after the date of the termination of her employment with the Applicant. It is common cause that she left the Applicant's employ on 31 August 2021, thus the 12 month period of restraint has not expired. Ms Grace agreed, for the period of the restraint, not to assist, be interested, engaged or concerned, whether as principal, proprietor, shareholder, partner, representative, member, consultant, advisor, director, financier, administrator, employee or otherwise, in any business, company or concern which carries on business in competition with the Applicant. The Applicant seeks to enforce the restraint of trade within Gauteng.

[87] The restraint of trade agreement is still enforceable in respect of duration. In my view what Ms Grace contractually agreed to in her contract of employment, constitutes an obligation, which remains in force for a period of 12 months after the termination of her employment with the Applicant.

[88] Section 197(2)(b) provides for all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee. The CC in *Horn* confirmed that "*if the obligation was in existence at the time of the transfer, it continued in force beyond the transfer."* This obligation is in existence and should the merger happen within 12 months from 31 August 2021, it will remain in existence and will continue in force beyond the transfer.

[89] The LAC held in *Bonfiglioli* that the restraint agreement is geared at protecting the employer's proprietary interest after the employee has left the employer's employment and the legitimate object is to protect the employer's goodwill and customer connections. The LAC confirmed that the restraint remains effective for a specified period after the employment relationship has come to an end. If the old employer is substituted by the operation of law with a new employer, the restraint is still enforceable as the object remains to protect the employer's interests, be that the old or the new one.

[28] At para 84.

[90] It is significant however that Ms Grace argued that her contractual obligations are in favour of the Applicant, which is to deregister following a merger with DSV and that she has no contractual obligation towards DSV. However, in her opposing affidavit, she made it clear that she will adhere to the undertakings she has made in favour of not only the Applicant, but also DSV. On her own version, DSV is entitled to adherence to the terms of the contractual agreement Ms Grace had entered into with the Applicant, even after the merger.

[91] The argument that the relief sought by the Applicant will become academic, has to fail.

A quantitative and qualitative weigh off the respective interests of the parties

[92] As alluded to *supra,* the Applicant has a protectable interest, which is being prejudiced by Ms Grace's breach of her restraint of trade undertaking by taking up employment with a direct competitor of the Applicant.

[93] The third consideration in *Basson,* is the weighing of interests. The question is how does the Applicant's interest weigh up qualitatively and quantitatively against Ms Grace's interests to be economically active and productive. This consideration goes hand in hand with a consideration of the public interest that requires parties to comply with their contractual obligations and that allows all persons be productive and be permitted to engage in trade and commerce or professions.

[94] In *Reddy v Siemens Telecommunications (Pty) Ltd*[29] the Supreme Court of Appeal upheld a 12 month restraint against an employee who had joined a competitor (Ericsson). The Court restated the following principles:

> 'A Court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part

[29] 2007 (2) SA 406 (SCA).

> of freedom in forming the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life.'

[95] In applying the two aforesaid principal considerations, the particular interest must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. I already found that the Applicant does have an interest that deserves protection.

[96] The Applicant's restraint and the relief sought is limited to the terms as set out in the restraint clause and is limited to Gauteng province. The Applicant is not seeking an order to interdict Ms Grace from being employed at all, but from being employed by a direct competitor of the Applicant in Gauteng.

[97] The Applicant's case is that the industry is extremely competitive and that the disclosure of its confidential information will be detrimental to the Applicant in that a competitor would obtain an unfair advantage over the business of the Applicant, which will result in dire financial consequences for the Applicant and the future sustainability of its business.

[98] The Applicant stated that Ms Grace is a skilled sales and marketing director, which skills can be put to use in any industry.

[99] Ms Grace on the other hand submitted that she has been employed in the logistics industry for 31 years in one capacity or the other and she does not know any other industry. Preventing her from being employed by Skynet, especially having regard to the undertakings she has given, is contrary to her constitutional right to earn a living and is against public policy. Due to the Covid-19 pandemic, she would have difficulty to secure alternative employment.

[100] The Applicant responded that in light of what Ms Grace has stated in respect of the Covid-19 pandemic, it is inconceivable that she would have resigned from the Applicant's employment in those circumstances and without first securing alternative employment.

[101] The facts placed before this Court indicate that Ms Grace was paid an amount of R 1 million in May 2021 as a 'thank you' gesture, she was offered a retention bonus of R 103 000 to be paid in February 2022, she was assured that her

position was not in line for retrenchment as a result of the DSV merger, she was assured that the sales and marketing team would remain and in general she was continuously provided with reassurances pertaining to her job security. Notwithstanding this, she decided to resign out of her own free will.

[102] She had left the Applicant's employ of her own accord, she is a highly skilled individual and there are no facts to demonstrate that she has tried to find alternative employment in areas that do not infringe upon the terms of her restraint. Ms Grace remains free to take up employment with a company that does not operate in direct completion with the Applicant.

[103] On 26 August 2021 the Applicant conducted an exit interview with Ms Grace and during the aforesaid interview Ms Grace indicated that she preferred not to continue with DSV and confirmed that she was not taking up employment elsewhere. She informed the Applicant that she was considering emigrating to Lithuania. Apparently her love for South Africa prevailed and she searched for other employment.

[104] A mere four working days later she was employed by Skynet. It is highly improbable that Ms Grace had no idea on 26 August 2021 that she was taking up employment with Skynet on 1 September 2021, the day after she departed from the Applicant's employ.

[105] Ms Grace, on whom the onus rests, adduced no evidence to show that the enforcement of the restraint is disproportionate, having regard to any of her countervailing interests.

[106] She has provided no reasons in law why the restraint is not enforceable and the reasons she provided are nothing but considerations *ad misercordiam,* which have no place in an application to enforce a contractually agreed to term. If those were the only basis not to enforce a restraint of trade, it would defeat the purpose of a restraint and undermine the consequence and effect of a valid and binding agreement.

Public policy

[107] The last aspect that has to be considered is whether there is an aspect or another facet of public policy, having nothing to do with the relationship between the parties, which requires the restraint being enforced or not.

[108] Mr Cassim submitted that the global and national effects of the Covid-19 pandemic are highly relevant and cannot be underestimated. It has resulted in significant economic downturn and resulting job losses and retrenchments. He relied on *Oomph Out of Home Media (Pty) Ltd v Brien and another*[30] *(Oomph)* where the High Court did not uphold a restraint of trade due to the effect of Covid-19. It was held that:

> 'Considering the last of the circumstances mentioned in the Magna Alloys Research case, being the circumstances prevailing at the time the enforcement of compliance with the restraint of trade is sought one cannot overlook the unexpected invasion of the covid 19 pandemic which resulted in a lockdown barely a week after the applicant's urgent application was unsuccessful. The relevance of stating this globally devastating situation is the applicant's insistence, while the pandemic continues to wreak havoc in the country, on the relief it seeks. In disputing the 1st respondent's claim that the restrictions would preclude him from earning a living, the applicant contends that the 1st respondent can remain active in the economy by the working in the field of communications, for instance, in which he has the necessary qualifications. This is clearly absurd and unreasonable considering that despite having the relevant qualifications, the 1st respondent had since 2012 pursued a carrier in the advertising and marketing industry. For him to be forced out of a carrier of choice to start working in a different field at a time when many businesses are closing down, retrenchments and lay-offs being common place and individuals doing everything possible to survive and cope with the health and economic devastating effects of the covid 19 pandemic, is plainly unreasonable and contrary to public policy and constitutional values. For these reasons given in this judgment I find that the restraint of trade agreement cannot be enforced. This conclusion coupled with the findings in respect of the shareholders agreement are therefore dispositive of this matter.'

[30] High Court of South Africa, Gauteng Division, Johannesburg, case number 10233/2020 at para 17.

[109] I am not inclined to follow the dicta in *Oomph.* Firstly, the factual matrix is distinguishable from the matter before me. In *Oomph* the employer was unable to pay the employee his full remuneration over several months, up to the point where the employee was owed in excess of R 1 million. *In casu* Ms Grace was paid her full remuneration, was paid a R 1 million 'thank you amount' and was set to receive a retention bonus.

[110] Secondly, the approach adopted in *Oomph* was subsequently rejected by this Court. I am inclined to follow the judgments handed down in this Court as they are, in my view, correct. In *Prima Interactive (Pty) Ltd v Lemon and others*[31]it was held:

> 'What this approach ignores is that the Coronavirus is no respecter of persons, and that employers and employees are equally vulnerable in the face of the pandemic. While it is no doubt true that many employees have borne the brunt of the economic devastation that the pandemic has visited on our society and the economy in particular, businesses have not been unaffected. Restraint undertakings are sought and enforced to protect the legitimate proprietary interests of an undertaking. There is no reason, once those undertakings have been judged legitimate, that they must yield to the bare assertion that alternative employment would be difficult to secure, whatever the cause. The fourth stage of the enquiry established by *Basson v Chilwan* does not empower a court to make assumptions about the state of the labour market and introduce some factor, drawn out of context and in isolation, as a basis to reject a restraint undertaking. The appeal to the Constitution is equally misplaced – the maxim *pacta sunt servanda* equally has its roots in constitutional principle. As Malan AJA observed in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA), '[C]ontractual autonomy is part of the freedom informing the constitutional value of dignity'.

[111] The aforesaid approach was followed in *Bulldog Abrasives South Africa (Pty) Ltd v Dan Llewelyn Davie and another*[32] it was held that:

> 'To suggest that enforcing a restraint in Covid-19 situation is contrary to public policy is to stretch the meaning of public policy beyond what it is supposed to be. As consistently held, public policy requires that parties to a contract freely entered into to be bound by such a contract. It cannot be said that during the

[31] Unreported case number J 246/2021, 30 April 2021 at para 20.
[32] Unreported case number J 123/21, 20 May 2021 at paras 19 and 20.

pandemic employment opportunities are completely closed out. At this juncture, this Court does not have tangible statistics but a judicial notice may be taken that South Africans continue to obtain employment in this country during this pandemic period. The former employee himself obtained employment during the pandemic lockdown period. Thus, I agree with Van Niekerk J that a Court is not empowered to make assumptions and thereafter refuse to enforce a legitimate restraint. What Rabie CJ was referring to was not instances like the current pandemic, but he was linking the prevailing circumstances to the *boni mores* of the society. I do not believe that the *boni mores* of the society will accommodate a complete shift from the maxim *pacta sunt servanda* because of the current pandemic. The pandemic is not a *vis major*, which renders the contractual performance impossible. In a *vis major* proper, a party must prove that its contractual performance is objectively impossible.

During the pandemic employees do manage to breach their undertakings, therefore, why should an employer be gaged by public policy to enforce the breached agreement because of the pandemic? Such an approach does not, in my view, command to the rule of law.'

[112] In my view there is no aspect of public policy that militates against the enforcement of the restraint. The restraint is reasonable and therefore enforceable.

Costs

[113] Ms Erasmus for the Applicant submitted that the Respondents should be ordered to pay the Applicant's costs. Mr Cassim submitted that in view of the undertakings given by Ms Grace, the Applicant should not have come to Court, but ultimately he left the issue of cost to be decided by this Court.

[114] In *Zungu v Premier of Kwa Zulu-Natal and Others*[33] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court (or

[33] (2018) 39 ILJ 523 (CC) at para 24.

oppose) cases that should not have been brought to Court (or opposed) in the first place.

[115] This is a case where the Court has to strike a balance.

[116] In respect of cost, this Court has a broad discretion. Although it is not uncommon for this Court to grant costs in contractual disputes, such as this one, in the present circumstances and in view of the relief I am inclined to grant, the interests of justice will be best served by making no order as to cost. Ms Grace was prepared to give undertakings to the Applicant and on the limited issue where she was not prepared to do so, a novel point in law was raised. Furthermore, Ms Grace will, as a result of the outcome of this application, have to terminate her employment with Skynet and as an individual in that position, a cost order might be a burden heavier than what she would be able to bear.

[117] in the premises, I make the following order:

Order

1. The First Respondent is interdicted and restrained from:

    1.1. taking up employment with or remaining in the employ of the Second Respondent;

    1.2. either alone or jointly or together with or as an agent for any other person, assist, be interested, engaged or concerned, directly or indirectly, whether as principal, proprietor, shareholder, partner, representative, member, consultant, advisor, director, financier, administrator, employee or otherwise in any business, company or concern which carries on business in competition with the Applicant within Gauteng;

    1.3. persuading or attempting to persuade any person whom, during her employment with the Applicant, was a banker, financier, supplier or customer of the Applicant, to cease doing business with the Applicant or commence doing business with anyone else;

1.4. soliciting or attempting to solicit any business or custom of the Applicant or inducing them to terminate or restrict their business relationship with the Applicant in any way; and

1.5. persuading, inducting, soliciting, encouraging or procuring any employee employed by the Applicant to cease such employment or to undertake employment with or have any interest in any other business.

2. The First Respondent is interdicted and restrained from directly and/or indirectly using or disclosing the confidential information and/or proprietary interests of the Applicant in any manner or for any reason or purpose whatsoever without the prior written consent of the Applicant.

3. There is no order as to cost.

_____

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate L Erasmus
Instructed by:	Du Randt Du Toit Pelser Attorneys
For the Respondents:	Advocate N Cassim SC
Instructed by:	Stein Scop Inc Attorneys