THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

10 August 2022
DATE

.....
SIGNATURE

CASE NO: 2850 / 2022

In the matter between:

PRONTO COMPUTER SOLUTION (PTY) (LTD)	**APPLICANT**
And	
GLEN VAN DER MERWE	**FIRST RESPONDENT**
EMALANGENI TECHNOLOGIES (PTY)(LTD)	**SECOND RESPONDENT**
DEON POTTAS	**THIRD RESPONDENT**
DAVID BLUMENTHAL	**FOURTH RESPONDENT**

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 14H00 on 10 August 2022.

[1] The Application.

This application was enrolled to be heard on urgent basis, as envisaged by Rule 6(12) of the Uniform Rules of the High Court. The Applicant seeks relief in the following terms:

1.1. That the First Respondent is interdicted and restrained, for a period of one year, calculated from 31 December 2021, from being employed by or engaged with the Second Respondent (or any other business similar to that of the Applicant) within the region of Mpumalanga;

1.2. That the Third Respondent is interdicted for a period of one year, calculated from 19 November 2021, from being employed by or engaged with the Second Respondent (or any other business similar to that of the Applicant) within the region of Mpumalanga;

1.3. That the Fourth Respondent is interdicted for a period of one year, calculated from 20 March 2022, from being employed by or engaged with the Second Respondent (or any other business similar to that of the Applicant) within the region of Mpumalanga;

1.4. That the First, Third and the Fourth Respondents (the employee Respondents) are ordered to comply with every provision in respect of the

confidentiality and restraint obligations contained in the employment agreement;

1.5. That the Second Respondent is interdicted and restrained from employing or being engaged with:

1.5.1 The First Respondent for a period of one year, calculated from 31 December 2021;

1.5.2 The Third Respondent for a period of one year, calculated from 19 November 2021;

1.5.3 The Fourth Respondent for a period of one year, calculated from 28 March 2022; and

1.6. The employee Respondents are interdicted and restrained from directly or indirectly communicating and/or divulging and/or disseminating to the Second Respondent and/or any other person or party, any confidential information relating to the Applicant.

1.7. The employee Respondents are interdicted and restrained from soliciting business and/or employees from the Applicant, for the Second Respondent or any other competing business;

1.8. Insofar as the employee Respondents have already approached any of the Applicant's customers, and/or client and conducted any business or provided any quotations to them, they are interdicted and restrained from conducting any further business with them.

1.9. The employee Respondents are to deliver up to the Applicant any and all confidential information concerning and belonging to the Applicant, including but not limited to, all customer lists and customer information, supplier lists and information, pricing and product information within three days of this order.

1.10. In the alternative to paragraphs 1.1 to 1.9 above, that the provisions of paragraphs 1.1 to 1.9 operate as an interim interdict with immediate effect

pending the finalisation of this application or an action to be instituted within 30 days.

1.11. The Respondents are to pay the costs of this application including the costs consequent upon employment of counsel, jointly and severally.

[2] Background.

Facts of this case are largely undisputed. The dispute is rather on whether such facts entitle the Applicant to the relief sought above. It is common cause that the employee Respondents were at one stage employees of the Applicant. The First Respondent held the position of a Sales Representative. The Third and Fourth Respondents were employed as Key Accounts Managers. Their responsibilities were *inter alia*, "to effectively promote and sell the company comprehensive range of products and services offerings; drive sales, turnover and profits and any other task necessary for the conduct of the employer's business, as the employer may from time to time direct."[1]

[3] The Third Respondent was the first to resign from the Applicant's employ which he did on 05 November 2021. His last working day was 19 November 2021. He disclosed to the Applicant that he will be working for the Second Respondent. He was followed by the First Respondent who resigned on 01 December 2021. His last working day was 31 December 2021. The First Respondent had been working for the Applicant since 01 May 2018. Shortly after resigning, he informed the Applicant that he also joined the Second Respondent as an employee. The Fourth Respondent resigned on 01 March 2022 with 28 March 2022 as his last day as the Applicant's employee. He also informed the Applicant that he would be joining the Second Respondent as an

[1] See clause 3.2 of the First Respondent's employment contract and clause 4.2 of the Third and Fourth Respondents' employment contracts on pages 61, 81 & 103 of the paginated bundle.

employee. He and the Third Respondent had started working for the Applicant on 11 February 2021.

[4] Upon their employment with the Applicant, the employee Respondents signed employment contracts that also provided for restraint of trade. The said clause provides,

> RESTRAINT OF TRADE
>
> a) The employee undertakes not to be engaged in any other business, in competition with the employer's business, be it direct or indirect, or as a shareholder, partner, member of the Close Corporation, director of a company or any other capacity, within 1 (one) year after termination of this agreement, in the area known as Mpumalanga.
> b) The employee acknowledges and agrees that the aforesaid restraint is fair, reasonable and necessary for the protection of his employer, his employer's trade name and the goodwill attached thereto.
> c) Without prejudice to any other rights which the employer may have in law, the employee acknowledges that the agreed damages due to his/her employer will be an amount of R5000.00 (five thousand rand) in respect of each calendar month during which any breach of the aforesaid restraint continues, and that the employer shall be entitled to recover such amount, and any associated recovery costs, from the employee in respect of such breach.[2]

[5] Acts in breach of the employment contracts.

It is also common cause that after he had resigned, the First Respondent attended to at least two companies that in the past, were serviced by the Applicant. They are the Lowveld Spar and a company known as Chem Kleen. The Applicant learned of the first incident when on 08 June 2022, its employee attended to Lowveld Spar in order to offer them a quotation for CCTV installation. While attending to this, he was informed that the First Respondent

[2] See clause 26 of the First Respondent's employment contract and clause 29 of the Third and Fourth Respondents' employment contracts on pages 73, 96 &118 of the paginated bundle.

was there already to quote the Lowveld Spar on the installation of the same equipment and data.

[6] As for Chen Kleen, another Applicant's employee had provided this company with a quotation for fibre network installation. Some days later, Chem Kleen called back to inform this employee that their company will no longer take the quoted offer. Chem Kleen disclosed later that this was because the Applicant's quotation was expensive and that the First Respondent came and did the installation "efficiently and timely."

[7] The First Respondent explains himself by invoking his prior knowledge and relationship with these companies and/or their employees. According to him, these were his clients long before he joined the Applicant as an employee. While he does not deny that they were also served by the Applicant (through him) at the time he worked for the Applicant, his attitude is that they were his clients during and before he joined the Applicant. In my view, there remains no dispute as the different understanding between the Applicant and the Respondents is about the legal interpretation of the First Respondent's continuous relationship with the clients. I will deal with the interpretation when evaluating the Respondents' defences hereunder.[3]

[8] In a confirmatory affidavit deposed to by the Second Respondent's representative, it is confirmed that it (the Second Respondent) is in a competitive business with that of the Applicant. The deponent to the Second Respondent's affidavit went as far as to allege that the Applicant has always been aware of this position. What remains for the court to determine is whether the Applicant gave the employee Respondents consent to work for the Second

[3] See paragraphs 20 to 32 below.

Respondent, knowing it to be a competitor. The court will deal first with the question of urgency as it is disputed.

[9] Urgency.

Counsel for all the Respondents argued that the application lacked urgency for two reasons. First, he submitted that the Applicant's delay in bringing the application was inordinate, thereby removing the urgency the application would otherwise have. In calculating the period that lapsed, the Respondents start counting from the date the Applicant became aware that each of the employee Respondents had joined the Second Respondent. Secondly, counsel submitted that the Applicant failed to prove that it would not have a substantial redress if the matter was enrolled for normal hearing. He argued that since a provision was made under restraint of trade, for damages at R5000.00 per month in case of breach by the employees, there was therefore no need to enrol the matter as urgent.

[10] The first argument cannot stand in that it ignores averments made by the person who deposed to the Applicant's founding affidavit (Mr. Herbst). In the same affidavit in which he mentioned the dates on which the employee Respondents resigned and joined the Second Respondent, he also disclosed the dates on which he became aware that they were involved in acts of competition. The dates of resignation and the dates he became aware that the employee Respondents were embarked on competition behaviour are not the same. He also made it clear that he did not perceive the Second Respondent as a competitor.

[11] Mr. Herbst averred in the founding affidavit that "during my discussion with the Third Respondent in which I advised him of his restraint of trade and confidentiality provisions of his employment agreement, he advised me that he had been appointed as a General Manager of the Second Respondent but that his

new employer only focused on serving the public sector (something which the Applicant did not). He also undertook to comply with the remaining provisions of his employment agreement."[4]

[12] Similar assertions are to be found in the exit interview that Mr. Herbst had with the First Respondent in December 2021. The First Respondent advised him that he intended becoming employed in the Fast Consumer Goods Industry and not Information Technology. Again, when the Fourth Respondent resigned in March 2022, he told him that he also accepted a position with the Second Respondent and that he would be responsible for the compilation of the Second Respondent's Public Sector Tender submissions. He also confirmed that he would abide by the terms of his employment agreement.

[13] It is evident from the above that M r. Herbst did not consider the Second Respondent as a competitor until information about its clients being pouched by the First Respondent reached his attention on 09 June 2022. It would appear he simply took whatever the employee Respondents told him as to what kind of a business the Second Respondent was involved in. Looking at all the steps taken by the Applicant to have this application heard from the date he learned for the first time that the First Respondent could be in unlawful competition, it cannot be said that there was inordinate delay before this application was launched.

[14] I have noted that the Second Respondent claims that the Applicant "has always been aware" that it is a competitor. No details were given as to when exactly the Applicant became aware of this and nothing is advanced to substantiate this allegation. This bare denial does not constitute a dispute as

[4] See para 82 of the Founding Affidavit on p. 38 of the paginated bundle.

envisaged in *Plascon-Evans* rule. That rule was enunciated by Harms DP in *National Director of Public Prosecution v Zuma*[5]when he said,

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[15] The second reason is about the availability of substantial redress in the future. In my view, this argument misquotes the actual wording of the contract. The opening statement in the paragraph providing for damages stipulates, "Without prejudice to any other rights which the employer may have in law, the employee acknowledges that the agreed damages due to his/her employer will be an amount of R5000.00…" [My emphasis]. The underlined statement makes it clear that the provision for damages in the contract is an added avenues availed to the employer, over and above other avenues it may be entitled to invoke in law. It therefore cannot be raised as providing for substantial redress available so as to preclude it from exercising other rights it may have in law including bringing urgent application as it did.

[16] Even if the court was to accept that the clause provides for some redress that can be available to the Applicant, the question would still be whether such redress is substantial. The Applicant demonstrated that the damages it suffered

[5] 2009 (2) SA 277 (SCA) at para 26.

exceed by far the amount stipulated in the employment contract.[6] Over and above that, as Davis J observed in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff*[7], breaches of restraint of trade have an inherent quality of urgency. In *Kiron Interactive (PTY) LTD v Netshishivhe*,[8] Malindi J remarked that,

> "Failure to do so [treating breaches of restraint of trade as urgent] would serve to defeat the Applicant's right to restraint the Respondent before a significant lapse of the restraint period that it claims applies and would not be reasonably easily able to claim damages as damages in these matters are not susceptible to easy calculation."

[17] Mr. Herbst became aware for the first time of the competitive behaviour on the part of the First Respondent on 09 June 2022. This was when information relating to the quotation he made to Lowveld Spar was relayed to him. He consulted with the attorneys on 14 June and on 17 June 2022, the first letter from the attorneys to the First Respondent was dispatched, in which they demanded an undertaking to adhere by the employment contracts. No undertaking was made, but the Respondents indicated that they intended to respond through their legal representatives, and wanted more time to do so. They failed to respond even after they were granted an extension. This application was therefore launched on 05 July 2022.

[18] In *Value Logistics Limited v Kuhn and Another*[9], the employer (applicant) became aware of its employee (respondent) intending to take up a position with its competitor on the date of resignation being 16 October 2020. Two weeks later, the employer discovered confidential information having been sent out from the respondent's work email address to his private email address. A letter warning him of the restraint of trade agreement contained in the employment contract was sent to him on the same date (16 October 2020). Another letter

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[6] See the Applicant's sales report since the resignation of the First Respondent on p. 123 of the paginated bundle.
[7] 2009 (3) SA 78 (C) at 88J-89A.
[8] (11014/2022) [2022] ZAGPJHC 328 (13 May 2022)
[9] (2854/2020) [2021] ZAECPEHC 1; [2021] 2 All SA 298 (ECP) (12 January 2021).

was sent to the respondent and his new employer on 02 November 2020, demanding an undertaking that they will adhere by the restraint of trade and for the respondent's employment to be terminated. When no undertaking was made, the employer launched an urgent application on 19 November 2020. The time lapsed was found not to be inordinate by the court. The matter was dealt with urgently.

[19] Having considered the nature of complaint in this case, the interest sought to be protected and the time frames prescribed in the employment contracts, I find that the application is urgent, the delay in launching it is not inordinate and that the Applicant will not get substantial redress in a normal hearing should it be successful.

[20] Respondents' defences.

The Second, Third and Fourth Respondents confirmed and aligned themselves with the affidavit deposed to by the First Respondent. The First Respondent alleged in the answering affidavit that the restraint of trade clause was unreasonable because the Applicant does not have the protectable interests that it claims, in that the clients that it wishes to prevent him from approaching for business purposes were in truth his clients. This claim should be read alongside the letters written by Lowveld Spar and Chem Kleen, attached to the First Respondent's answering affidavit.

[21] A certain Hannes Blom, a Retail Risk Manager at Lowveld Spar wrote an undated letter the relevant parts of which read,

> "I first met Mr. Glen van der Merwe about 7 years ago at ICTS (IT Company). ICTS performed CCTV installation for J&M Security who we had a relationship with at the time. From there Mr. Glen van der Merwe moved to Pronto Computer Solutions where I met him again, through Pronto Computer Solutions we started doing CCTV solution planning and integrations at a few of our Spar stores.

> Our Spar required a CCTV upgrade and I knew that Mr. Glen van der Merwe no longer worked at Pronto Computer Solutions. I then gave him a call on the 17th of May and found out that he was now working at Emalangeni Technologies. I then contacted Mr. Glen van der Merwe if he could make a turn and have a look at our current CCTV Solution and advise and quote on an upgrade solution…" [My emphasis].

[22] Chem Kleen also wrote an undated letter the relevant parts of which read,

> "This is to inform you that we have known Glen van der Merwe for approximately 20 years. We requested a quote from Pronto Computers for the installation of our fibre network as they were supplying us with data, but found that they were ridiculously expensive, so having known Glen for so many years we approached him to install the fibre network for us…" [My emphasis].

[23] From the letters written by Spar, it is evident that although the author had known the First Respondent from the past, they met again through the Applicant and they started doing CCTV solution planning and integrations at other Spar stores. There cannot therefore be any doubt that the Spar (and a few other branches) became a client of the Applicant and that the First Respondent was their contact person at the Applicant. Equally, Chem Kleen first requested a quote from the Applicant because it was a client thereof from whom data was supplied. The statement by the First Respondent that the Spar and Chem Kleen were actually his clients (and thereby not the Applicant's), is not supported by the letters he attached to the answering affidavit.

[24] The First Respondent finds himself in no different situation to the first respondent in *Nampesca (SA) Products (Pty) Ltd v Zaderer*[10] when he alleged in his answering affidavit,

> "'I was not introduced to any of Nampesca's important customers subsequent to my joining Nampesca. I introduced the customers and most of the important suppliers

[10] 1999 (1) SA 886 (C) at 898G-H

to Nampesca. Nampesca's customers and suppliers were customers and suppliers with whom I had close contact and a strong personal and business relationship even before Nampesca was started and even before the service contract was concluded. I deny furthermore that, during my employment with Nampesca and because of my employment with Nampesca, I formed any attachment to or acquired any influence over Nampesca's customers which I never had before."

[25] The court however held,

"The first respondent's approach is that the first applicant does not have any proprietary interest in the customers and suppliers introduced by him to it. That approach, in my view, is fallacious. When the first respondent introduced customers and suppliers to the first applicant they became the latter's customers and suppliers. Although the first respondent may have had dealings with them before, his employment with the first applicant enabled him to re-establish any pre-existing relationships and further strengthen them over a period of approximately five-and-a-half-years. That customer goodwill can be established or enhanced in favour of an employer over customers previously known to an employee is recognised in *Rawlins and Another v Caravantruck (Pty) Ltd*[11]. It is recognised that where an employee has access to an employer's customers and is in a position to build up a particular relationship with them so that when he leaves an employer's service he could easily influence them to follow him, there is, in principle, no reason why a restraint to protect the employer's trade connections should not be enforced."[12]

[26] I echo the sentiments expressed by Nestadt JA in *Rawlins and Another v Caravantruck (Pty) Ltd*[13] who dealt with the issue of a party's relationship with customers as follows,

"The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business.

[11] 1993 (1) SA 537 (A) at 542E-H
[12] See *Nampesca (SA) Products (Pty) Ltd v Zaderer (Supra)* at 898J-899A.
[13] *Supra* at 541D-F.

> (Joubert *General Principles of the Law of Contract* at 149). Heydon *The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that the 'customer contact' doctrine depends on the notion that 'the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket'. In *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires such personal knowledge of and influence over the customers of his employer . . . as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection . . .”

[27] The First Respondent further alleged that there was no confidential information to protect. He alleged that the list set out in paragraph 78.2 to 78.23 does not constitute trade secrets. “Trade secrets are protected by patents and copyright.” He further alleged that they do not constitute confidential information saying, “In any event, the applicants have failed to prove that this information is currently in the possession of the employee Respondents especially considering that this information resides in the CRM (Customer Relation Management) which they have no access to.”[14]

[28] The list the First Respondent was referring to is what the Applicant quoted as Trade Secrets and confidential information which comprises *inter alia* of, “marketing and business strategies; pricing, inclusive of mark-ups, of its products and services which are not general and unique to particular customer; profit margins; financial and marketing policies and philosophies of the Company; sources of supply; quality control products; discount granted by suppliers; client and supplier relationships; method of distribution; other matters which relate to the business of the Applicant and in respect of which information is not readily available in the ordinary course of business to a

[14] See paragraphs 13.2.6 and 22 of the First Respondent answering affidavit.

competitor of the Applicant; the names and contact details of existing clients and their requirements, who require additional product and/or service offering which are offered by the Applicant and in respect of which such existing clients are therefore also potential clients. ; knowledge of Company's customers and business associates…"[15]

[29] In response to this argument, counsel for the Applicant referred the court to a judgment of *Graffiti Design (Pty) Ltd v Teffu*[16] where the Labour Court said,

> "It cannot be doubted that information such as customer lists including the names and contact details of key customers and their requirements; sales, business and marketing strategies; pricing of products of clients; the terms of contractual relationships with suppliers and the terms of supply; business financial information including revenue generated; and information and contact details of suppliers, is confidential. Such information in a competitive market is clearly capable of application in the trade or industry, and is of economic value to the person seeking to protect it, unless the person seeking to escape from the restraint provisions can demonstrate that such information is either useless to other persons, or alternatively, that it cannot be deemed to be confidential as it was in the public domain."

[30] It is common cause that the employee Respondents had access to CRM when they worked for the Applicant and that from the CRM, information relating to client's contact details, their purchases, invoices, sales needs and potential future orders based on their historical dealings was stored. This information is not readily available to everyone in the ordinary course of business. While the employee Respondents no longer have access to the CRM, the fact that the First Respondent still has contact details of some of the Applicant's clients is enough proof that some of the information may have been

[15] See paragraph 78.2 of the founding affidavit on p. 36 of the paginated bundle.
[16] (J4376/2018) [2019] ZALCJHB 10 (22 January 2019) at para 24.

stored for use outside the CRM. There could be more such information still stored by any of the Employee Respondents. The Applicant remains at their mercy or has to rely on their *bona fides*.

[31] In *New Justfun Group (Pty) Ltd v Turner*[17], Van Niekerk J held that all that an applicant needs to show is that there is secret information to which the respondent had access and which in theory the respondent could transmit to the new employer should he or she desire to do so. Where the ex-employer seeks to enforce against an 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; it is sufficient to show that the ex-employee could do so. Indeed, the very purpose of a restraint agreement is that the applicant does not wish to have to rely on the *bona fides* or lack of retained knowledge on the part of the respondent, of the confidential information.

[32] In *Experian South Africa (Pty) Ltd v Haynes and Another*[18], Mbha J (as he then was) held,

> "Where an applicant as employer has endeavoured to safeguard itself against the unpoliceable danger of the respondent communicating its trade secrets to, or utilising its customer connection on behalf of a rival concern after entering that rival concern's employ, by obtaining a restraint preventing the respondent from being employed by a competitor, the risk that the respondent will do so is one which the applicant does not have to run and neither is it incumbent upon the applicant to enquire into the bona fides of the respondent, and demonstrate that he is mala fide, before being allowed to enforce its contractually agreed right to restrain the respondent from entering the employ of a direct competitor."

[17] (J786/14) [2014] ZALCJHB 177; (2018) 39 ILJ 2721 (LC) (14 May 2014) at paragraph 13.
[18] 2013 (1) SA 135 (GSJ) at paragraph 21.

[33] Different positions with the new employer.

The First Respondent further submitted that he and other employee Respondents are currently employed in different capacities from their employment with the Applicant. Their duties are different from the duties they performed whilst employed by the Applicant. This, he argued, rendered this application unnecessary. He used to be a salesperson and now he is a project manager. The Third and Fourth Respondent used to work as Key Accounts Managers and now they work as General Manager and Sales Representative respectively. I take note that none of the employee Respondents attached their employment contracts with the Second Respondent to prove their current position.

[34] Assuming that they indeed hold the positions they claim to, this submission is shallow given the behaviour by the First Respondent having consulted the Applicant's clients irrespective of his current position. In *Mpact Operations (Pty) Ltd t/a Mpact Plastics Wadeville v Whitehead and Another*[19] Basson J held that being in a different division in the competitor's employment does not bar an employee from sharing information with the employer. After all the wording of the actual employment contracts bars the employee Respondents from taking up jobs with the Applicant's competitors (irrespective of the positions).

[35] Unreasonable restraint of trade.

The employee Respondents argue that the employment contracts are unreasonable in that they take away their right to work in the field of their qualification. But this is not a fact for consideration on whether the restraint of trade is unreasonable or not. The right to work needs to be balanced with the right to freely enter into a contract freely and voluntarily. In *New Justfun Group*

[19] (J1335/2015) [2015] ZALCJHB 442 (25 September 2015) at paragraph 13.

(Pty) Ltd v Turner[20], the court held that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint and to prove a breach of its terms. Once a restraint agreement has been invoked and a breach of the agreement proved, the onus is on the respondent to prove on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable.

[36] In *Reddy v Siemens Telecommunications (Pty) Ltd*[21], the Supreme Court of Appeal (the SCA) held that agreements in restraint of trade were valid and enforceable unless they are unreasonable and thus contrary to public policy, which necessarily as a consequence of their common-law validity has the effect that a party who challenges the enforceability of the agreement bears the burden of alleging and proving that it is unreasonable. The SCA referred to *J Louw and Co (Pty) Ltd v Richter and Others*[22] with approval where the following was held,

> "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. 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. 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 enforcement is sought."

[37] In applying these principles to the facts, the employee Respondents would have to compare the circumstances at the time of signing their contracts,

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[20] *Supra* at paragraph 9.
[21] 2007 (2) SA 486 (SCA) at paragraph 15. See also *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).
[22] 1987 (2) SA 237 (N) at 243B - C.

against the current developments to show what has since changed, what caused the changes, the reason thereof and the roles by the employer in those changes that renders the contract enforcement unreasonable. Using this test, the Respondents have failed dismally to show that the restraint of trade contained in the employment contracts is unreasonable.

[38] For the aforesaid reasons, I make the following order:

[38.1] The Applicant's failure to comply with the forms and service provided for in the Uniform Rules of the Court is condoned. This matter is dealt with on an urgent basis as envisaged in Rule 6(12) of the Uniform Rules.

[38.2] The First Respondent is interdicted and restrained, for a period of one year, calculated from 31 December 2021 from being employed by or engaged with the Second Respondent (or any other business similar to that of the Applicant) within the Province of Mpumalanga.

[38.3] The Third Respondent is interdicted for a period of one year, calculated from 19 November 2021 from being employed by or engaged with the Second Respondent (or any other business similar to that of the Applicant) within the Province of Mpumalanga.

[38.4] The Fourth Respondent is interdicted for a period of one year, calculated from 20 March 2022 from being employed by or engaged with the Second Respondent (or any other business similar to that of the Applicant) within the Province of Mpumalanga.

[38.5] The First, Third and the Fourth Respondents (employee Respondents) are ordered to comply with every provision in respect of the confidentiality and restraint obligations contained in the employment agreement;

[38.6] That the Second Respondent is interdicted and restrained from employing or being engaged with:

[38.6.1] The First Respondent for a period of one year, calculated from 31 December 2021;

[38.6.2] The Third Respondent for a period of one year, calculated from 19 November 2021;

[38.6.3] The Fourth Respondent for a period of one year, calculated from 28 March 2022; and

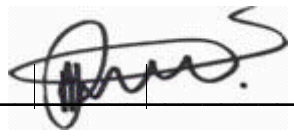
[38.7] The employee Respondents are interdicted and restrained from directly or indirectly communicating and/or divulging and/or disseminating to the Second Respondent and/or any other person or party, any confidential information relating to the Applicant.

[38.8] The employee Respondents are interdicted and restrained from soliciting business and/or employees from the Applicant, for the Second Respondent or any other competing business;

[38.9] Insofar as the employee Respondents have already approached any of the Applicant's customers, and/or client and conducted any business or provided any quotations to them, they are interdicted and restrained from conducting any further business with them.

[38.10] The employee Respondents are to deliver up to the Applicant any and all confidential information concerning and belonging to the Applicant, including but not limited to, all customer lists and customer information, supplier lists and information, pricing and product information within three days of this order.

[38.11] The Respondents are ordered to pay the costs of this application including the costs consequent upon employment of counsel, jointly and severally.



TV RATSHIBVUMO

JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION
MBOMBELA

FOR THE APPLICANT	**: ADV JA BOOYSE**
INSTRUCTED BY	**: BARNARD INC**
	C/O: DE KOCK ATTORNEYS
	NELSPRUIT
FOR THE RESPONDENT	**: ADV T NGWENYA**
INSTRUCTED BY	**: NTHABISENG MADOA ATTORNEYS**
	: NELSPRUIT
DATE HEARD	**: 26 JULY 2022**
JUDGMENT DELIVERED	**: 10 AUGUST 2022**