THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 326/24

In the matter between:

SA RANGER FORCES SECURITY DIVISION CC **Applicant**

and

CLIVE WANNENBURG **First Respondent**

ODYSSEY SECURITY MANAGEMENT SOLUTIONS (PTY) LTD **Second Respondent**

Hearing: **18 September 2024 & 2 October 2024**

Delivered: **05 November 2024**

JUDGMENT

BECKENSTRATER, AJ

Introduction

[1] The Applicant has brought an application interdicting the First Respondent from being employed by the Second Respondent or any other direct competitor of the

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Applicant within an area called Booysens Sector 1 and Mondeor Sector 2 (the restricted area) for a period of 24 months from the date of the order, and other associated relief. The Applicant's claim is based upon an allegation that the First Respondent has breached and is breaching the terms of a Restraint of Trade Agreement between the Applicant and the First Respondent. The application is opposed by the First Respondent who is supported therein by an affidavit filed on behalf of the Second Respondent, although the Second Respondent formally states that it does not oppose the application because no relief is sought against it.

[2] The matter first came before this Court as an urgent application on 4 June 2024. On that occasion, it was struck off the roll on account of lack of urgency and each party was ordered to pay its own costs. The application was then set down for hearing before me on 18 September 2024 pursuant to a request for expedited enrolment.

[3] The First Respondent alleges being caught by surprise by this subsequent set down as it did not anticipate that the Applicant would be proceeding further with the matter after the urgent application. The matter was then fully argued before me on 18 September 2024 save for an issue of the First Respondent's introducing updated information pertaining to his employment (the new facts) on which argument was heard on 2 October 2024.

The background facts

[4] The Applicant is a Private Security Service Provider conducting business in and around Southern Johannesburg.

[5] The Second Respondent is also a Private Security Service Provider. It was established in 2003 but apparently became dormant around 2022. Its Managing Director, Mr Wellman, asserts that in December 2023 he decided to relaunch the company as a local Southrand Security company and in consequence, around mid-December 2023, deployed a vehicle in Suideroord (within the restricted area) for the purposes of enabling its sales consultants to canvass clients on their

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return from the festive season (which would have been in January 2024). That vehicle was deployed only in Suideroord. Despite the Second Respondent's protestations in the answering affidavits that because of the technological advances and specialised technology utilized by the Second Respondent, it was not a direct competitor of the Applicant, it is clear that the Applicant and Second Respondent are in competition with each other. In his supporting affidavit, Mr Wellman inferred that the Applicant was part of their business "*opposition"* from whom the Second Respondent distinguished its technology.

[6] The First Respondent is a long-standing resident of Mondeor and had for some time been actively involved in its Community Policing Forum (CPF). He was previously employed by other Private Security companies until commencing employment with the Applicant as a Sales Manager on 20 May 2022. He was paid a salary of R12 000.00 per month and commissions.

[7] At the commencement of his employment, the First Respondent concluded three agreements with the Applicant, namely a Contract of Employment, a Restraint of Trade Agreement and a Confidentiality Agreement.

[8] The Restraint of Trade Agreement recorded the First Respondent's acknowledgement that during the course of his employment with the Applicant, he would have "*the opportunity of learning and acquiring the trade secrets, business connections and other confidential information"* pertaining to the Applicant. It then proceeded to record that the First Respondent undertook:

> 'That for a period of 3 years from the date of his/her employment is terminated with the company, the employee shall not directly or indirectly at any place in Booysens Sector 1, Mondeor Sector 2, whether for his/her own account or as a principle, employee… and whether for the employee's direct or indirect benefit or otherwise, and whether for rewards or otherwise and whether formally or otherwise… be interested in or connected in any business which is directly or indirectly in competition with the business of the company or its suppliers.'

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[9] The Restraint Agreement further contained the usual provision in which the First Respondent acknowledged the terms of the restraint to be reasonable and that its provisions were severable "*and may entirely or partially be enforced"*.

[10] The First Respondent gave the Applicant notice of resignation on 12 January 2024 tendering to work two weeks' notice and thanking the Applicant for "*the opportunities for growth, time and development"*. It is common cause that at the time of his resignation, the First Respondent advised that he was taking up employment with the Second Respondent.

[11] The Applicant apparently had no difficulty with that advice at the time because, according to it, the Second Respondent had not been operating in the restricted area at any prior time. The Respondents deny this contention but provide no further detail of why it is denied other than, as set out above, alleging its intention to be active in the area and allocating a vehicle to Suideroord.

[12] On 8 January 2024 however, the Applicant was seen at the premises of one of the Applicant's big clients, Ascot Cosmetics (outside the restricted area) with a man named Michael driving a motor vehicle branded by the Second Respondent. The Applicant was seen to be pointing out security cameras to Michael and attending the premises together. On 15 January 2024, the Second Respondent was added to the Suideroord South Crime WhatsApp Group. The First Respondent does not deny this allegation but simply points out that Ascot falls outside the restricted area. Of course, as at 8 January 2024, the First Respondent was still employed by the Applicant and would not have been entitled to assist the Second Respondent's business because of his duty of loyalty to the Applicant (rather than because of any restraint).

[13] There was a CPF meeting on 19 January 2024. The Applicant alleges that at that meeting, the First Respondent was seen and heard promoting the Second Respondent. The First Respondent denies this, stating that he had been told by the Applicant to tell people at that meeting that he was leaving the employment of

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the Applicant and did so, but that he in no way promoted the Second Respondent.

[14] The First Respondent was confronted with these allegations by Mr Clinton Dennis, a Director of the Applicant and the deponent to its founding affidavit, on 22 January 2024. There is a dispute about whether he was placed on "gardening leave" or whether his employment was summarily terminated on that date.

[15] The Applicant's attorneys thereupon sent letters of demand to both the First and Second Respondents arising out of what they contended was a breach of the Restraint of Trade Agreement. It is evident from the response thereto that the First Respondent only became employed by the Second Respondent on 1 February 2024.

[16] The First Respondent was employed as the Second Respondent's Suideroord Armed Response Operations Manager. As such, his duties were not sales-related but did include issues such as managing relationships, resolving customer problems and complaints and generally managing the overall operations of the Second Respondent in that area.

[17] A number of the Applicant's previous clients cancelled their contracts and became clients of the Second Respondent. The Respondents point out in this regard that a number of the Applicant's clients had become clients of other Security Services Providers, not necessarily the Second Respondent, and argued that issues of poor performance or the use of less impressive technology was the cause of that situation. In particular, the First Respondent denied ever soliciting the Applicant's customers and demonstrated by several examples how, when he received any queries or customer calls from the Applicant's existing customers, he had referred them to Steven Van Blerk of the Applicant.

[18] There were evident delays between these above events and the Applicant's instituting the present proceedings, which are well documented in this Court's judgment in the urgent application of 4 June 2024 and need not be repeated herein.

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General approach to restraints of trade

[19] Restraints of trade are valid and binding, and as a matter of principle enforceable, unless the enforcement thereof is considered to be unreasonable.[1]

[20] A party seeking to enforce a restraint agreement is required only to invoke the restraint and to prove a breach of its terms. Once this has been done, the onus is on the respondent to prove on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable.[2]

[21] In *Basson v Chilwan and Others*[3], the court set the following test for determining the reasonableness or otherwise of a restraint agreement: (a) Does one party have an interest that deserves protection after termination of the agreement? (b) Is that interest threatened or being prejudiced by the other party? (c) If so, does that interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

[22] In *Reddy v Siemens Telecommunications (Pty) Ltd*[4], the Supreme Court of Appeal added a fifth consideration, namely whether the restraint goes further than necessary to protect the interest, which involves a consideration of less restrictive measures to achieve the purpose of the limitation.[5]

[23] The proprietary interests that can be protected by a restraint agreement are essentially of two kinds: confidential information (trade secrets) and trade connections.

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[1] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A) (*Magna Alloys*) at 891B - C; *Reddy v Siemens Telecommunications (Pty) Ltd* [2006] ZASCA 135; (2007) 28 *ILJ* 317 (SCA) (*Reddy*) at para 14.
[2] *Magna Alloys* at 875 H-I; *Dot Activ (Pty) Ltd v Daubinet and Another* [2022] ZALCJHB 318; (2023) 44 *ILJ* 785 (LC) (*Dot Activ*) at paras 34 - 36.
[3] [1993] ZASCA 61; 1993 (3) SA 742 (A) at 767C - H.
[4] *Reddy supra* fn 1.
[5] *Ibid* at para 17.

[24] Trade connections constitute an interest worthy of protection 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 or she leaves employment and becomes employed by a competitor, the employee could easily or readily induce the customers to follow the employee to the new business.[6]

[25] Whether the employee can be seen to have the ability to exert this kind of influence, is dependent upon (a) the duties of the employee; (b) the employee's particular personality and skill; (c) the frequency and duration of contact between the employee and the customer(s); (d) the nature of the relationship between the employee and the customer(s) and in particular, whether the relationship carried with it a notion of trust and confidence; (e) the knowledge of the employee concerning the particular requirements of the customer and the nature of its business; (f) how competitive the rival businesses are, and (g) the nature of the product or services at stake.[7]

[26] It has also been held that the seniority of the employee concerned is an important consideration when it comes to evaluating the existence of a protectable interest. The more senior the employee, the more likely it is that the employee would be entrenched with what can legitimately be considered to be a protectable interest.[8] Seniority is not just the level of the employee in the organisation of the erstwhile employer but also includes factors such as the influence, knowledge, expertise, nature of duties, relationships and even the particular personality of the employee.[9]

The present application

[27] The Applicant's founding affidavit, consistent with the caselaw referred to above, set out the restraint agreement and the clear breach of it with the First Respondent having become employed by the Second Respondent. It asserted in

[6] *Dot Activ* at para 41.
[7] *Ibid* at para 41.
[8] *Ibid* at para 42.
[9] *Ibid* at para 42. See also *Plumblink SA (Pty) Ltd v Legodi and Another* [2019] ZALCJHB 357; (2020) 41 *ILJ* 1743 (LC) at para 30.

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bald terms that the First Respondent had been exposed to both its confidential information and customer connections but gave almost no detail of this alleged confidential information or customer connections save to state:

> '84. Clive had and still has all of SA Ranger's customer's/clients [sic] connections and contacts with him. Not only does Clive have all the contact details of SA Ranger's customers within the Booysens Sector 1 and Mondeor Sector 2 area, certain clients of SA Rangers namely:
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> 84.1. 126 Sedar Road, Suideroord;
> 84.2. 6 Conroy Street, Suideroord;
> 84.3. 8 Conroy Street, Suideroord;
> 84.4. 97 Sedar Street, Suideroord;
> 84.5. 94 Sedar Street, Suideroord; and
> 84.6. 16 Magaliesberg, Suideroord;
>
> Situate within the Booysens Sector 1 and Mondeor Sector 2 area have cancelled their services with SA Rangers and signed up with Odyssey, as Odyssey security boards have now been placed at the erstwhile clientele of SA Rangers.'

[28] Copies of the Applicant's earlier agreements with those clients procured from the Second Respondent, and the Second Respondent's recent boards outside those premises were attached.

[29] The First Respondent's answering affidavit and Second Respondent's supporting affidavit emphasised that the Second Respondent had a different (and allegedly more advanced) security methodology and that the First Respondent was employed in an operational position, and had no involvement in sales. There was however no dispute that he was engaged in a restricted area. The First Respondent denied that he had any of the Applicant's confidential information or trade connections. This denial was mainly based on the First Respondent's contention that he was only involved in sales and marketing at the Applicant, and thus his knowledge of the industry arose out of his long-standing interest in it. His denial of having gathered any customer connections was based on his allegation

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that as a result of his residence in the restricted area and his previous membership of the CPF, the customer connections he had were his own and not gained while employed with the Applicant.

[30] In the Applicant's replying affidavit, the allegations pertaining to confidential information were met, almost entirely, with a bare denial. The Applicant did not set out any particular information (such as price lists, operating procedure, documents, know-how or methodology) to indicate what confidential information the First Respondent may have had. In the circumstances, the First Respondent's denial that he did not have confidential information cannot be dismissed as far-fetched or fanciful. On the basis of the well-established test for the resolution of disputes of facts in motion proceedings set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[10] (*Plascon-Evans*), it must be accepted that the Respondent has discharged the onus of demonstrating that, as far as confidential information is concerned, the Applicant has no protectable interest in enforcing the restraint against the First Respondent.

[31] The circumstances relating to customer connections are somewhat more. In answer to the founding affidavit, in relation to the issue of trade connections, the First Respondent said the following:

> '[21] To the Applicant's and Dennie's knowledge, I live in Mondeor and am socially active in the community and suburbs of Mondeor, Suideroord and Winchester Hills, both as a member of the community and also previously as a member of the Community Policing Forum (CPF). The security of the suburb and surrounding areas where I live is of utmost importance to me, and it is also my passion to serve the community, and assist in keeping them safe.
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> …
>
> [23] I also point out that the Applicant, initially approached me because of the friendships and vast networks of acquaintances that I had built up in my

[10] 1984 (3) SA 623 (A).

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suburb and in the surrounding and neighbouring suburbs (all of which the Applicant sought to bring under its sole control as a security services provider). The Applicant utilised my proprietary knowledge, customer connection and contact with the residents in that geographical area, to bolster and grow its own business. If anyone is to be accused of exploitive and unlawful conduct, it is the Applicant…

…

[37] I address the very faint assertion by Dennis (without any evidence or proof) that the clients of the Applicant may be poached using my knowledge, as follows:

37.1. The Applicant's clients that I interacted with are people who were friends, acquaintances and neighbours of mine that I have known and interacted with and been friendly with for many years;

37.2. These persons were brought into the Applicant's registry because of their connection with me. Not the other way around;

37.3. I dispute that the Applicant put me in touch with clientele and that, but for my employment with the Applicant, I would not know or be familiar with any of my neighbours or people living and whom I serve in the community;

37.4. I respectfully remind the Court that I was also a very active and executive member of the CPF for my region – this further facilitated my exposure in that region, and the fact that I was well known amongst residents in that area. It was nothing to do with (in fact it pre-dates) my employment with the Applicant;

37.5. I cannot be restrained, with respect, from taking with me customer connections which I introduced my erstwhile employer in the first place.

[38] In addition, I must point out that the Applicant used me as its spokesperson, particularly because of the extent of notoriety that I have in

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the area. The Applicant felt that because I was so well-known and acquainted with most of the residents in the region, it would be very important for them to communicate and interact with me (on behalf of the Applicant) instead of an unknown face. This is sound thinking, with respect, but it does not entitle the Applicant to claim any proprietary interest in that customer connection…

…

95.3. Secondly, as I explained above, the client information was introduced to the Applicant by me, as a result of my work and experience in this field and this sphere of industry, my exposure to the region and my acquaintance, friendship and relationships with residents in that area.

95.4. This also results from my involvement as a CPF Chairperson and a participant in the Community Policing efforts.

95.5. I deny that I was ever made privy to any of the alleged categories of confidential and proprietary information that the Applicant claims.

96.1. As explained, I deny that I "forged close customer connections" during the time of my employment with the Applicant – those customer connections were, for the overwhelmingly large part, already in place.

96.2. As I stated, that was the reason why the Applicant headhunted me to join its organisation and the hopes of using my customer connections to draw custom to its business.'

[32] In its replying affidavit, the Applicant retorted to these allegations as follows:

'17.2. Contrary to the Respondent's claims, the Respondent was previously employed by a security company called S.O.S. Subsequently, Clive moved to another security company named Reaper as a result of S.O.S

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closing. However, due to issues regarding unpaid wages at Reaper, the First Respondent sought employment at the Applicant.

17.3. It is important to note that during Clive's employment at Reaper, no security services were rendered in the zones covered by the restraint of trade agreement. Therefore, it is unfounded to suggest that Clive provided the Applicant with any significant customer connections in the area.

17.4. Furthermore, the Applicant was already an established competitor in the areas prior to Clive's employment. Thus, the allegation that Clive's employment provided the Applicant with a competitive advantage is baseless and untrue. I assert that the Respondent's employment with the Applicant was initiated due to his employment history in the security industry, not as a result of any significant customer connections the Respondent purportedly brought the Applicant…

…

23.1. The Respondent's own admission that his duties required close customer connections and relationships. Any customer relations and connections within the prohibited zones contracted in the restraint of trade agreement were built and maintained while working under the name and style of the Applicant.

23.2. These relationships would only have materialized as a result of working for the Applicant, as Clive had never worked within the prohibited zones outlined in the restraint of trade agreement before being employed by the Applicant.'

[33] The Respondents did not apply for leave to deliver any further affidavit.

[34] Notwithstanding that the onus to demonstrate the unreasonableness of the restraint and thus, the lack of any protectable interest is on the First Respondent, disputes of fact are still to be resolved in accordance with the principles

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established in *Plascon Evans*[11]*.* In *Ball v Bambalela Bolts (Pty) Ltd and Another*[12]*,* the Labour Appeal Court held:

> 'In *Reddy v Siemens Telecommunications (Pty) Ltd,* it was held that the reasonableness of a restraint could be determined without becoming embroiled in the issue of *onus*. This could be done if the facts regarding reasonableness have been adequately explored in the evidence and if any disputes of fact are resolved in favour of the party sought to be restrained. If the facts, assessed as aforementioned, disclose that the restraint is reasonable then the party, seeking the restraint order, must succeed, but if those facts show that the restraint is unreasonable, then the party, sought to be restrained, must succeed. Resolving the disputes of fact in favour of the party sought to be restrained involves an application of the *Plascon-Evans* rule.' [footnotes omitted]

[35] The First Respondent's criticism that the Applicant had failed to make out a case for any proprietary interest in its founding affidavit overlooks that the onus in that regard lies on the Respondent. Any criticism of the lack of facts set out by the Applicant must be measured and tested against the above principles, not just the lack of facts in the founding affidavit.

[36] Before turning to this issue in more detail, I must however consider a recurring refrain appearing from the First Respondent's answering affidavit and argument. The repeated assertions were to point out that the Applicant's reliance upon having lost business to the Second Respondent was purely speculative because the Applicant could not demonstrate as a fact that the First Respondent had been the cause of that lost business. The Respondents' affidavits set out several examples to demonstrate how the Applicant had lost business to the Second Respondent because of customer dissatisfaction or customer choices or due to the work of the Second Respondent's sales representative rather than a connection to the First Respondent.

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[11] *Reddy supra* at para 14; *BHT Water Treatment (Pty) Ltd v Leslie* 1993 (1) SA 47 (W) at 55F – 56A.
[12] [2013] ZALAC 14; (2013) 34 ILJ 2821 (LAC).

[37] The First Respondent annexed WhatsApp messages and/or quoted a number of times when he had received queries or complaints from customers of the Applicant after he had left the Applicant. In those circumstances, he referred these to the employee who had replaced him at the Applicant, Steven Van Blerk. This, he contended, confirmed he was not using his trade connections on behalf of the Second Respondent. As the Applicant argued, however, the First Respondent did not set out any engagements he may have had with any previous customers of the Applicant relating to choice of service provider, rather than operational complaints.

[38] An Applicant in restraint proceedings is not obliged to demonstrate that its customer connections are or will actually be exploited. It is precisely because such facts are difficult to prove (the so-called unpoliceable conduct) that restraints against being engaged by a competitor are upheld. Just as an applicant in restraint proceedings does not have to accept a respondent's undertaking not to utilise confidential information or trade connections, the Applicant in this matter is not forced to be satisfied with the First Respondent's statements that he will not use customer connections – particularly in circumstances where while still employed with the Applicant, he had breached his duty of loyalty to it in assisting the Second Respondent to approach the Ascot Pharmacy.

[39] In *Hard Hat Equipment Hire (Pty) Ltd v McLean*[13], Mahalelo J remarked as follows on the discharge of the onus by the Respondent:

> 'As I have pointed out above, the onus is on the Respondent to prove the unreasonableness of the restraint. He must establish that he had no access to confidential information and that he never acquired any significant personal knowledge of, or influence over, the applicant's customers whilst in the applicant's employ. It suffices if it is shown that trade connections through customer contact exist and that they can be exploited if the former employee were employed by a competitor. Once that conclusion has been reached and it is

[13] (15214/2019) [2019] ZAGPJHC 215 (7 June 2019) at para 30.

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demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant, if its former employee were to take up employment, becomes apparent.'

[40] In *New Justfun Group (Pty) Ltd v Turner and Others*[14], this Court similarly held:

'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. It is sufficient for the applicant to show that the customer contacts exist and that they can be exploited by the former employee. In *Rawlins v Caravan Truck (Pty) Ltd* [1992] ZASCA 204; 1993 (1) SA 537 (A) at 541 C-D it was said 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.'

[41] In *Den Braven SA (Pty) Ltd v Pillay and Another*[15], the High Court dealt with a similar defence that customers would be influenced by commercial factors rather than trade connections and held:

'… The second difficulty is that this fails to take account of such factors as customer loyalty to a particular supplier; customer inertia in continuing to purchase from an established supplier rather than going to the effort of always checking the market for the best possible price; and the fact that where two different suppliers quote very similar prices for comparable products, the trade connection established through the sales person may well be the decisive factor. It is not in my view necessary for an applicant in this situation to winnow the wheat of trade connections and customer contact from the chaff of other factors that may influence purchasing decisions. It suffices for the applicant to show that

[14] [2014] ZALCJHB 177; (2018) 39 ILJ 2721 (LC) at para 12.
[15] [2008] ZAKZHC 22; 2008 (6) SA 229 (D) at para 17.

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> trade connections through customer contact exist and can be exploited by the former employee if employed by a competitor. The applicant in this case has discharged that onus.'

[42] Similarly, it does not help the First Respondent to contend that the job he is involved in at the Second Respondent is different. The fact that the First Respondent's title and/or responsibilities have changed is largely irrelevant because the danger of the poaching of customers remains.[16]

[43] This approach must of course be balanced against the position that:

> 'It is clear however, given the nature of the Plascon Evans rule, that the mere ipse dixit of the applicant cannot suffice on its own to establish these proprietary interests'.[17]

[44] The real issue in this matter appears to me to be that the Applicant contends that the First Respondent had trade connections which he had built up while working in the area as its sales representative for 20 months. The First Respondent does not deny that he has trade connections. He did not attempt to establish a case that the acquaintances he had did not constitute the type of connections which form a proprietary interest so that "*the customer is so strongly attached to him that when the employee quits and joins a rival, he automatically carries the customer with him in his pocket"*.[18] Rather, the First Respondent's contention is that he always had a body of customer connections. It was because of these connections that he was initially hired by the Applicant and he brought these customers, through the use of these trade connections, to the Applicant. The First Respondent consequently contends that he cannot be restrained from making use of his own trade connections. In this respect, the First Respondent's counsel contended that such trade connections were akin to his skills and abilities which were his own attributes and in respect of which the Applicant could

[16] See: *Mpact Operations (Pty) Ltd t/a Mpact Plastics Wadeville v Whitehead* (J1335/2015) [2015] ZALC JHB 442 (25 September 2015) at para 13.
[17] Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another 2009 (3) SA 78 (C). 87A.
[18] JD Heydon, '*Restraint of Trade Doctrine*' (1971) at p 108 quoted with approval in *Rawlins and Another v Caravan Truck (Pty) Ltd* 1993 (1) SA 537 (A) (*Rawlins*) at 541E.

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claim no proprietary interest. At the same time, the First Respondent denied that he was making use of such customer connections given the operational nature of his job with the Second Respondent.

[45] Guidance can be taken in the present matter from what is probably the leading case dealing with customer connections and the contention that those connections were connections of the ex-employee rather than the employer, *Rawlins and Another v Caravan Truck (Pty) Ltd*[19] (*Rawlins*). As in the present matter, the Court found that no case had been made out in relation to the protection of confidential information. In relation to trade connections, the Court held as follows:

> 'In summary then, what Rawlins says is that during his employment with the respondent he largely dealt, not with its existing customers, but with his own pre-existing following or buyers whom he later found. Does this establish that the respondent did not have a proprietary interest of the kind under consideration? It is, of course, a factor in his favour; but not conclusively so (see *Cansa (Pty) Ltd v Van Der Nest* 1974 (2) SA 64 (C) at 69E-H and *M&D Drapers (a firm) v Reynolds* [1956] 3 All ER 814 (CA) at 820E; compare, however, the views of Denning LJ at 821A-E). Even though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense 'his customers', he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before. Where this occurs, what I call the customer goodwill which is created or enhanced, is at least in part an asset of the employer. As such it becomes a trade connection of the employer which is capable of protection by means of a restraint of trade clause.
>
> The onus being on Rawlins to prove the unreasonableness of the restraint, it was for him to show that he never acquired any significant personal knowledge of or influence over the persons he dealt with as a salesman of the respondent, over and above that which previously existed. In my opinion he did not do so. No allegation that he did not acquire such knowledge or influence is made by Rawlins. Nor do I think that it can be inferred. On the contrary, it would appear to

[19] *Rawlins supra*.

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be no less probable that Rawlins' relationships with the customers he dealt with as a salesman of the respondent were such as to make it reasonable for the respondent to protect itself. Rawlins worked for the respondent for some 15 months. During this time he received training in the use and marketing of products sold by the respondent. He was obviously a successful salesman. Taking account of the realities of commerce, it is a fair inference in these circumstances that it was Rawlins' employment with the respondent that gave him the opportunity to consolidate or even strengthen the prior rapport which he had with his customers.'[20]

[46] Similar principles were restated in *Scibit Scientific Bitware (Pty) Ltd v Steenkamp*[21] (*Scibit*) which held:

'[26] In *Nampesca (SA) Products (Pty) Ltd v Zaderer*[22] the issue of proprietary interest in customers and suppliers was pertinently addressed where it was said:

> "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* [1992] ZASCA 204; 1993 (1) SA 537 (A) at 542E-H. It is recognised that where an employee has access to an employer's

[20] Ibid at 542F-543B.
[21] (3242/2020); [2020] ZAFSHC 243 (7 December 2020) at paras 26 - 27.
[22] 1991 (1) SA 886 (C) at 898I – 899B.

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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. (See *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SE) at 444A--C; *Branco and Another t/a Mr. Cool v Gale* 1996 (1) SA 163 (E) at 177C; *Turner Morris (Pty) Ltd v Riddell (supra* at 408I--409G)."

[27] It is clear that the applicant had a proprietary interest in its customers and suppliers. The respondent admitted that he took clients with him to the applicant. The number is not relevant. Whether it is 9 or 149. Those clients became the applicant's clients when he took them there. He may not, on his resignation, claim that the clients are his and encourage them to leave the applicant to join him or any other business.'

[47] On the facts, the Courts upheld the restraint agreements in *Rawlins* and *Scibit*. Similar contentions arose in *Humphrys v Laser Transport Holdings Ltd*[23] (*Humphrys*). In *Humphrys*, the Court found that the appellant had a well-developed relationship with significant customers with whom he had done business long before he had joined the respondent. The Court found that the customers were in reality those of the appellant and that it was improbable that during his 10 months of employment with the respondent, he had acquired any further attachment or influence over them. Consequently, the Court dismissed the restraint application.

[48] The First Respondent bears the onus of demonstrating that he did not acquire any significant knowledge of or influence over the persons he dealt with as a salesman of the Applicant, over and above that which previously existed. The affidavits of both the Applicant and First Respondent are far from detailed in this regard. Neither gives any detail of individual relationships which were or were not improved over that time. They both make generic assertions. Unlike in *Rawlins*,

[23] 1994 (4) SA 388 (C). For other cases, considering similar issues, see *Digicore Fleet Management (Pty) Ltd v Steyn and Another* [2008] 1 AII SA 264 (D) and *Southgate Electrical Wholesalers CC v Rabilal & Another* (3113/2011) [2011] ZAKZDHC 27 (27 May 2011).

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the First Respondent does deny having gained any such knowledge or influence during the course of his employment with the Applicant. Also, there is no evidence to suggest that a sales representative in the security industry would usually or that the Applicant did in fact have ongoing engagements with the Applicant's clients after securing their business. On the papers before Court, it cannot be said that it is probable that the First Respondent, as the Applicant's sales representative in the armed response industry would have dealt with clients after securing their business and thus had occasion to improve relationships.

[49] It may be that the First Respondent has not set out how close his ties were with the people over whom he had customer connections before and after his employment with the Applicant. He does however deny that any training he received at the Applicant materially benefited or enhanced these relationships. The Respondents' rather bland version in that regard is not however so fanciful that it can be rejected on the papers, particularly when it is met without detail from the Applicant. On the application of the *Plascon-Evans* test, one is then constrained to accept the factual position stated by the First Respondent and to thus accept that while the First Respondent has trade connections, they were connections he brought to the Applicant and they were not (in any material respect) improved upon or enhanced during the course of his employment. On that finding, the Applicant has no protectable interest in the enforcement of its restraint and the restraint is unreasonable.

The new facts

[50] At the hearing of this matter in September 2024, the First Respondent's counsel raised with the Court that the Applicant's job functions had changed, which removed him from employment within the restricted zone. No affidavits had been filed relating to this issue. It was evident that this contention was in dispute and, by agreement between the parties, the matter was postponed with costs reserved so that the parties could each file a further affidavit dealing with these new facts.

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[51] When the further affidavits were filed, it was the First Respondent's version that he was now primarily engaged by the Second Respondent to service one of its large clients, Standard Bank, in an area far removed from the restricted area. On the First Respondent's own version, however, this constituted his primary function and he accepted that still "*in cases of emergency"* he would assist the Second Respondent's operations within the restricted area. The Applicant in any event denied this, contending that the First Respondent was still frequently involved in the Second Respondent's business within the restricted area. In this regard, the Applicant made reference to a sighting of the First Respondent in the area on patrol, a number of WhatsApp messages on local security groups where he was reporting on the Second Respondent's activities and his attendance at meetings between the South African Police Services and security companies where he represented the Second Respondent. The First Respondent sought to explain many of these attendances but it is evident that the First Respondent's involvement in the restricted area, on behalf of the Second Respondent, continues in respect of many more issues than just emergency issues.

[52] The consequence of the aforegoing is that the new facts took the matter no further.

Costs

[53] Both parties contended that if they were successful, they should be awarded the costs of the matter, both contending that High Court Scale C would be appropriate. The First Respondent further argued that attorney and client costs were warranted as the Applicant had (apparently) been warned in the judgment of this Court in relation to the urgent hearing that it could not succeed given the dispute of facts on the papers. I do not think that there was such a warning, in relation to the merits of the matter, in the judgment of the urgent Court. The urgent Court itself had made no order as to costs. In my view, it can in any event not be said that the Applicant's pursuing its application was frivolous or vexatious or in any other way invited a special costs order.

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[54] Restraint matters fall under this Court's jurisdiction because they pertain to provisions of employment contracts, rather than its jurisdiction under the Labour Relations Act[24]. An order that costs follow the result is thus not inappropriate. Moreover, as argued by the First Respondent, he has incurred fairly substantial costs of litigation. The First Respondent can be said to have been dragged to this Court to defend his position. While the First Respondent has been supported in his defence of this case by the Second Respondent, this point still remains valid.

[55] On the other hand, for the reasons set out above in relation to the new facts, I do not think the postponement of this matter for the purposes of filing affidavits in relation to the new issue was warranted. It was the First Respondent that introduced this issue before Court. While it contended that it was caught by surprise when the matter was enrolled for hearing after having previously been struck from the roll, this contention appears hollow. The Respondents' attorney had been copied in earlier correspondence to the Registrar indicating the Applicant's intention to proceed with the matter after the urgent application. Because of an incorrect email address utilised by the Registrar, the Respondents had in fact been notified of the hearing date before the Applicant. Moreover, the First Respondent was at all times fully aware that, on their own version, the new facts would not be dispositive of the matter. The First Respondent is thus responsible for the extra costs occasioned by the introduction and argument of the new issue.

[56] This Court enjoys a large discretion in relation to costs, not only in the awarding of costs but in relation to their scale. In the circumstances, I deem it appropriate to adopt the recent amendments to the Rules of the High Court pertaining to the scale of Advocates charges.[25] While restraint matters are not simple, this matter cannot be said to have been one of great complexity. Scale B would then seem most appropriate.

[57] Consequently, the following order is made:

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[24] Act 66 of 1995, as amended.
[25] Uniform Rule 67A.

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Order

1. The application is dismissed;

2. The Applicant is ordered to pay the First Respondent's costs on scale B but excluding the costs contemplated in the third order below; and

3. The First Respondent is ordered to pay the Applicant's costs in relation to the affidavits filed after 18 September 2024 and the hearing of 2 October 2024, on scale B.

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C Beckenstrater

Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Advocate Tyler Mirtle
Instructed by:	Jessica Anne Leisher Fiocchi or Dino Lopes – Paul T Leisher and Associates Attorneys Inc
For the Respondent/s:	Advocate Anthonie Jansen Van Vuuren
Instructed by:	Marthus Du Toit - LM Du Toit Attorneys Inc

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