**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: 2024-112022

In the matter between:

**ALTRON NEXUS (PTY) LTD** **Applicant**

and

**MAURICE FOWLER** **First Respondent**

**MST CRITICAL COMMUNICATIONS (PTY) LTD** **Second Respondent**

**Heard:** **14 November 2024**

**Delivered:** **6 December 2024**

**This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand-down is deemed to be 6 December 2024.**

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**JUDGMENT**

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**MAKHURA, J**

Introduction

[1] Altron Nexus (Pty) Ltd (Altron) launched this application seeking a final order to interdict and restrain Maurice Fowler (Fowler or first respondent), with immediate effect and until 18 September 2025, from breaching the restraint of trade agreement (restraint agreement). The restraint agreement that Altron seeks to enforce is contained in clauses 11 and 12 of the letter of appointment, the terms of which were accepted by Fowler on 22 October 2021.

[2] The application is opposed by Fowler. MST Critical Communications (Pty) Ltd (MST), the second respondent in these proceedings, is Fowler's potential new employer in that it has offered him a position as sales representative, a position Fowler held with Altron from 2021 until his resignation with effect from 18 September 2024. MST filed a notice to abide by the decision of this Court.

Material facts

[3] Altron is an importer and distributor of Motorola Solutions South Africa (Pty) Ltd (Motorola) and SA Hytera (Pty) Ltd (Hytera) critical communication products and sells these products to private and public sector clients or customers. These customers include those who procure to resell the products, referred to as "resellers".

[4] Fowler was employed by Altron with effect from 20 November 2018 as a Bench Technician and was promoted in 2021 to the position of sales representative. He held the position of sales representative until his resignation in September 2024. He contends that before joining Altron, he had already possessed the technical expertise as a Technician due to his previous experience which started as early as 2007 in the industry where he was involved in installation, maintenance and service of critical communication systems.

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[5] MST is also an importer and distributor of critical communication products. It however only specialises in Hytera and ICom products, which products are also directly sourced from amongst others, Hytera. Although MST does not compete in the direct sales space, it competes with Altron in the reseller space and only in respect of Hytera critical communication products.

[6] Altron and Fowler concluded a restraint agreement, which is contained in the two contracts of employment as a Bench Technician and later as a sales representative. Although Fowler signed a restraint agreement with similar terms as a Bench Technician, that restraint agreement has in my view been superseded by the current restraint agreement as a sales representative. In terms of the restraint agreement, Fowler is essentially precluded, within a period of 12 (twelve) months and in the Republic of South Africa, directly or indirectly, in any capacity whatsoever, from carrying on, being interested in, engaged in or concerned with or employed by any person who carries on any competitive activity or any activity engaged in by a competitor. The confidential undertaking provisions preclude Fowler from disclosing or utilising Altron's confidential information and/or exploiting his customer and supplier connections for his benefit or that of a third party.

[7] Altron’s case is that the main purpose of its restraint agreement is to preclude Fowler from using its client relationships and confidential information as a springboard to unfairly compete with Altron, on behalf of MST, a direct competitor, and by poaching its clients and employees.

[8] In support of its case, Altron argues as follows. By virtue of his position as a sales representative, Fowler was privy to its confidential information pertaining to its client list, the stock-on-hand as well as plans in respect of its legacy stock. In addition, Fowler is aware of the discounts which are offered by Hytera to Altron and could use that information for the benefit of MST. Fowler specifically knew the price of Altron's stock charged to its clients and/or customers as well as the mark-up applied and he will use that information to undercut Altron and target customers in the critical communications sector.

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[9] By virtue of his responsibilities, so Altron continues, *"Fowler had access to highly confidential information including, by way of example, the names, locations and contact details of key clients, customers and suppliers, the prices agreed with both suppliers and customers, volumes both for supply and sale, daily operating issues (including customer complaints and the steps taken to address such complaints), stocklists, stock-on-hand, back-order items (where stock was not available), replenishment cycles and landed stock."* He was engaged in pricing and decision support function on the most appropriate solution pricing schedules to be applied during bid or proposal or quotation development and collating details on new business (pipeline, pending and actual new business) and present the progress and successes of performance against the business development objectives, targets, as well as against competitive benchmarks.

[10] Fowler, on the other hand, contends that it would be unreasonable and would infringe his right to trade and to be productive if the restraint agreement is enforced because it is so wide that it would preclude him from working in any position, anywhere in the critical communications industry or related industry, anywhere in South Africa and parts of Africa, for 12 months after his resignation. Fowler also contends that at the time of the conclusion of the restraint agreement, he was not on equal footing with Altron because he did not have the luxury to nitpick the type of employment contract in light of various factors, his previous retrenchment and an opportunity for a permanent employment. He further contends that it would be unreasonable to enforce the restraint agreement against him when Altron had previously not enforced the restraint agreement against former employees who resigned to join competitors.

*Competition*

[11] It is common cause that Altron and MST are competitors in the reseller space and in respect of the Hytera products. Fowler contends that MST does not supply Motorola products. Altron admits this but contends that should MST elect to start supplying Motorola products, Fowler will be able to assist MST to enter that market

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with an unlawful competitive advantage because he possessed knowledge of these products.

[12] Fowler participated in weekly sales meetings where the commercial relationship with Motorola was discussed, along with critical details about its products, including their costs. This exposure, Altron contends, provided Fowler with a comprehensive insight into the Motorola product line, enabling him to remain informed and aligned with ongoing strategies despite not working directly with these products.

*Customer connections*

[13] Fowler disputes, on the basis of what he alleges the industry operates, that he had access to trade connections and confidential information of Altron that could be exploited by him to Altron's detriment and MST's benefit. He contends that there are approximately 100 resellers in South Africa and that as a sales representative for Altron, he only dealt with resellers and had 18 active reseller accounts. Altron, whilst conceding that Fowler had no direct customers and that he only had reseller customers, contends that this was not because he was precluded from doing so by Altron.

[14] According to Fowler, resellers do not exclusively buy their products from MST or Altron. They deal with all distributors in the industry. The 18 active resellers he had as customers are also established customers of MST. He knows this allegedly because resellers buy products from any distributor depending on the availability of stock. Further, the names and contact details of the resellers are public knowledge and in the public domain as all distributors and resellers of Hytera products are on a WhatsApp group named SA Hytera Information Group, operated by Hytera. He attached as evidence the screenshot of the WhatsApp group.

[15] Altron disputes that resellers do not buy their products exclusively from one supplier. It contends that the critical communications industry is a highly specialised industry and that there are only two Hytera distributors in South Africa, namely Altron and MST. This means that resellers have to buy Hytera products

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from either Altron or MST. Distributors, so argues Altron, are required to obtain and provide accredited licences through the Independent Communications Authority of South Africa (ICASA) for the use of radio frequency spectrum. Although there are a variety of distributors for other products, that is not true of Hytera products. Altron however acknowledges that the industry is fast-paced, and it is relatively common for customers to purchase their products from more than one distributor.

[16] Altron submits further that, even if its customer connections are not exclusive, it nonetheless maintains significant relationships with its customers, and is entitled to take reasonable steps to protect those relationships. After Fowler's resignation, Altron telephonically contacted some of his 18 customers to inform them of Fowler's resignation. Altron contends that it faces a genuine risk of harm to its business interests and client relationships give that some of Fowler's customers had since contacted him and as he claimed, he had referred them to Altron.

[17] Finally, Altron stated that the WhatsApp group was created by Hytera for direct marketing purpose and is used by Hytera to share marketing material, such as brochures. There is nothing confidential about the information shared on this group. The reselling customer market (approximately 100 customers) is far larger than the WhatsApp group, of which many contacts belong to the same institution.

*Stock-on-hand*

[18] Fowler admits that he had knowledge whether Altron had stock-on-hand of a certain product or not, but denies that such information is useful after termination of his employment because the stock-on-hand changes daily, if not hourly and therefore any knowledge which he had when he left employment on 18 September 2024, would now be of no use, as the stock-on-hand would have changed significantly since then. He contends that he is not able to access this information since he had returned Altron's laptop which contained its information and his Altron email account was deactivated.

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[19] Altron disputes that the price change daily, but at the same time concedes that some product prices may change. It contends that while stock-on-hand fluctuates over time, prior to his resignation, Fowler possessed detailed knowledge of large quantities of stock, including the rate at which stock moved and how quickly it was replenished. He would also have been aware of any stock that Altron did not have on hand at the time and could use this information to provide MST with a competitive advantage in undercutting Altron. Moreover, some stock changes quickly, while other stock less so. Orders for new stock are placed on a regular basis, based on the feedback from the sales representatives. It is the responsibility of the sales team to forecast stock requirements, and to ensure that orders are placed regularly. Fowler was part of the sales team and would have had a great deal of insight into Altron's existing stock, new stock on order and the lead times for new stock to arrive.

*Legacy stock*

[20] This is stock that has been discontinued and no longer manufactured by Motorola or Hytera, this information according to Fowler, cannot possibly be of any use to a competitor. It cannot be used in competition with the current stock. Altron's response is that insight to the legacy stock would be useful because Fowler will know the type of the legacy stock available. Altron contends that there is a significant amount of discontinued stock of Hytera, which forms part of Altron's "legacy stock", and this stock continues to be in high demand. Fowler was well aware of the existence of this legacy stock and had access to Altron's strategic plans regarding its use and distribution in the foreseeable future, ensuring alignment with Altron's long-term objectives.

*Price mark-up and discounts offered by Hytera to Altron*

[21] Fowler contends that he had no access to information regarding the discounts offered by Hytera to Altron as he was not involved in the purchasing of stock and/or any negotiations between Altron and the manufacturers, in this case Hytera, in respect of the purchasing of stock. He contends that for about a year prior to his

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resignation, the pricing structures were only provided to management and not sales representatives and all deals had to be approved by management. Further, that he was assigned specific accounts in respect of resellers only (18 reseller accounts) and did not have to collate details on new business and/or attract new relationships.

[22] Altron's case is that while Fowler did not purchase stock himself, it is the responsibility of the sales team to forecast stock requirements, and to ensure that orders are placed regularly. A standard markup is applied within Altron, which Fowler is well-acquainted with and is contained in Altron's price books. Furthermore, the minimum discount begins at a predetermined percentage, which is clearly visible within the Microsoft Dynamics 365 system and the integrated CRM platform. All sales representatives, including Fowler, have access to this system, which provides them with key business insights, including data on fast-moving goods and Altron's top resellers. Fowler would have been required to access this information in order to provide quotations to his customers. These quotations would be generated by factoring in the base cost of the product, the shipping costs and the margin added in by Altron. He is also aware that Altron makes bulk purchases, which enables the company to secure more favourable pricing. Altron changed its suppliers approximately 18 months ago, and since then its stock pricing has been stable

[23] Fowler admits to having had knowledge regarding the general markup percentages but disputes knowledge of how the price markup percentage is determined. He argued that without knowledge of the cost prices and landing costs, the mark up percentages is of no use to the competitor. In any event, so Fowler submits, prices vary regularly as stock is bought in dollars and then imported, then mark-up percentages are added on the landing cost and stock is sold in rands. For the past year, the manufacturer provided pricing structures to management only and sales representatives, including him, were not provided with these structures. The pricing of stock is a critical factor in any business, including that of Altron and MST.

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*Product training*

[24] Fowler contends that he spent approximately three years in sales where product training was only provided by Hytera directly and only in the last few months before his resignation. This training was also available to MST.

[25] Altron contends that Fowler did not solely receive training from Hytera but also had extensive access to Udemy for several years, which provided a broad range of additional learning resources. Furthermore, Altron implemented a comprehensive internal training programme on sales, which began in early 2024 and continued through September 2024, ensuring that Fowler received structured, ongoing development. To complement these efforts, Altron also organised an in-depth, full day training session around March or April 2024, further enhancing Fowler's skills and knowledge in key areas of sales.

Evaluation

*Legal principles*

[26] The legal principles for enforcement of restraint agreements are well established. An applicant to enforce a restraint agreement is only required to establish the existence of the restraint agreement and prove that its terms have been breached. Thereafter, the onus is on the respondent opposing the enforcement of restraint to prove that the restraint agreement is unenforceable because it is unreasonable.[1] The test to determine reasonableness of enforcing the restraint agreement is equally trite. It was set out in *Basson v Chilwan*[2] as follows:

28.1 Is there an interest of the one party which is deserving of protection?

28.2 Is such interest being prejudiced by the other party?

[1] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)*; Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at paras 10 and 16; *New Just Fun Group (Pty) Ltd v Turner and Others* (2018) 39 ILJ 2721 (LC) at paras 9 and 10.
[2] 1993 (3) SA 742 (A).

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28.3 If so, does that interest weigh up qualitatively and quantitively against the interest of the latter party that he should not be economically inactive or unproductive?

28.4 Is there another facet of public policy that requires that the restraint should either be maintained or rejected?

[27] Restraint agreements are not there merely to protect the former employer against competition from its ex-employee but as a necessity to protect the former employer's proprietary interests. It is further trite that the protectable proprietary interests are all confidential information or matter that could be used by a competitor to gain a competitive advantage and the relationship with customers, suppliers and others that go to make up what is referred to as the trade connection of the business.[3]

[28] Therefore, where it is shown that there is (1) *confidential information and/or trade connection* (2) to which the employee had *access* to and (3) which he *could transmit* to his new employer, the applicant would be entitled to the protection afforded by the restraint agreement.[4] Whether the information is confidential or constitutes a trade secret is a factual enquiry, to be determined by considering whether the information is useful and not in the public knowledge, whether it is known only to a restricted number of persons and whether it is of economic value to the applicant.[5]

[29] The Labour Appeal Court (LAC) summarised the legal principles in *Labournet (Pty) Ltd v Jankielsohn and others*[6] *(Labournet)*. It held that the enquiry is essentially a value judgment that encompasses a consideration of two policies, being the duty by the parties to comply with the terms of their agreement and the right to freely

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[3] *Sibex Engineering Services (Pty) Ltd v Van Wyk and another* 1991 (2) SA 482 (T), at pg. 502C – F.
[4] *ARB Electrical Wholesalers (Pty) Ltd v Texan Grove and Others* [2014] ZACCT 31 (3 June 2014); *New Justfun Group (Pty) Ltd v Turner and others* (2018) 39 ILJ 2721 (LC) *(New Justfun)* at paras 12 and 13.
[5] *Townsend Productions (Pty) Ltd v Leech and other* 2001 (4) SA 33 (C) *(Townsend Productions)* at 53J - 54B; *New Justfun* at para 13.
[6] (2017) 38 ILJ 1302 (LAC); See also: *Townsend Productions*.

choose and practice one's trade, occupation or profession. The LAC elaborated further:[7]

> '[41] … A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The list of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. To seek to enforce a restraint merely in order to prevent an employee from competing with an employer is not reasonable…
>
> [43] It is now clear from, inter *alia*, *Basson* and *Reddy* that the reasonableness and enforceability of a restraint depend on the nature of the activity sought to be restrained, the rationale (purpose) for the restraint, the duration of the restraint, the area of the restraint, as well as the parties' respective bargaining positions. The reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced. With reference particularly to the facts of this matter, it is an established principle of law that the employee cannot be interdicted or restrained from taking away his or her experience, skills or knowledge, even if those were acquired as a result of the training which the employer provided to the employee.
>
> [44] Even though it is acknowledged that it is difficult to distinguish between the employee's use of his or her own knowledge, skill and experience, and the use of his or her employer's trade secrets, it is accepted that an employee cannot be prevented from using what is in his, or her, head…' [Emphasis added]

*The restraint agreement and breach*

[30] The contract of employment which incorporated the restraint agreement is not in dispute. It is also not in dispute that MST, which offered Fowler a position as a sales representative, competes with Altron at least in the reseller space and in

[7] *Labournet*, at paras 41 – 44.

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respect of the Hytera products. Ms Potgieter, counsel for Fowler, though with some resistance, conceded that Altron has discharged its onus in this regard.

*Enforcement of the restraint agreement: un/reasonableness*

[31] Fowler has conceded customer connection and knowledge of stock-on-hand, legacy stock and general mark-up percentage. He does not dispute having detailed knowledge, not just access to information, of how Altron priced its products and the discounts it offered to its customers, both direct and reselling customers. Altron filed a confidential affidavit which sets out confidential information which Fowler had access to. This includes the list of customers and list of accounts assigned to various sales representatives. Fowler has not disputed having access to this information nor has he disputed attending weekly meetings were feedback was given regarding suppliers and clients, purchase volumes, sales forecasts, monthly price lists, stock-on-hand, sales results and sales strategy.

[32] However, Fowler contends that the information listed by Altron as confidential is either already in the public domain due to the fact that MST and Altron share the same suppliers and customers in the reseller space in respect of Hytera products and/or has become useless after his resignation, as it changes and varies constantly. Further, Fowler argues that he returned his laptop with all Altron's information upon his resignation and was removed from the systems and his email was deactivated. He concludes therefore that he does not have any access to any alleged confidential information and have no such confidential information in his possession.

[33] The above defenses are unsustainable. There is no doubt that Fowler had knowledge and access to confidential information obtained during his employment with Altron regarding at least the following - the stock-on-hand, new stock, discounts offered and the pricing and price mark-ups. This in my view is confidential information that Fowler could exploit to the benefit of MST and prejudice of Altron. That the confidential information may have changed since his resignation is in my view of no assistance to his case.

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[34] There is no question in this case that Altron and MST are competitors, at least insofar as the reseller space and sale of Hytera products are concerned. Fowler claimed that some of his 18 reseller customers were customers of MST. This allegation however has not been pleaded with sufficient particularity and has not been proven. None of the resellers provided confirmation of this allegation. Barnes, the managing director of MST, has only attempted to confirm this allegation in an email correspondence to Fowler. Barnes has therefore not confirmed the information under oath nor has he indicated which of Fowler's customers were also MST's customers. On this basis, the defence that his reseller customers were not exclusively dealing with Altron is not substantiated and falls to be rejected. Equally, that Altron reseller customers serviced by him were on a WhatsApp group with other customers and MST employees such as Barnes does not prove that his reseller customers were also established customers of MST and that they were not dealing exclusively with Altron.

[35] In his papers and during arguments, Fowler raised various grounds why it would be unreasonable to enforce the restraint agreement. He contends that enforcing the restraint agreement would infringe his right to trade and be productive because the restraint agreement is so wide that it would preclude him from working in any position, anywhere in the critical communications industry or related industry, anywhere in South Africa and parts of Africa, for the twelve months. Further, that at the time of conclusion of the restraint agreement, he was not on equal footing with Altron because he did not have the luxury to nitpick the type of employment contract in light of various factors, which include his previous retrenchment and an opportunity for a permanent employment. He also claims that he was under duress when he signed the restraint agreement. Finally, Fowler raised the defence of selective enforcement of the restraint.

[36] The unsubstantiated allegation of duress is dismissed outright. There is no case made out why enforcing the restraint agreement in the agreed geographical area would be unreasonable. At the time of signing the restraint agreement, Fowler was

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already on a permanent employment with Altron as a Bench Technician. His claim of an unbalanced bargaining power and previous retrenchment is rejected.

[37] It is the defence that Altron historically has not enforced the restraint agreements that deserves a closer inspection and attention. Fowler provided two names of former employees who joined a direct competitor (Biptel) in the competitor's direct sales space. He alleged that when these two former sales representative employees, namely Niso Mabuya and Tiso Mapanza, left Altron to join Biptel, a direct competitor in the direct sales space, their restraint of trade agreements were not enforced. Altron's response was that:

> 'The representatives of Altron were under no obligation to inform Mr Fowler of their intention to enforce the restraint of trade and confidentiality provisions. In any event, following Mr Fowler's resignation, he was promptly made aware of the applicable restraint of trade and confidentiality provisions and Altron sought the necessary undertakings from him in this regard.
>
> When Mr Fowler indicated his intention to resign, Altron focused on entering into negotiations with him in order to retain him. As Altron offered a substantially improved package and he was receptive to the proposal, it was reasonably understood that he would accept the revised terms.
>
> In mid-2023, following the appointment of a new Managing Director at Altron, it revised its policy on the enforcement of restraints of trade and decided to actively enforce these provisions where appropriate, particularly in relation to the protection of confidential information and the safeguarding of customer relations.
>
> The fact that Altron may not have historically enforced its restraint of trade provisions against previous sales representatives is irrelevant to the question before this court as to whether it would be reasonable to enforce Mr Fowler's restraint and confidentiality undertakings.
>
> Altron is fully entitled to exercise its rights and enforce the restraint of trade and confidentiality provisions against Mr Fowler in accordance with the contractual obligations he voluntarily agreed to.' [Emphasis added]

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[38] Parties were granted an opportunity to file supplementary heads of argument on selective enforcement of the restraint agreements. They filed their respective supplementary heads of argument on 20 and 22 November 2024. The supplementary heads of argument did not raise any new legal arguments. Ms Mclean appearing for Altron could not find any judgment dealing with selective enforcement of restraint agreement. I have not been able to find any judgment on this issue at the time of finalizing this judgment.

[39] I am unable to agree with Altron's response that this issue is irrelevant. The enquiry this Court is required to undertake is a value judgment encompassing consideration of two policies - the duty on the part of Fowler to comply with the restraint agreement he signed without any duress and the right to freely choose and practice his trade, occupation or profession.

[40] Altron does not dispute that it had previously not enforced restraint agreements against its former employees who joined direct competitors. Altron did not place any facts before this Court to justify why it did not enforce the restraint agreements against these two employees. Further, it did not make it clear to its employees, including Fowler, that it had changed its practice of not enforcing restraint agreements and that it would, going forward, enforce all restraint agreements. Nor did it make its intention clear before Fowler tendered hisresignation that should he resign, it would enforce the restraint agreement. The intention to enforce the restraint agreement was only communicated after Fowler tendered his resignation, which was a little too late. In my view, it was not unreasonable for Fowler to expect, based on Altron's previous conduct or practice as it existed at the time of his resignation, that Altron would not enforce the restraint agreement.

[41] Having considered Altron's selective enforcement of restraint agreement, its non-communication to employees that the practice of non-enforcement has changed and that it would enforce restraint agreements going forward, the failure to inform Fowler during the discussions when it sought to persuade him to stay that it would enforce the restraint, I am of the view that it would be unreasonable to enforce the

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restraint agreement against Fowler. Altron was happy or content with at least two former employees with restraint agreements joining a competitor free of any restraint. Fowler expected the same or similar treatment and that expectation is not unreasonable. Therefore, enforcing the restraint agreement inn the circumstances would ne unreasonable. The application must therefore fail.

Costs

[42] This application is for the enforcement of contractual rights between two private individuals. It is often said that since this is a civil claim, the trite legal principle in this court that costs do not follow the result does not apply. However, the court retains its overall discretion to award costs.

[43] The application to enforce a restraint agreement is not purely and strictly a contractual matter. Although the contract is between two private parties, the application to enforce the restraint agreement involves a constitutional issue and the Court determining such an application inevitably has to balance the right of the employer to enforce a voluntarily agreed term of the employment contract and the right of the employee to practice his trade, occupation or profession. The LAC held in *Ball v Bambalela Bolts (Pty) Ltd and another*[8], that:

> 'In my view, the only ground upon which the court a quo, seemingly and in the absence of any reasons indicating the contrary, ordered the appellant to pay the costs is because of the fundamental principle which applies generally in courts of law, as I have stated above. If that is so, then the court a quo has erred. In the Labour Court, specifically, the law and fairness are prime considerations when considering costs. The normal rule that costs follow the result is not automatically applicable in Labour Court proceedings. The court is required to consider factors like the financial state of the parties, their bona fides and their continuing relationship in coming to a decision whether to order the unsuccessful party to pay costs. Litigants are not to be deterred from defending or prosecuting bona fide actions for fear of adverse costs orders. In *MEC for Finance, KwaZulu Natal &*

[8] (2013) 34 ILJ 2821 (LAC).

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*another v Dorkin NO & another*, Zondo JP summarized the position, regarding the awarding of costs in the Labour Court, as follows:

'[19] The rule of practice that costs follow the result does not govern the making of orders of costs in this court. The relevant statutory provision. is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless those requirements are met. In making decisions on costs orders, this court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organizations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court. That is a balance that is not always easy to strike but, if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes. In that way, these courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the courts for adjudication.

[20] In this case, the second respondent will lose his job and he has had to defend the decision taken by the first respondent and has even engaged senior counsel to defend such decision. Unless there is a trade union behind him which will foot his legal bill, he stands to spend a lot of money on legal fees. In all of the circumstances, I am of the view that the requirements of the law and fairness dictate that no order should be made as to costs on appeal and none should have been made in the court below.'

Another important aspect which the court a quo clearly did not consider before making the costs order, is the fact that the enforcement of a restraint, technically, involves a constitutional issue. Restraints of the kind being considered, constitute a limitation on a citizen's right, in terms of s 22 of the Constitution, which, arguably, requires justification (although the procedure employed in *Reddy* would suffice in most cases). In constitutional matters, the general rule that costs follow the result does not apply. In such matters costs orders are generally eschewed out of

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> concern that they may produce a 'chilling effect', in that litigants may be deterred from approaching a court to litigate concerning an alleged violation of their constitutional rights for fear of being penalized with costs if they are unsuccessful. If constitutional matters are raised or defended in good faith and not vexatiously and the issues raised have merit or are important, like the violation of a right guaranteed in the Bill of Rights, and the proceedings that ensued resolved those issues, the party complaining of the violation, even if unsuccessful, would, generally, not be ordered to pay the costs.'[9]

[44] In my view, the conduct of the respective parties in bringing and opposing the application and their conduct during the proceedings, similar to what section 162(2) of the LRA, play a pivotal role in the enquiry whether to award costs or not. Both Altron and Fowler were within their rights to assert their respective rights. Whilst Altron did not succeed in its application, I do not believe that this is a matter that warrants a costs order being made.

[45] In the premises, the following order is made:

Order

1. The application is dismissed.

2. There is no order as to costs.

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M. Makhura

Judge of the Labour Court of South Africa

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[9] Ibid at paras 29 – 30.

Appearances:

| | | |
|---|---|---|
| For the Applicant | : | Ms. K.S. Mclean with Mr. S. Malibe |
| Instructed by | : | Cowan Harper & Madikizela Attorneys |
| For the First Respondent | : | Ms. K. Potgieter |
| Instructed by | : | Chris Janeke Attorneys |

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