THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no. 2024 – 115703

In the matter between:

SELECT PPE (PTY) LTD **Applicant**

and

RYAN HOLMES **First Respondent**

UNIVERSAL SAFETY PRODUCTS (PTY) LTD **Second Respondent**

Heard: **22 November 2024**

Delivered: **3 December 2024**

This ruling was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 3 December 2024

Summary: **Urgency – principles considered – applicant establishing proper case of urgency – inherent nature of restraints as being urgent prevails – matter heard as one of urgency**

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Restraint of trade – principles stated – application of principles to matter – issue of competition, protectable interest and infringement of such interest considered

Restraint of trade – protectable interest in the form of confidential information considered – employer making out proper case of protectable interest relating to confidential information – however employment with new employer does not place protectable interest at risk – breach / infringement of protectable interest not shown

Restraint of trade – protectable interest in the form of trade connections considered – employer failing to make out proper case of trade connections – no protectable interest with regard to trade connections shown to exist

Restraint of trade – breach of restraint – employment with new employer does not constitute breach in this instance – no actual competition or competing business shown to exist – nature of industry / business of new employer such that no risk to applicant as a result of employment of employee with new employer

Restraint of trade – enforcement of restraint not appropriate – employer appropriately protected in the circumstances by protection of confidential information insofar as employee may have confidential information

Interdict – requirements of interdict not satisfied – no clear right shown – no reasonable apprehension of prejudice – application refused

Costs – principles considered – contractual dispute – costs ordinarily follow result – costs however still subject to discretion – costs award appropriate

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JUDGMENT

SNYMAN, AJ

Introduction

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[1] The applicant has brought an urgent application on 23 October 2024 to enforce a restraint of trade covenant against the first respondent, a former employee of the applicant. It was common cause that the first respondent has commenced employment with the second respondent, which conduct the applicant considers to be in violation of the restraint of trade of the first respondent. In the application, the applicant effectively seeks an interdict against the first respondent, to prevent him from continuing his employment with the second respondent. The applicant also seeks further relief in the form of an order directing the first respondent to keep the applicant's confidential information, confidential.

[2] The first respondent has opposed the application on several grounds. He challenged urgency. He contended that the second respondent was not in competition with the applicant. According to him, the applicant has in any event failed to demonstrate the existence of any protectable interest, in that there was no propriety or confidential information in existence in this case which could be exploited by him, and that he has no trade connections which he could similarly exploit. And finally, the first respondent accused the applicant of selectively enforcing the restraint.

[3] Because the applicant seeks final interdictory relief against the first respondent, the applicant must satisfy three essential requisites to succeed, being (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[1]

[4] The application came before me on 22 November 2024 for hearing. Both parties provided comprehensive written submissions and presented argument in Court. Considering that the pleadings and annexures were extensive, and the fact that I still had to carefully consider the written submissions of the parties, I reserved judgment, indicating that I will hand down judgment on 3 December 2024. For

[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20. In particular, and where it comes to restraint applications, see *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another* (2011) 32 ILJ 601 (LC) at para 38 – 40; *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 26; *Experian SA (Pty) Ltd v Haynes and Another* (2013) 34 ILJ 529 (GSJ) at para 59; *Jonsson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC) at para 54; *FMW Admin Services CC v Stander and Others* (2015) 36 ILJ 1051 (LC) at para 1.

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ease of reference in this judgment, I shall refer to the applicant as '*SPPE*', the first respondent as '*Holmes*', and the second respondent as '*USP*'. I shall commence the judgment by first dealing with the issue of urgency.

Urgency

[5] The facts relating to urgency are more or less undisputed. Holmes resigned on 31 August 2024 by e-mail. This was a Saturday, and consequently the resignation came to the attention of SPPE, and in particular the CEO Petrus Pieterse (Pieterse), on 2 September 2024. On the same date, Pieterse had a discussion with Holmes about his resignation and tried to convince him not to persist with the same. At this point Holmes also informed Pieterse that he would be taking up employment with USP, which Pieterse objected to. Pieterse asked Holmes to think about his decision, but despite several engagements over the next few days, Holmes indicated that his decision to resign and join USP was final.

[6] As a result, and on 9 September 2024, SPPE informed Holmes by way of a letter of demand sent by its attorneys, that taking up employment with USP would be a contravention of his restraint of trade and confidentiality agreements, and demanded an undertaking that he refrain from doing so, failing which an urgent application would be brought against him. He was required to provide such undertaking by 15 September 2024. Holmes then engaged attorneys, and through such attorneys answered on 16 September 2024 and recorded that he was not in breach of these agreements, USP was not in competition with SPPE, and any application brought would be opposed.

[7] Because Holmes had now engaged attorneys, and considering several contentions such attorneys had raised in their letter of 16 September 2024, SPPE's attorneys decided to send a comprehensive demand to Holmes's attorneys, sent on 23 September 2024, in order to address the issues raised and perhaps convince Holmes to the contrary. At the conclusion of the letter of 23 September 2024, a final demand was made that Holmes undertake in writing that he would not breach the aforementioned agreements and would not continue with employment at USP. Holmes was given a deadline of 25 September 2024 to provide such undertakings. Holmes's attorneys requested

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an extension to 27 September 2024 to answer, which was granted. Holmes's attorneys then did respond on 27 September 2024 to the effect that Holmes would not be giving the undertakings sought. Holmes then indeed commenced employment with USP on 1 October 2024.

[8] Because 27 September 2024 was a Friday, SPPE and its attorneys set up a consultation with counsel for Monday 30 September 2024. Counsel had to be briefed and provided with all the necessary information to prepare the application. The notice of motion was issued out of the Court, with a case number, on 10 October 2024, and the founding affidavit was deposed on 17 October 2024. The application was served on Holmes on 23 October 2024, and set down for 22 November 2024.

[9] The question is whether the above core facts satisfy the requirements of urgency. The Court dealt with urgency, specifically in the context of restraints of trade, in the judgment of *Vumatel (Pty) Ltd v Majra and Others*[2] and said:

> 'I accept that restraints of trade have an inherent quality of urgency. This position comes from the following dictum in *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff & another* where the court held: 'I accept that breaches of restraints of trade have an inherent quality of urgency.'

The Court however added the following:[3]

> '… An urgent restraint of trade application is still nothing else but an urgent application, just like any other urgent application where final relief is sought. The ordinary requirements applicable to such urgent applications must still find application. The fact that one is dealing with a restraint of trade is not some kind of license that in itself establishes urgency, to the exclusion of all other considerations.'

[10] The requirements relating to urgent applications in general was summarized in *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[4] as follows: (a) the applicant has to set out explicitly

[2] (2018) 39 ILJ 2771 (LC) at para 4. See also *FMW* (*supra*) at para 28.
[3] Id at para 5. See also *Ecolab (Pty) Ltd v Thoabala and Another* (2017) 38 ILJ 2741 (LC) at para 20.
[4] (2016) 37 ILJ 2840 (LC) at paras 20 – 26, and all the authorities cited there.

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the circumstances which renders the matter urgent with full and proper particularity; (b) the applicant must set out the reasons why the applicant cannot be afforded substantial redress at a hearing in due course; (c) where an applicant seeks final relief, the court must be even more circumspect when deciding whether or not urgency has been established; (d) urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity; (e) the possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing must be considered; and (f) the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency.

[11] I am satisfied that the approach adopted by SPPE to first resort to seeking an undertaking to comply from Holmes, before simply launching into litigation, is a proper and responsible approach. This because such an approach is tantamount to first trying to resolve the matter without running off to Court.[5] Therefore, I consider the time taken by SPPE accounting for the period 9 to 27 September 2024, to obtain redress without litigation by seeking undertakings, should not serve to non-suit it where it comes to urgency. It is only on 27 September 2024 that Holmes made it finally clear that he would not be providing the undertakings sought and would continue with his employment at SPPE.

[12] Once Holmes had made his position clear, SPPE acted promptly in consulting counsel the following Monday, 30 September 2024. That being said, I must say that I am not entirely satisfied with the time then taken to prepare and finally submit the application, being the period of some three weeks, until 23 October 2024. There is no proper explanation why it took this amount of time. Whilst this certainly bordered on scuppering urgency, I am of the view that considering the scope of the application, and what was dealt with therein, it cannot be unequivocally said that three weeks for such an application is an unduly long period. I also consider that earlier, on 10 October 2024, the case number had at least been issued out of Court. I further consider that failures in expedition

[5] In *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 21 it was said that: '*… In my view, litigants should be encouraged in any attempt to avoid litigation, rather than rushing to court as a first option. Litigation is costly and often unnecessary. …*'. See also paras 22 – 23 of the judgment, and *A J Charnaud & Co (Pty) Ltd v Van der Merwe and Others* (2020) 41 ILJ 1661 (LC) at para 5.

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occasioned by SPPE in this regard is largely ameliorated by the sufficient time afforded to Holmes to answer the application, thereby removing any prejudice to him. The following *dictum* in *Trendy Greenies (Pty) Ltd t/a Sorbet George v De Bruyn and Others*[6] is apposite:

> 'In the light of the sequence of events above, I am satisfied that the applicant allowed a reasonable time of approximately a fortnight for the individual respondents to reconsider their alleged breach of the restraint and acted reasonably quickly thereafter in launching these proceedings. The respondents also were given adequate time to file their answering affidavits …'

[13] Further, the nature of the relief sought, and the purpose sought to be achieved by the enforcement of a restraint of trade, must be considered. It is all preventative in nature, and a hearing in the ordinary course may well render any restraint enforcement application entirely moot, especially considering the limited period for which a restraint remains operative. It follows that it is highly unlikely that there is any other form of substantial redress in due course.[7] *In casu*, it would in any event be in the interest of both parties to have their futures decided, having regard to the fact that they both had a complete and adequate opportunity to ventilate their cases fully, and all the information necessary to finally decide this matter is before Court.

[14] As to the time taken for the application to be actually heard, Holmes, in argument, complained about the application only being heard about a month after it was brought, which he contended also dispelled urgency. In this context, Rule 39 provides an answer, which Rule specifically regulates restraint of trade applications. There is a reason behind Rule 39, stemming from the fact that restraint of trade applications is regularly vigorously opposed, with extensive affidavits being filed by the litigating parties. Where it came to applying the ordinary practice relating to urgent applications in this Court, to these kinds of restraint applications, difficulties often arose. These difficulties included the matter not being ready to be heard when the set down date arrived and parties requesting more time to file opposition and replies. Because of complexity with

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[6] (2021) 42 ILJ 592 (LC) at para 12.
[7] See *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

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the *onus* in restraint applications, there were often further sets of affidavits required to be filed by the parties. All this meant that time was taken up on the urgent roll and Judges preparing themselves, for matters that were simply not finally ripe to be heard, which was simply a waste of resources and certainly not ideal. Hence the introduction of Rule 39.

[15] Rule 39(1) prescribes that when an application to enforce a restraint of trade is brought, the process stipulated in Rule 39 must be followed (barring exceptional circumstances). Provision must be made for four sets of affidavits.[8] Further, specific time periods are provided for the exchange of these affidavits,[9] being seven days to file an answering affidavit, five days to file a replying affidavit, and a further five days to file a fourth affidavit. Once the time period for the filing of a fourth affidavit expires, the applicant must immediately index the matter,[10] and the parties must file heads of argument within five days of such index.[11] Importantly, and when first bringing the application and seeking a hearing date from the Registrar, the applicant must account for all of these time periods, in obtaining such date.[12] And finally, the matter will only be enrolled for the week following the filing of heads of argument.[13]

[16] The consequence of all the above is that any applicant seeking to enforce a restraint of trade is looking at a time period of at least 22 Court days from when the application is first brought and until it is finally heard. Added to this, and considering the congestion of the urgent Court Roll and the fact that the Registrar must have a date available for the matter to be set down, practice in this Court has shown that even considering the time periods prescribed by Rule 39 as discussed, it may take up to a further two weeks for the actual set down date. It is not unusual that restraint of trade applications are set down only six to eight weeks from when these applications are first brought. This is simply the reality of these kinds of bespoke applications. This period of delay in my view cannot be held against an applicant where it comes to deciding urgency.

[8] Rule 39(2).
[9] Rule 39(3).
[10] Rule 39(9).
[11] Rule 39(1).
[12] Rule 39(4).
[13] Rule 39(11).

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[17] In all the circumstances as set out above, I am satisfied that the requirements of urgency in terms of Rule 38, as read with Rule 39, have been satisfied, and it is appropriate to decide this application as an urgent application in terms of Rule 38.

The relevant facts

[18] A number of material factual disputes have arisen in this case, especially surrounding the issue as to whether USP is in fact a competitor of SPPE, and as such, whether the employment of Holmes with USP would be conduct in breach of the restraint of trade. Whilst I deal with this issue specifically later in this judgment, I must state from the outset that where it comes to what facts must be accepted in this regard, I will determine all these factual disputes in line with the principles established in *Plascon Evans Paints v Van Riebeeck Paints*[14], which equally applies in restraint of trade enforcement applications. As said in *Ball v Bambalela Bolts (Pty) Ltd and Another*[15]: '*… Resolving the disputes of fact in favour of the party sought to be restrained involves an application of the Plascon-Evans rule …*'. But at least there is also a core factual matrix that emerged as largely undisputed or admitted,[16] however this must not be confused with the inferences to be drawn from those facts, and what these facts seek to prove, which is very much in dispute. What is set out below is the relevant facts, as I see them, based on the application of *Plascon Evans*, which would inform the decision I ultimately come to in this case.

[19] SPPE was founded in 1998, and describes itself as the leader in procurement and distribution of quality and application specific products that protect people's health and safety, commonly known as Personal Protective Equipment (PPE). SPPE also provides a wide range of services relating to PPE. It is however not

[14] 1984 (3) SA 623 (A) at 634E-635C. These principles are, in sum, that the facts as stated by the respondent party together with the admitted or facts that are not denied in the applicant party's founding affidavit constitute the factual basis for making a determination, unless the dispute of fact is not real or genuine or the denials in the respondent's version are bald or not creditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable, that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.

[15] (2013) 34 ILJ 2821 (LAC) at para 14. See also *Reddy v Siemens Telecommunications* (2007) 28 ILJ 317 (SCA) at para 4; *Labournet (Pty) Ltd v Jankielsohn and Another* (2017) 38 ILJ 1302 (LAC) at para 40; *Vumatel* (*supra*) at para 29; *New Justfun Group (Pty) Ltd v Turner and Others* (2018) 39 ILJ 2721 (LC) at para 10.

[16] Admitted facts include facts that, though not formally admitted, simply cannot be denied – see *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another* (2016) 37 ILJ 902 (LAC) at para 16.

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a manufacturer of PPE, and purchases the same from a wide range of suppliers / manufacturers, and then retails the same into its own end-user customer base.

[20] Over years of conducting business, SPPE has formulated and established an online PPE cloud-based solution (system), housed on a secure IT platform, which is controlled by SPPE and subject to access control. This platform assists employers to comply with industry and regulatory requirements, keeping record of PPE issued, control of PPE costs, and is able to generate reports on historic data and planned PPE usage in real time. Importantly, an end-user customer utilising this system is able to plan what PPE would be needed, and then effectively order the same from SPPE. SSPE provides these services to customers in the mining, manufacturing, agriculture, construction, petroleum, hospitality, medical, corporate and security industries.

[21] SPPE has sought to describe its business methodology, by using the mining industry as an example. It does conduct a significant part of its business in the mining industry. In this industry, SPPE first sources a wide range of PPE required for mining operations from various suppliers based on demand as driven by the mines themselves where it comes to PPE to be used by a mine's employees. SPPE then makes this PPE available for collection by the mine from an on-site store. When mine employees then collect their PPE from the on-site store as and when required, what is collected is managed by the system, and is then billed by SPPE to the mine at the end of the month. This whole process is described as Vendor Managed Inventory (VMI), and effectively managed by the system referred to above. SPPE has developed its own unique and bespoke VMI, known as ppe365.net®.

[22] It was undisputed that this system obviously contains valuable information and data concerning the use of PPE by each end-user customer of SPPE, the frequency PPE would have to be renewed, and the quantity of various PPE products utilised. This data extracted from the system then allows the customer to conduct advance planning, assess demand and avoid stock pilfering. In short, the VMI system of the applicant involves managing the supply and dispensing of PPE directly to customers in terms of a pre-agreed issuing protocol and thereafter, the billing of dispensed PPE to the customer on a periodic basis as agreed. This all, according to SPPE, makes it a '*a value-added service provider*

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responsible for procuring a range of PPE from manufacturer to end users while simultaneously maintaining an efficient and cost-effective PPE inventory, distribution and billing system for the ultimate benefit of the Customer'.

[23] SPPE employs in excess of 300 employees. It conducts business through approximately 153 on-site stores and 2 warehouses, and several branches, strategically placed to best serve its customers. It provides, through its ppe365.net® software and these on-site stores, a large variety of PPE to end-user customers, which includes head protection, eye protection, hearing protection, respiratory protection, workwear, foot and hand protection, and application specific protection. It also solves for individual customer PPE challenges by offering tailor-made and customer specific solutions which provides real time information on all PPE issued, and inventory holding of PPE. All the information on the customers of SPPE is held on a comprehensive customer database, which is part of the system.

[24] Where it comes to Holmes, he was employed as infrastructure technician in 2006. He progressed to become the information infrastructure co-ordinator at SPPE, in 2016, and he occupied this post at time of termination of employment. Upon Holmes being appointed as information infrastructure co-ordinator, SPPE and Holmes concluded a written contract of employment, a restraint agreement, and a confidentiality agreement, all on 5 December 2016.

[25] Dealing first with the contract of employment, it provided for both confidentiality and restraint undertakings. In terms of clause 14.2, Holmes undertook not disclose, without prior written consent, any confidential information relating to the business, customers, products methods or processes of SPPE which may have come into his knowledge in the course of his employment with SPPE. Then in clause 18.4, he undertook not to be engaged in any other business that would be directly or indirectly in competition with SPPE, for a period of a year after termination of the contract of employment, regardless of where such competing business is located, but subject to such competing business operating in the same geographical area as SPPE.

[26] Turning next to the restraint agreement, it is comprehensive, containing a variety of restraint obligations and undertakings, some of which are not relevant

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to the case *in casu*. I will therefore confine myself to referring only to those restraint provisions relevant to deciding this case. First, clause 2.3.1 contained a general confidentiality undertaking. Second, and in clause 2.3.4, Holmes agreed and undertook, for a period of 12 months from date of termination of employment, not to solicit, interfere with, or entice or endeavour to entice away from SPPE any person, firm or entity that was a client or customer of, or was accustomed to dealing with, SPPE. This covenant also included an undertaking, applying for the same restraint period of 12 months, not to solicit business from any such client or customer for any product or service which is provided by SPPE, nor to be employed by any such client or customer.

[27] Of some importance to the case *in casu* is clause 2.3.5 of the restraint agreement, and I thus quote the entire clause, which reads:

> '… for a period of 12 (twelve) months calculated from the date on which he/she ceases to be employed by the Company, he will not, anywhere in the area and whether personally or as a proprietor, principal, member, agent, partner, representative, shareholder, director manager, employee, executive, adviser, financier, administrator and/or in any other capacity, be directly or indirectly associated and/or concerned with, interested and/or engaged in and/or interest himself/herself in any syndicate, partnership, joint venture, firm, business, Company, close corporation or other association which carries on any business which is similar to and/or which competes with the business carried on by the Company.' (emphasis added).

[28] The confidentiality agreement places a direct obligation on Holmes to hold the proprietary information of SPPE in strict confidence and to take all reasonable precautions to protect such information, and not to disclose any such proprietary information to any third party.

[29] According to SPPE, Holmes, as information infrastructure co-ordinator, was intricately involved in the IT infrastructure, software and most importantly the ppe365.net® software and its development over the past two years. He was required to integrate the systems of SPPE in such a manner so as to be able to communicate with various customer systems, and cater for new product and systems development in supply chain and warehousing. Holmes was also responsible for the day-to-day administration of the

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applicant's IT infrastructure, networks, backups and systems, as well as, in all respects, being the liaison with independent developers, being Crayon South Africa (Pty) Ltd (Crayon), in respect of new features and functionality to be rolled out in the new version of the ppe365.net® system.

[30] SPPE further contends that Holmes was at the centre of the development of the new ppe365.net® software going live in January 2025, giving him direct insight into the new information technology business strategy developed by SPPE over the last fourteen months, that is central to the operations and competitive edge of SPPE. As SPPE says in its founding affidavit, '*… the ppe365.net® is a corplexed system, one of its kind which provides significant value to the applicant and its customers…*'

[31] Holmes has a different take on his duties, to that suggested by SPPE. He explains that he was not involved in any strategic business planning or product development, nor any development work beyond basic coordination between the end users of PPE, being the customers, and SPPE, in order to manage and control the issuing of PPE to customer employees. Holmes points out that many of SPPE's actual competitors, such as Pienaar Brothers, Sheq Safety, Hamisa Group, Botshelo and Rondo/Evrigard, have developed their own similar internal systems according to the specifications and needs of their businesses and customers.

[32] According to Holmes, he has no computer programming or coding skills or technical knowledge of software systems, but he concedes that he was the project manager for the system development project with Crayon, and he provided information and support to Crayon.

[33] Due to several reasons, which need not burden this judgment, Holmes became dissatisfied and disillusioned in his position at SPPE, and sought alternative employment. He applied for many alternative positions, and attended several interviews. He even went for three interviews at Microsoft, but was not successful. The only offer Holmes ultimately received was the offer for the position of IT manager at USP, which he decided to accept.

[34] Holmes then tendered his resignation on 31 August 2024, by e-mail. According to Pieterse, he first had sight of the resignation on Monday 2 September 2024,

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at the office. He also came into contact with Holmes at the office on 2 September 2024, and decided to discuss the resignation with him. Holmes informed Pieterse at this point that he would be taking up employment at USP as IT Manager. Pieterse states that he conveyed his dissatisfaction to Holmes with him taking up a position with USP and informed him that he would be in breach of the agreements referred to above should he continue to do so. He made attempts to convince Holmes to come to other insights, but this failed. This then led to all the correspondence exchanged between the parties as set out in the facts relating to urgency, above.

[35] According to Holmes, Pieterse called him to a meeting about his resignation on 2 September 2024, and in this meeting, he did inform Pieterse that he would be joining USP, and explained to Pieterse that he would be an IT Manager and explained what his duties would entail. Pieterse asked Holmes to reconsider his resignation. On 3 September 2024, Holmes was called to another meeting with Pieterse and the Financial Director of SPPE, Erika Stols. During this meeting, Pieterse said he specifically had a problem with Holmes joining USP. Pieterse instructed Holmes to finalise a handover process that same day, and placed him on garden leave until the end of his notice period. Holmes was instructed to immediately return all the company electronic devices, such as his laptop and cell phone, which he did. Holmes never returned to the office after 3 September 2024, or further interact with any of the employees of SPPE.

[36] But what is significant to this current matter is that Holmes contended, throughout, that USP was not a competitor of SPPE. It was also pointed out that Holmes was to be employed at the IT manager at USP, and just like any IT manager, would look after USP's own IT infrastructure and manage the same. He was not appointed to develop any system.

[37] Nonetheless, SPPE remained unconvinced, and the current application followed.

Restraint principles

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[38] In *A J Charnaud & Co (Pty) Ltd v van der Merwe and Others*[17] the Court summarized the process where it comes to enforcing restraints of trade as follows:

> 'In short, the logical sequence that applies in the case of an employer (the applicant) seeking to enforce a restraint against an employee, is firstly to prove the existence of a restraint obligation that applies to the employee. Secondly, and if a restraint obligation is shown to exist, the employer must prove that the employee acted in breach of the restraint obligation imposed by the restraint. Finally, and once the breach is shown to exist, the determination then turns to whether the facts, considered as a whole, show that the enforcement of the restraint would be reasonable in the circumstances.'

[39] It is trite that restraints of trade are valid and binding, and as a matter of principle enforceable, unless the enforcement thereof would be considered / regarded to be unreasonable.[18] A restraint of trade also does not infringe on the constitutional right to free economic activity.[19]

[40] In restraint applications, there exists what can be described as a dual onus. Firstly, the onus would be on the party seeking to enforce the restraint (applicant party) to prove the existence of the restraint, that the restraint binds the party against whom the restraint is sought to be enforced (respondent party), and that the restraint has been breached. Secondly, and if the aforesaid is established, the next question to answer is whether the enforcement of a restraint of trade is unreasonable, and here the onus rests on the respondent party to show that enforcement would be unreasonable.[20] However, and in my view, it is mostly not necessary to become embroiled in the issue of where the onus lies, when deciding the issue of whether the enforcement of the restraint would be

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[17] (2020) 41 ILJ 1661 (LC) at para 56.
[18] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891B-C; *Reddy* (*supra*) at para 14; *Labournet* (*supra*) at para 39; *Ball* (supra) at para 13; *Esquire* (*supra*) at para 26; *SPP Pumps (SA) (Pty) Ltd v Stoop and Another* (2015) 36 ILJ 1134 (LC) at para 26; *Shoprite Checkers (Pty) Ltd v Jordaan and Another* (2013) 34 ILJ 2105 (LC) at para 20.
[19] *Reddy (supra)* at paras 15 – 16. See also *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) where the Court said: '*The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions*'.
[20] See *Magna Alloys* (*supra*) at 875H-I; *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (2008) 29 ILJ 1665 (N) at para 89; *Bridgestone Firestone Maxiprest Ltd v Taylor* [2003] 1 All SA 299 (N) at 302J-303B; *Jonsson* (*supra*) at para 8, and all the authorities cited in that paragraph.

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reasonable. The proper approach to follow was summarised in *Reddy v Siemens Telecommunications (Pty) Ltd*[21] as follows:

> '…. If the facts disclosed in the affidavits, … disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved ….'

Similarly, and in *Ball supra* the LAC said:[22]

> '… 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.'

[41] But the fact remains that the applicant party should make out a complete and substantiated case in the founding affidavit why it believes the enforcement of the restraint would be reasonable, no matter where the onus may lie.[23] If the applicant party fails to make out a proper case in the founding affidavit that enforcement of the restraint would be reasonable, it cannot remedy that failure on reply, and then rely on the issue of an onus as basis to justify this. Similarly, the onus cannot serve to override the ordinary application of *Plascon Evans* in opposed motion proceedings where final relief is sought. In *Jonsson Workwear (Pty) Ltd v Williamson and Another*[24] the Court said:

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[21] (2007) 28 ILJ 317 (SCA) at para 14. This approach was also applied by the LAC in *Labournet* (*supra*) at para 40.
[22] Id at para 14.
[23] In *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC) at para 29 the Court said: '*… It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time …*'. See also *Van Der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) at para 122; *President of the Republic of SA and Others v SA Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para para 150; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paras 29-30.
[24] (2014) 35 ILJ 712 (LC) at para 9.

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> 'What I must however point out is that no matter where the onus may lie, this does not change the principle and approach on how factual disputes in motion proceedings should be determined, and in particular, how this restraint application should be determined. …'

[42] Whether the enforcement of the restraint of trade against Holmes would be reasonable is dependent upon deciding the following questions set out in *Basson v Chilwan and Others*[25]: (a) Does the one party have an interest that deserves protection?; (b) If so, is that interest threatened (breached) by the other party?; (c) does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?; and (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. More recently, a further enquiry has been added, which can be called question (e), being whether the restraint goes further than necessary to protect the relevant interest.[26]

[43] This Court and the LAC have been consistently applying these five considerations in determining whether the enforcement of a restraint of trade would be unreasonable.[27] Deciding each of these considerations is a determination on the facts of that particular case, applying, as held in *Ball supra*[28], the following approach:

> '… the determination of reasonableness is, essentially, a balancing of interests that is to be undertaken at the time of enforcement and includes a consideration of 'the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests …'

[44] The protectable interest of an applicant in a restraint of trade application can be found in one or both of two considerations, being confidential information (trade

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[25] 1993 (3) SA 742 (A) at 767G-H.
[26] *Jonsson* (*supra*) at para 44; *Medtronic (Africa) (Pty) Ltd v Van Wyk* (2016) 37 ILJ 1165 (LC) at para 15; *Esquire* (*supra*) at paras 50 – 51.
[27] *Labournet* (*supra*) at para 42; *Jonsson (supra*) at para 44; *Vox Telecommunications (Pty) Ltd v Steyn and Another* (2016) 37 ILJ 1255 (LC) at paras 28 – 29; *Shoprite Checkers* (*supra*) at paras 23 – 24; *Benchmark Signs Incorporated v Muller and another* [2016] JOL 36587 (LC) at para 15.
[28] Id at para 17. See also *Labournet* (*supra*) at para 40.

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secrets), or trade connections.[29] In *Labournet (Pty) Ltd v Jankielsohn and Another*[30] the Court held:

> '… 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. …'

[45] Confidential information would be:[31] (a) Information received by an employee about business opportunities available to an employer; (b) information that is useful or potentially useful to a competitor, who would find value in it; (c) Information relating to proposals, marketing or submissions made to procure business; (d) information relating to price and/or pricing arrangements, not generally available to third parties; (e) information that has actual economic value to the person seeking to protect it; (f) customer information, details and particulars; (g) information the employee is contractually, regulatory or statutory required to keep confidential; (h) Information relating to the specifications of a product, or a process of manufacture, either of which has been arrived at by the expenditure of skill and industry which is kept confidential; and (i) information relating to know-how, technology or method that is unique and peculiar to a business. Importantly, the information summarized above must not be public knowledge or public property or in the public domain. In short, the confidential information must be objectively worthy of protection and have value.

[46] Trade connections as an interest worthy of protection would be 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.[32] Whether the

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[29] *Dickinson* (*supra*) at para 32; *Basson (supra)* at 769 G – H; *Bonnet and Another v Schofield* 1989 (2) SA 156 (D) at 160B-C; *Hirt and Carter (Pty) Ltd v Mansfield and Another* (2008) 29 ILJ 1075 (D) at para 37; *Esquire* (*supra*) at para 27; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502E-F; *FMW (supra)* at para 36; *Vox* (*supra*) at para 30.

[30] (2017) 38 ILJ 1302 (LAC) at para 41.

[31] See *Dickinson (supra) at* para 33; *Jonsson* (*supra*) at paras 46 – 49; *David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (LC) at para 21; *Esquire (supra)* at para 29; *Experian* (*supra*) at para 19.

[32] See *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D-F; *FMW* (*supra*) at paras 46 – 48; *Esquire* (*supra*) at paras 31 – 32; *Experian* (*supra*) at para 18; *LR Plastics (Pty) Ltd v Pelser* [2006] JOL 17855 (D) at para 26.

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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 (d) the nature of the product or services at stake.[33]

[47] The seniority of the employee concerned is also an important consideration where it comes to evaluating the existence of a protectable interest.[34] 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 based on the above two considerations.[35] Seniority is not just the level of the employee in the organization of the erstwhile employer, but also includes factors such as the influence, knowledge, expertise, nature of duties, relationships and even the particular person of the employee.[36]

[48] In sum, the enquiry has been succinctly summarized in *Torrente and Another v Grant Monaghan and Associates Incorporated*[37] as follows:

> 'In general, a court which is required to evaluate a restraint of trade agreement has also to engage with the reasonableness of the restraint. It is now trite law to note that this enquiry is a value judgment which involves a consideration of a public interest which requires that parties to a contract should comply with their contractual obligations (pacta servanda sunt) and the principle reinforced in s 22 of the Constitution of the Republic of SA 1996, namely that every citizen has a right to choose their trade, occupation or profession freely. As stated by this court in *Ball v Bambalela Bolts (Pty) Ltd & another*, a court seeks to achieve a balance between the respective gravitational pull of pacta servanda sunt and s

[33] *Caravantruck* (*supra*) at 541F-I; *FMW (supra)* at para 45; *Aquatan (Pty) Ltd v Jansen van Vuuren and Another* (2017) 38 ILJ 2730 (LC) at para 24.
[34] See *Dickinson* (*supra*) at para 38; *Stewart Wrightson (Pty) Ltd v Minnitt* 1979 (3) SA 399 (C) at 404B-C; *Random Logic (Pty) Ltd t/a Nashua*, *Cape Town v Dempster* (2009) 30 ILJ 1762 (C) at para 32; *Experian* (*supra*) at para 43; *Jonsson (supra)* at para 51.
[35] See *David Crouch* (*supra*) at para 21; *Plumblink SA (Pty) Ltd v Legodi and Another* (2020) 41 ILJ 1743 (LC) at para 30.
[36] *Dot Activ (Pty) Ltd v Daubinet and Another* (2023) 44 ILJ 785 (LC) at para 42.
[37] (2024) 45 ILJ 798 (LAC) at para 21.

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> 22 of the Constitution by carefully examining the nature of the activity prevented by the relevant clause, the area of operation of the restraint, and the overall balance of the competing interests between the parties.'

Breach of the restraint

[49] *In casu*, whether Holmes breached the restraint is very much in dispute. The point is that if SPPE is unable to prove that Holmes's employment with USP constitutes a breach of the restraint of trade covenant as defined in the restraint agreement (and related agreements), that must be the end of the matter for it. Without a breach being proven, there is no need to even enquire into the issue of whether enforcement of the restraint is reasonable, and in that context, the issue of the protectable interest *per se*. As held in *Sadan and Another v Workforce Staffing (Pty) Ltd*[38]:

> 'Once the party seeking to enforce a restraint of trade agreement has established an interest worthy of protection and that the other party is threatening that interest, the onus is on the party resisting the enforcement of the agreement to prove that it would be unreasonable. …'

[50] Answering the question whether employment of Holmes with USP constitutes breach of the restraint, is very much dependent on answering whether USP is a competitor of SPPE. This is because the restraint agreement specifically prohibits the employment of Holmes with any business that '*carries on any business which is similar to and/or which competes*' with the business of SPPE.[39] This kind of clause contemplates a comparison, on the facts, between the business of SPPE, and the business of USP, as the businesses currently stand.[40]

[51] The phrase '*same or similar business*' has enjoyed the attention of the Courts in a variety of contractual restraining provisions, including restraints of trade. In *Kelly Group Ltd v Capazorio*[41] the Court held:

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[38] (2023) 44 ILJ 2506 (LAC) at para 19.
[39] The employment contract refers to direct or indirect competition.
[40] See *Capnorizas v Webber Road Mansions (Pty) Ltd* 1967 (2) SA 425 (A) at 430B-D; Rogers & Hart (Pty) Ltd v Parkgebou-Beleggings en Wynkelders Beperk 1956 (3) SA 329 (A) at 334D-E.
[41] 2011 JDR 0221 (GSJ) at para 25.

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> 'I am of the view that the phrase "any concern or entity which carries on the same business or similar business or alike the business of the COMPANY" postulates a comparison of the applicant's business to the respondents business, as a composite whole (*Capnorizas v Webber Road Mansions (Pty) Ltd* 1967 (2) SA 425 (A). Accordingly, because the applicant provides some of the services which are provided by the third respondent does not mean that the respective businesses viewed in their entirety, are the same, similar or alike. …'

[52] Another opposite example of the comparison consideration can be found in *Value Logistics Limited v Smit*[42]. In that case, the applicant seeking to enforce a restraint of trade was in the business of retail distribution essentially comprising the distribution and transportation of goods for the applicant's customers, whilst the core business of the employee's new employer was a courier service. Despite some overlapping functions / activities between the two businesses, and after conducting the comparison envisaged by *Capnorizas supra*, the Court concluded:[43]

> '… the respective businesses of the applicant and DPD viewed in their entirety do not compete, despite the fact that some of the services rendered by a separate company affiliated to DPD are similar to the applicant's core activities. Moreover, despite the fact that a division of the applicant, apparently provides the same services as DPD, the applicant's core business (provided by three of its four divisions), is not the same or similar to that of DPD. In these circumstances, the applicant has not proved that it competes in any material respect with DPD and/or Dawn Wings, as the applicant's core business is completely different to that of DPD. …'

[53] The following *dictum* in *Poolquip Industries (Pty) Ltd v Griffin and Another*[44] is equally an apposite illustration of the point:

> 'Mr *Schreiner* for the applicant submitted that a "similar" business in the context in which it is used means a business which competes with the applicant's business and not a business which is the same in all respects. In relation to businesses which "compete" with the applicant's business he and Mr *Browde* submitted it means competition in some material respect. There is,

[42] 2013 JDR 1409 (GSJ).
[43] Id at para 81.
[44] 1978 (4) SA 353 (W) at 361I-J.

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> to my mind, force in these submissions. It is unthinkable that the first respondent should be restrained from working for, say, a hardware store which incidentally sells some pool chemicals. …'

[54] A final comparable example, to the contrary so to speak, is the judgment in *Shoprite Checkers (Pty) Ltd v Johnson and Others*[45]. In that case, it concerned the Sixty60 customer retail platform of Checkers, with the employee concerned resigning and the joining another customer retail platform, called OneCart. It was argued that the businesses do not complete, because Sixty60 only enables a consumer to buy goods from Checkers, whilst OneCart gives the consumer a choice of outlets to buy from and offered a much wider range of products than are sold by Checkers.[46] The point was sought to be made that a consumer can buy their bread, crockery, bricks and timber at OneCart, whilst that same customer can only buy bread and crockery at Checkers. In this context, the Court however had the following to say:[47]

> 'I accept that these are material differences between what the two platforms offer. However, those differences do not detract from the inescapable fact that they both enable the online purchase of the class of goods sold by Shoprite. The online market for groceries and household goods made available by OneCart to online consumers overlaps with the online market Sixty60 provides for Shoprite's groceries and household goods. The platforms merely offer alternative online channels for consumers to make those purchases either from Shoprite or from some of its competitors. If OneCart succeeds in becoming the application of choice used by consumers when buying such goods, then that benefits Shoprite's competitors to the detriment of Shoprite, whose goods are not available on that platform.'

[55] When unpacking the facts *in casu*, what then emerges from the exercise of this comparison? Does it show same, similar, or competing businesses, of the kind envisaged by the restraint agreement quoted above? In my view, the answer is a resounding no. There are several reasons for my conclusion in this regard, which I will now turn to.

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[45] (2023) 44 ILJ 906 (LC).
[46] See para 51 of the judgment.
[47] Id at para 52.

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[56] First and foremost, there is a material difference between the nature of the two businesses. USP is a manufacturer of some PPE, whilst SPPE is a retailer of a broad range of PPE which it gets from multiple suppliers without itself manufacturing anything. USP sells the PPE manufactured by it to PPE retailers or wholesales, such as SPPE, and not to end-user customers. SPPE sells it broad range of PPE specifically to end-user customers, and the very systems it is so adamant is essential to its business and needs to be protected, is only geared at doing just that. In the simplest terms possible, USP would be a manufacturer that is a supplier to SPPE, and not a competitor to it. For these simple reasons, there is simply no legitimate basis for contending that the businesses are the same or similar or in competition with one another, even though the common denominator is selected PPE products.

[57] Obviously appreciating this, SPPE then sought to demonstrate that USP is doing more than described above, or is intending to do more, to the extent that it is brought into competition with SPPE. In this respect. SPPE has contended that USP in the last 12 – 18 months sought expand its PPE product range to the same product range as SPPE, and then sought to sell, or is planning to sell, that increased product range directly to customers in the open market, bypassing its retail customers such as SPPE.

[58] SPPE elaborates on this contention in several respects. It contends that USP changed its primary trading name from '*U-Mask*' to '*Universal Safety Products*', coupled with increased marketing and branding in the marketplace under this name of Universal Safety Products, signifying its expansion in its manufacturing and distribution of PPE. SPPE further contends that over the last 12 – 18 months, USP started to approach SPPE's customers directly to branch out to a range of other PPE products, thereby bypassing SPPE and selling directly to end-user customers.

[59] In the founding affidavit, Pieterse refers to what SPPE considers a number of examples illustrating this alleged expanded competing activity by USP. First, and on 26 January 2024, Yolandi Hattingh (Hattingh), SPPE's purchasing and operations manager, received a photograph via WhatsApp in the form of a price enquiry of safety glasses that USP delivered to a customer of SPPE, being ArcelorMittal. Second, on 3 August and 30 September 2024, one of SPPE's

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employees, Magda van der Walt (Van der Walt) visited one of SPPE's customers, Kopanang, and noticed in the visitor's sign-in book that an employee of USP, a Mr van der Merwe, had come to Kopanang for meetings, which according to SPPE was against the practice at the time, as USP would not attend at customers' sites without a representative from SPPE present. It was stated that these visits were to sell PPE directly to this customer. Third, and in similar context, it is stated that USP had visited other customers, being Petra Diamond Mines and Impala Marula Platinum Mine, offering the same products to those customers, as purchased from SPPE.

[60] In answer to the aforesaid contentions, the CEO of USP, Jordean Phillipus Eksteen (Eksteen), engaged in the matter and filed an explanatory affidavit as part of Holmes's answering affidavit. In this affidavit by Eksteen, he penitently states that most of what Pieterse had said in the founding affidavit was false. He pointed out and explained that USP had not undergone an identity change, and always traded as '*Universal Safety Products*'. He further explained that USP is a black-owned manufacturing enterprise founded in 2012 and is the largest manufacturer of disposable respiratory masks in Africa, under the trademark '*U-Mask*', which is simply the trade name by which it is commonly known as. U-Mask is used and had always been used by many sectors of industry from mining, construction, manufacturing, and petrochemical to food and beverage, pharmaceutical, and healthcare, as well as municipal departments. In fact, SPPE itself is a distributor and retailer of U-Mask, which it purchases from USP.

[61] As to the contention that USP has in the past several months expanded its product range to include the same products that SPPE distributes and sells, Eksteen describes this as false. Similarly, the contentions that USP has expanded its business enterprise from manufacturing PPE to also distributing and selling PPE, and that USP has approached several of the customers of SPPE in this respect, is called out to be false. According to Eksteen, USP conducts no such business, and has no intention of conducting such a business.

[62] What Eksteen further explains is that it is in the process of researching the demand for other PPE, such as safety gloves, glasses, and earplugs, not for the purposes of sourcing and then retailing the same, but to see if manufacturing the same would be viable. This is because the business of USP, at its core, is

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a manufacturer. Eksteen points out that USP has manufactured a very limited number of these mentioned products, which are only sample products specifically manufactured for testing and research purposes and not for sale. But despite considering the expansion of the product range USP manufactures, Eksteen has made it clear that USP is not considering becoming a distributor and/or retailer of PPE and will continue operating only as a manufacturer of PPE. If USP ultimately decides to expand its manufactured product range, it will still only provide this for sale to its distributors, such as SPPE, as it has done in the past, and never directly to end-user customers.

[63] Eksteen then dealt with the individual examples mentioned by Pieterse. The fact that USP employees visited at the customers mentioned was not disputed. But what was disputed was that these visits had anything to do with USP attempting to sell PPE to these customers. He explained that it was not unusual for the employees of USP to directly engage with or liaise with the end-users of its safety masks, be it customers of SPPE or any other customer. The purpose of this interaction was for the purposes of product feedback, testing and quality control. This in fact happened with the knowledge of SPPE. In addition, the employees of USP would often conduct site visits at the business premises of end-users to provide safety training on the proper use of the safety masks in the workplace, sometimes accompanied by a representative of SPPE and sometimes not. But none of this interaction ever translates into a sale being made directly to the customer by USP.

[64] Eksteen disputes that Peter-John Du Plooy, an employee of SPPE, delivered a sample pair of safety gloves and glasses to ArcelorMittal for testing and review purposes. According to Eksteen, this equipment was actually handed to Melony White, an employee of SPPE, who presented it to the customer for testing. Eksteen admits that employees of SPPE attended an engagement at Petra Diamond Mines. Eksteen however points out that what was not said by Pieterse is that this was actually a joint attendance together with representatives from SPPE. USP complained that the photograph relied on by Pieterse to prove USP attended at this engagement was cut off, and the whole photograph, which was presented in Court, shows that one Annelize, an employee of SPPE, was actually present.

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[65] Where it comes to the engagement of USP with Impala Marula Platinum Mines, Eksteen confirm this happened, but states that what Pieterse alleged to have taken place was not correct. USP did not approach Impala with a sales proposal, but engaged with it with regard to a community initiative, the object of which was to assist local individuals and/or businesses with training and resources to enable them to run their own businesses. According to Eksteen, it is blatantly false that SPPE engaged Impala on the possibility of directly selling PPE to it.

[66] In the answering affidavit Holmes also confirms that USP is performing research regarding the possibility of developing and expanding its manufactured product range to include other PPE, specifically safety gloves, glasses, and earplugs, but that he is not involved in any of this research. He adds that in his experience after joining USP, it currently exclusively manufactures safety masks, which it then sells to distributors and retailers, and does not directly sell safety masks or any PPE to end-user customers.

[67] It is clear from what is summarized above that there is a material factual dispute between SPPE and USP regarding the comparison between their respective businesses. If the version proffered by Eksteen is be accepted, then there is nothing detracting from what is the well-known and established business of USP, which is simply not a business that is same or similar to that of SPPE, or in competition with SPPE. This is where SPPE's case faces a considerable difficulty. Once the *Plascon Evans* principles are applied, it follows that Eksteen's version is to be preferred. There is nothing that could otherwise legitimately detract from this version prevailing. As held in *TIBMS (Pty) Ltd t/a Halo Underground Lighting Systems v Knight and Another*[48]:

> 'Credibility is only capable of being addressed on paper when the assertions are palpably absurd or demonstrably false. The threshold that had to be cleared is 'wholly fanciful and untenable'. Moreover, the appetite to resolve paper contests by reference to the probabilities, though ever present, is not appropriate. On the allegations canvassed on the record, the threshold was not cleared …'.

[48] (2017) 38 ILJ 2721 (LAC) at para 29. See also *Torrente* (*supra*) at para 20.

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[68] In any event, the best that SPPE could offer as to the alleged change in business direction of USP is in reality nothing else but conjecture and speculation. There is not a single shred of evidence provided of any sales proposal for PPE being made by USP to any end-customer of SPPE. And considering the tight hold that SPPE keeps on the order process with its customers, through the very systems it brags about, it would surely have known if this had occurred. In addition, if USP, which on the common cause facts is a safety mask manufacturer, all of a sudden went on a drive to acquire PPE from other suppliers to re-sell to end user customers, SPPE would have evidence of this. It is after all, on its own version, it is the largest retailer of PPE, and it follows that USP would have to acquire such PPE from the same suppliers as SPPE. In sum, it is simply highly unlikely that if USP, for a period 12 to 18 months as contended by SPPE, was pursuing a new PPE retail business, SPPE would not have proper evidence of this.

[69] Even the examples provided by Pieterse, as they stand, are questionable to say the least. There are bald contentions of sales proposals being made to its customers, with whom SPPE on its own version has a close working relationship, without any confirmation from those customers that this happened, being provided. The issue with the redacted photograph in respect of the visit to Petra Diamond Mines is also concerning. All these examples at best prove a visit by USP personnel to customers, and nothing else. It is way too far a leap to infer from this that there is now a material change in the business of USP, from a manufacturer of some PPE not selling to end-user customers, to becoming a retailer of all PEE to all end-user customers.

[70] All said, I am not convinced that the employment of Holmes with USP constitutes breach of his restraint of trade with SPPE. The reason for this, in a nutshell, is that USP is not a competing business to that of SPPE. SPPE cannot overcome the undeniable reality that USP is not a retailer of PPE to end-user customers. USP is simply a manufacturer of certain limited PPE, and does not sell such PPE to any end-user customers. USP only sells the PPE it manufactures to retailers such as SPPE itself, which ironically, is still a customer of USP where it comes to U-Mask. SPPE and USP simply do not compete with one another in the open market. As such, the employment of Holmes with USP

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cannot be a breach of his restraint of trade as defined, and that must be the end of the matter for SPPE.

The protectable interest

[71] However, and if it could be said that I was wrong on the issue of USP not being a competitor of SPPE and the employment of Holmes with USP not being a breach of the restraint, I will deal with the issue of the protectable interest of SPPE as well. In this regard, what SPPE must show is that firstly it has a protectable interest worthy of protection, and secondly that the breach of the restraint violates this protectable interest. If it is found that the employment of Holmes with USP violates the legitimate protectable interests of SPPE, then it must follow that sufficient potential prejudice (if not actual prejudice) exists to justify enforcement of the restraint of trade by way of an interdict. As stated in *Shoprite Checkers supra*[49]:

> '… the courts are required to consider, as a separate enquiry, whether the ex-employee's access to the former employer's proprietary interests (whether in confidential information or customer connection) will, in his new employment environment, afford him with the opportunity to use those interests to the advantage of his new employer. This is a separate factual enquiry. …'

[72] As discussed above, the first element of the protectable interest to be considered in this case is that of confidential information. Contrary to what was suggested on behalf of Holmes, I do believe that SPPE has a proper and legitimate protectable interest in this respect. The point in this regard is that SPPE is not an ordinary retailer, so to speak, of PPE. Its competitive edge obviously lies in its systems, which substantially facilitate customer orders and sales. It is a tool that effectively places needs determination and then ordering in the hands of the customer directly, with the co-operation and facilitation of SPPE, which is most advantageous to the business of SPPE. Undeniably, this system has substantial commercial value.

[73] I accept that Holmes was not conducting the actual programming, maintenance and development of the system. But that does not mean the protectable interest

[49] (2023) 44 ILJ 906 (LC) at para 31.

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vis-à-vis Holmes is expunged as a result. The fact is that Holmes is the custodian of the system. He is the one that effectively instructs the developers (Crayon) on what do where it comes to executing development. He is fully familiar with how the system functions, what is required to make it effective as a business tool, and how it is deployed and then utilised by customers. This kind of knowledge would be useful to a competitor, even in the absence of seeking to duplicate the system at a competitor. I accept that Holmes would be in a position, if employed at a competitor in a similar capacity he was employed in at SPPE, would be in a position to effectively project manage any third-party developer to create a similar system, with similar functionality, which would be to the benefit of the competitor and the detriment of SPPE. In short, Holmes would know what needed to be done for such a system, what the system must be capable of, and how it functions. This could place this competitor at an undue advantage, because it would then compete effectively off the back of what Holmes knows, experienced, and has skill in, because of his duties at SPPE.

[74] But the above being said, one must then come back full circle to the original problem for SPPE. That problem is the material differences between the businesses of SPPE and USP. To state it as simply as possible, SPPE's entire system is aimed and geared at retail sales of a wide range of PPE products to end-user customers on site, as supported by on-site stores. The sole objective of the system is making retail sales effective, repeated, and easy. This however has no value to USP, for the simple reason that it does not conduct retail sales to end-user customers. There is no point for it to have such a comprehensive retail sales management system, such as ppe365.net®. This system cannot assist its business in any way, even if USP expands the product range it seeks to manufacture by adding the few products referred to above, as it still will not provide those products directly to end-user customers.

[75] The very focus of the business of USP is different. It would rather find value in issues such as the management of production costs. Being a manufacturer / supplier, its sales cycle would be solely based on retailer demand. In short, retailers would come to it to place orders for the products which it manufactures. It has absolutely no need to implement a system which, like the ppe365.net® system of SPPE, effectively allows a customer to order from a wide range of PPE products available, and which proactively identifies needs and trends

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where it comes to the use of such products. Simply stated, a retailer like SPPE, based on what it would clearly establish from operating its own system as being the actual use of the U-Masks it has available in its on-site stores, would decide the scope of an order to place with USP as a manufacturer / supplier of U-Masks. It is as simple as that. In the end, what SPPE has in its ppe365.net® system, is not worth anything to USP.

[76] Because of the aforesaid, the employment of Holmes with USP would not constitute an infringement of the protectable interest of SPPE, where it comes to the issue of confidential information. This is as a result of the confidential information which Holmes may have of USP's business, its systems, operations, and even customers, not being relevant to USP's business and its operations, and simply put, USP has no use for it. Or put differently, could either Holmes or USP derive any benefit should Holmes decide to share any of this confidential information with USP? And the answer to this must be no.

[77] At best, the information that Holmes may have can serve as some kind of business intelligence consideration to USP, to compare with its own systems with the view of perhaps enhancing or improving the same. But this would fall far short of being sufficient to establish a breach of the protectable interest of SPPE, as USP is a long-standing business, with the core business being that of manufacturing, which simply does not compete with SPPE in the marketplace.

[78] Comparable to the situation *in casu* is once again the judgment in *Shoprite Checkers supra*. It will be recalled, from what has been dealt with above, that the Court in that case accepted that the OneCart retail platform business was in competition with the Checkers Sixty60 platform business. What was further placed before the Court in that case was that the employee had access to the online functioning of the Sixty60 system and had knowledge of its distinctive features, design, what information was provided to the application developers, and that the system was custom built by Checkers and formed part its intellectual property.[50] The employee, on the other hand, explained that he was not involved in the actual development of the system to operate the Sixty60 business, and the system was developed by a third-party supplier of which he had no detailed knowledge, and he only had sporadic high-level insight into the

[50] Id at para 56.

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system.[51] The comparisons to the case *in casu* is apparent. In these circumstances, the Court in *Shoprite Checkers* then decided, with reference to the confidential information the employee had access to:[52]

> 'Much of it would be of interest to another competing chain store competing in the same market at least while it was current in the sense that it is useful to know how well or badly your competitor is doing in certain respects. It might help a competitor to refocus the way it markets certain lines of products or identify aspects of its sales strategy it should strengthen. How valuable the figures of a single chain store's degree of success in achieving its own sales and marketing objectives would be to a digital sales platform designed to promote the sales of a variety of different chain stores, some of which compete in the same market as Shoprite, but which also compete with each other, is less obvious. The value to OneCart of Johnson's knowledge of consumer gripes about the Sixty60 platform as a way of obtaining some competitive advantage is not clear. At best it might help it know what could go wrong with a platform from a consumer's perspective, but what will be far more important to it is fixing its own users' gripes.
>
> I do not think that the confidential information Johnson was exposed to and which he might share with OneCart, assuming his undertaking is not honoured, would be of such value to OneCart and so detrimental to Shoprite if it were leaked that it outweighs Johnson's right to take up an opportunity to work in a more complex e-commerce platform catering to multiple chain stores but attempting to achieve an on-demand service standard achieved by Sixty60 underpinned as it is by a single strong retail business.
>
> Consequently, even though Johnson's employment by OneCart is in breach of his restraint agreement with Shoprite, it would not be reasonable to enforce it. …'

[79] Another comparable example is *Baroque Medical (Pty) Ltd v Medtronic Africa (Pty) Ltd*[53], which also concerned a consideration whether the employment of an employee with what could be seen as a competing business, would infringe

[51] Id at para 57.
[52] Id at para 83 – 85.
[53] 2014 JDR 0758 (GSJ).

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on a protectable interest because the employee was dedicated to a unique product range at the new employer. The Court held as follows in this regard:[54]

> 'The second respondent has not infringed any interest belonging to the applicant. Even if the applicant did have confidential information and customer connections worthy of protection, such interests have not been infringed. The second respondent is, as I have found, employed by Medtronic to promote and market a singular product, the Midax Rex Drill, a product which does not compete at all with any of the applicant's products. Thus any confidential information or trade secrets which the second respondent may have had access to are useless to Medtronic. Furthermore, any customer connection which the applicant has vests with its sales representatives and not with the second respondent.'

[80] A final apposite example is *Dot Activ (Pty) Ltd v Daubinet and Another*[55], which also concerned an employee's involvement with a particular software system at an employer, and it being contended that employment at a competitor would place this at risk. The Court dealt with this issue as follows:[56]

> '… As touched on above, the Spaceman software is a small part of the second respondent's entire business, and on the facts the first respondent is not in any manner involved in that business. What the first respondent may know about the fully supported service solution linked to the applicant's category management software is of no use or value to the second respondent where it comes to researching and analysing trends relating to the pricing and promotion of fast-moving consumer goods in retail stores, which is what it employed the first respondent to do. Further, there is no indication that the second respondent is even of the intention to expand its Spaceman software offering to clients by including a fully supported service solution linked to that software. Next, there is no indication that the first respondent would be in any position to assist the second respondent in developing the Spaceman software, as the first respondent was never involved in the development of the applicant's software itself. Finally, it does not appear that the first respondent would fulfil any strategic managing role in the second respondent and is in essence simply part

[54] Id at para 40. See also *Amalgamated Retail Ltd v Spark and Another* 1991 (2) SA 143 (SE) at 149I-150H, and *Truworths Ltd v De Bruyn and Another* (2020) 41 ILJ 1617 (WCC) at para 24, for similar reasoning.
[55] (2023) 44 ILJ 785 (LC).
[56] Id at para 55.

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> of a research team in a specific discipline. These factual considerations show that there is very little risk that the first respondent could or would use the confidential information that was at her disposal whilst employed at the applicant.'

Similar considerations clearly apply *in casu*, considering the facts summarized above.

[81] Accordingly, it is my conclusion that the employment of Holmes with USP would not infringe upon the protectable interest of SPPE in this instance, where it comes to the issue of confidential information. In short, his employment with USP poses little or no risk to SPPE. The confidential information that Holmes may have is effectively bespoke to SPPE, and simply cannot be deployed or utilised in USP, and has no value to it. What makes it worse is the confidential information Holmes had concerning SPPE's systems is geared at facilitating and managing retail sales to end-user customers, and USP is simply not in that business. It would in the circumstances be unreasonable to prohibit Holmes from being employed with USP, and the relief sought by SPPE in this regard must fail.

[82] But even if it is accepted that Holmes, because of his extensive past experience in the IT operations and systems of SPPE would remain possessed of confidential information concerning the design, operation and structure of what SPPE describes as its distinguishing business methodology and system, I believe that adequate protection can be afforded to SPPE by way of the enforcement of the confidentiality undertaking. Whilst it is true that USP currently does not conduct retail operations selling product to end-user customers, it is perhaps possible that it could do so in the future only with regard to the PPE product ranges it would manufacture. I cannot see USP ever becoming a wholescale retailer of a vast PPE product range, such as SPPE. But even to this limited extent, confidential information that Holmes may have concerning the systems of SPPE and how it is designed and operates could become useful. It would in any event be unlawful competition for Holmes to have copied SPPE's system and handed it to USP with source codes, and there is no suggestion this ever happened or is bound to happen. But one cannot extract what is in Holmes's head, and SPPE should at least be protected in this regard.

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I am therefore satisfied in grating relief to SPPE protecting its confidential information, even though it has fallen short of making out a case prohibiting Holmes's employment with USP. In this regard, it must be pointed out that in the answering affidavit, Holmes is quite willing to provide such an undertaking.

[83] That brings me to trade connections, as the second source of a possible protectable interest SPPE would be able to enforce. In my view, SPPE has failed to make out a case of even the existence of any protectable interest in this regard, where it comes to Homes. The reasons for my conclusion in this respect now follow.

[84] On the facts, SPPE has simply not established the existence of any kind of trade connections or customer relationships, which may have been held by Holmes, that can serve as a protectable interest. The reality is that Holmes never dealt with any customers of SPPE, as it was simply not his job. He did not visit or call upon customers and had no working relationship with any customer of the kind where he could influence such a customer to follow him to another business. To put it bluntly, Holmes was an IT person working on the internal IT of SPPE, and had nothing to with its customers.

[85] The high-water mark of SPPE's case with regard to the issue of trade connections is where it contends that over the years of his employment, Holmes had exposure to a number of departments within SPPE's structures, including departments outside IT, and in this context, he had '*some exposure*' to customer and supplier names and sensitive information in the way of various supply and pricing details. The issue of the '*sensitive information*' would actually pertain to the protectable interest relating to confidential information, and has been dealt with above. The only other issue raised by SPPE would be Holmes's knowledge of customer and supplier identities, and this mere issue is way short of establishing the kind of customer relationship worthy of protection. To describe it by example, the mere fact that Holmes may know who a customer is, would be worthless in enabling Holmes to solicit the custom of such customer, in the absence of any relationship with the customer.

[86] In the answering affidavit, Holmes has denied that he acquired in-depth knowledge of SPPE's customer and supplier names and sensitive information

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in the way of various supply and pricing details. He points out that he was not involved in sales or business strategies and would not have dealt with this type of information in the course and scope of his employment. And considering what Holmes did in SPPE, this version makes sense. There would be no need for a person doing what Holmes was required to do, to have any dealings with sales, strategies, pricing and / or customers. Finally, and to top this off, there is no reason to reject Holmes's version in this regard, which must be preferred.

[87] Considering the case sought to be made out by SPPE, it is my view that it focussed principally on a case to prevent the employment of Holmes with SPPE, to the detriment of a case relating to protecting trade connections *per se*. I say this because the information provided by SPPE in the founding affidavit about the nature of its customer case, what kind of influence Holmes may have with regard to such customer base, and whether he had actually sought to solicit custom away from SPPE and to USP, is non-existent. A proper case needed to have been made out in the founding affidavit in this regard, but it was not.

[88] I thus conclude that SPPE has failed to establish a protectable interest relating to trade connections, satisfying the following requirements, as enunciated in *Rawlins and another v Caravantruck (Pty) Ltd*[57] as being:

> '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 …'

[89] Accordingly, and all considered, it is my view that SPPE has failed to establish that the employment of Holmes with USP constitutes a breach / infringement of any protectable interest it may have relating to confidential information, to the extent that the enforcement of the restraint of trade by prohibiting the employment of Holmes with USP would be justified. I arrive at this conclusion subject to the protection of any confidential information of SPPE that Holmes may retain in his mind, which will be reflected in the order at the conclusion of this judgment. I am further convinced that SPPE has failed in establishing the existence of a protectable interest where it comes to trade connections, where

[57] 1993 (1) SA 537 (A) at 541D-I. See also *Esquire* (*supra*) at para 27; *Continuous Oxygen* (*supra*) at paras 34 – 36; *FMW* (*supra*) at para 45.

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it comes to Holmes, especially considering what he did at SPPE as an occupation. Therefore, and with the first two requirements in terms of *Basson supra* that SPPE needed to establish to successfully enforce the restraint of trade against Holmes remaining unfulfilled, that should be the end of the enquiry, and SPPE must fail in the enforcement of the restraint of trade against Holmes.

Other considerations

[90] Both Holmes and USP have played open cards with the Court, and have given an exposition of exactly what Holmes would do in the course of his employment and duties at USP. In my view, and simply described, it is the job of an IT manager, just like any other IT manager in any other business. Holmes is not required to develop a system or be involved in the development of a system like that in place at SPPE. Considering that USP has no intention of entering the retail market to retail all kinds of PPE directly to end-user customers, it makes sense that this would not be required of Holmes.

[91] What would be true is that Holmes would likely deploy his knowledge, skill and experience of system development and maintenance he obtained whilst employed at SPPE, in discharging his duties at USP on its own systems. However, what Holmes may have accrued in this respect, in the course of his employment with SPPE, would belong to him and he would be entitled to deploy the same in his new position at USP.[58] In *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others*[59] the Court said:

> 'In my view, the facts establish that the know-how for which the appellant seeks protection is nothing other than skills in manufacturing machines albeit it that they are specialised skills. These skills have been acquired by the first and second respondents in the course of developing their trade and do not belong

[58] In *Shoprite Checkers* (*supra*) at para 82, it was held: '*There is no doubt that as a result of the position he held in Shoprite, Johnson learned about the application of marketing and merchandising techniques, in which he was trained and of which he had experience, in the e-commerce environment. The skills he acquired no doubt would make him an attractive candidate for other retail operations looking for someone with prior e-commerce marketing experience. However it is trite that Shoprite has no proprietary claim to prevent him using those skills in the employment of a competitor, as they are attributes which inhere to him, even though he acquired them through working for it …*'. See also *Dot Activ* (*supra*) at para 72; *Aranda Textile Mills (Pty) Ltd v L D Hurn and Another* [2000] 4 All SA 183 (E) at para 33.

[59] (2007) 28 ILJ 145 (SCA) at para 20.

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> to the employer - they do not constitute a proprietary interest vesting in the employer - but accrue to the first and second respondents as part of their general stock of skill and knowledge which they may not be prevented from exploiting. As such the appellant has no proprietary interest that might legitimately be protected.'

Conclusion

[92] In summary, SPPE has not demonstrated the existence of a clear right, despite having a legitimate and proper restraint of trade covenant and confidentiality undertaking in place with Holmes, which in principle would be susceptible to being enforced. The reason for this is threefold. First, USP is not in competition with SPPE and as such, the employment of Holmes with USP is not a breach of the restraint of trade. Second, SPPE has failed to demonstrate the existence of any protectable interest where it comes to trade connections. Third, and where it comes to the protectable interest of confidential information, SPPE has failed to establish that the employment of Holmes with USP would place such protectable interest at risk, to the extent of the prohibition of the employment of Holmes with USP would be justified and reasonable. For these reasons, SPPE would also fail to demonstrate the existence of an injury reasonably apprehended. The application must, overall considered, accordingly fail.

[93] Despite the aforesaid, I do consider it appropriate that since Holmes had access to information that could qualify as confidential information, and he may still have that information, SPPE should be granted an order protecting any of its confidential information Holmes may still have. In any event, Holmes has conceded in the answering affidavit that he would be willing to provide an undertaking in this respect, and I see no reason not to oblige by simply formalising such an undertaking in an order.

Costs

[94] This then leaves only the issue of costs. Both parties sought costs against the other. In fact, both parties were *ad idem* that the victor be awarded costs, on the party and party scale C. In this regard, it must be remembered that the current matter is a contract dispute, considered by this Court in terms of section 77(3)

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of the Basic Conditions of Employment Act (BCEA)[60]. Effectively, this Court is in exactly the same position as any other civil Court deciding a contract dispute. This means that ordinarily, to the victor goes the spoils where it comes to costs, and the contrary ordinary principle in employment disputes under the Labour Relations Act (LRA)[61] that costs do not follow the result would not apply.[62] That being said, one must be alive to what the Court said in *Ball supra* with regard to costs orders in restraint disputes before the Labour Court:[63]

> '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.
>
> 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 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.'

[95] Obviously, therefore, this Court would retain its wide discretion under section 162(1) of the LRA where it comes to making costs awards in restraint disputes,

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[60] Act 75 of 1997 (as amended).
[61] Act 66 of 1995 (as amended).
[62] *Alcon Laboratories SA (Pty) Ltd v Potgieter and Others* (2020) 41 ILJ 1689 (LC) at para 58; *Service Parts Logistics (Pty) Ltd v Mshengu* (2020) 41 ILJ 1762 (LC) at paras 25 – 26.
[63] Id at para 29.

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so it cannot be said that costs must always follow the result in these kinds of disputes. There may be particular circumstances, applying considerations of reasonableness and fairness, where no costs order is justified.[64] But *in casu*, I believe that there is nothing standing in the way of costs following the result, as no case has been made out that to award costs would be unreasonable and unfair. Thus, I will give effect to the parties' own wishes, resulting in SPPE being ordered to pay the costs of the application, on the party and party scale C.

[96] For all the reasons as set out above, I make the following order:

Order

1. The application is heard as one urgency.

2. Save for the relief granted in paragraph 3 of this order, the applicant's application is dismissed.

3. The first respondent is interdicted and restrained from disclosing, whether directly or indirectly, any confidential information acquired from the applicant, which shall include but not be limited to information relating to ppe365.net software, all calculations, strategy documents, spreadsheets, computer programs, papers, drawings, models, samples and other materials in respect of which the applicant has exclusive rights.

4. The applicant is ordered to pay the first respondent's costs, on the party and party scale C.

[64] See for example *Dot Activ* (*supra*) at paras 83 – 84; *Vumatel* (*supra*) at para 67; *TIBMS* (*supra*) at para 33.

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S. Snyman
Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant: Advocate G M Harrison

Instructed by:	McNaught & Co Inc Attorneys
For the First Respondent:	Advocate G L Van Der Westhuizen
Instructed by:	Waldick Inc Attorneys

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