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The Protection of Confidential Information in Restraint of Trade Agreements

Michelle Van Eck; Marthinus Van Staden

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The Protection of Confidential Information in Restraint of Trade Agreements

Michele van Eck*
Marthinus van Staden**

Abstract

This article examines the balance between protecting an employer's confidential information and the enforceability of restraint of trade agreements. Central to the discourse is the principle that while employers legitimately seek to safeguard their proprietary information and trade secrets, such measures must align with public policy considerations to avoid unduly curtailing employees' employment opportunities. Restraint of trade clauses are not inherently invalid but must be scrutinised for their reasonableness, necessity in protecting legitimate business interests and compliance with public policy. Focusing on confidential information as a key protectable interest, the article delineates the conditions under which such information qualifies for protection and how its misuse by former employees poses a legitimate concern for employers. The article underscores a growing tendency to prioritise the safeguarding of employers' interests, particularly concerning proprietary information. This focus has led to foundational contractual principles being overlooked. The article argues for a nuanced understanding that considers the confidentiality undertaking, location and timing. It underscores the need for the judicious drafting and enforcement of restraint of trade clauses and confidentiality undertakings, guided by clear legal principles that safeguard both employers' proprietary interests and the public interest in fair competition and employment mobility.

'When arguing with your neighbour, don't betray another person's secret.'
Proverbs 25:9

Keywords: employment contracts — restraint of trade agreements — non-disclosure agreements — confidential information — proprietary knowledge.

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1 Introduction

Protecting an employer's interests is at the heart of restraint of trade agreements.[1] The interests to be protected often relate to the sensitive and proprietary nature of an employer's confidential information. As well-meaning as such restraint of trade clauses may be in protecting an employer's interests, they are not without a level of controversy and, on occasion, have been abused or used oppressively. After all, protecting an employer's interests in this manner would inevitably harm an employee's employment prospects.

The position of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* that restraint of trade clauses are not inherently invalid but must comply with public policy considerations remains relevant in the modern approach to such clauses.[2] Put differently, a restraint of trade clause will not be enforced where the enforcement would be prejudicial to public policy.[3] *Basson v Chilwan and Others* provides a framework to determine whether a restraint of trade clause is against public policy. First, it must be assessed whether one party (usually the employer) has an interest that deserves protection upon the conclusion of the agreement in which the constraint is contained.[4] If there is a protectable interest, the second factor for determination is whether the protectable interest is being threatened (or jeopardised) by the other party (usually the employee).[5] If so, the third factor to consider is whether the employer's legitimate interests, in terms of both scope and importance, are sufficiently compelling to justify restricting the employee's ability to earn a living or contribute productively to the economy.[6] The final consideration in this framework is whether (beyond the relationship between employer and employee) there might be other aspects of public policy that dictate whether the restraint should be upheld or dismissed.[7]

This framework has formed the basis for assessing whether a restraint of trade clause is valid and enforceable. However, recent case law has seemingly developed the framework further. It has placed much emphasis on the employer's protectable interest, specifically that of confidential information, often to the detriment not only of the employee's interest but also the contractual principles that underpin the enforcement of such clauses. Arguments supporting confidential information as a protectable interest often blur the lines between the contractual rights reflected in

[1] C Hock 'Covenants in restraint of trade: Do they survive the unlawful and unfair termination of employment by the employer?' (2003) 24 *ILJ* 1231 and 1233; *Reeves and Another v Marfield Insurance Brokers CC and Another* 1996 (3) SA 766 (A) 772.

[2] 1984 (4) SA 874 (A).

[3] ibid 897F-898E.

[4] 1993 (3) SA 742 (A) 767G-H (*Basson*).

[5] ibid.

[6] ibid.

[7] ibid.

the restraint of trade provisions and the contractual rights afforded under a confidentiality undertaking — both of which are separate juristic acts.[8]

Against this background, the article aims to analyse six recent cases dealing with the validity and enforcement of restraint of trade clauses with specific reference to employers' confidential information as a protectable interest and to highlight the growing judicial trend in prioritising such protection. It sets out, inter alia, to assess the current divergent approaches to the enforcement of restraint of trade clauses. The trend is analysed by examining the importance of the source of the obligation, the location of the confidentiality undertaking (within the restraint of trade clause or a separate agreement) and the timing of the undertaking. This analysis exposes inconsistencies in how the courts have applied legal principles relating to the protection of confidential information and the restraint of trade agreements. In conclusion, we make suggestions for the judicious drafting and enforcement of restraint of trade clauses and confidentiality undertakings.

2 Confidential Information as a Protectable Interest

It is generally accepted that confidential information forms part of an employer's protectable interest.[9] However, there is no fixed legislative definition of what confidential information entails. Not all information may be considered confidential. On the one hand, there may be so-called 'general' or 'harmless' information that is not specialised or unique to the employer and would, therefore, not endanger the employer's business if it were to be used.[10] Similarly, information, knowledge and expertise inherent to the knowledge and experience of an employee (and not the employer) would not fall within a class of protected information[11] and cannot, therefore, be classified as confidential.

It is important to distinguish between different types of information and their relation to an employer's protectable interests in more detail. Proprietary interests are identified as specific, confidential information

[8] The main classification of the sources of obligations may be found in the law of delict, contract and undue enrichment. Breach of contract is not, in itself, a source of the obligation. See *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1992 (1) SA 837 (C) 850A; *Deez Realtors CC v South African Securitisation Program* [2016] ZASCA 194 para 14. This notwithstanding, each contractual obligation (in itself) gives rise to its own set of rights and corresponding duties. Therefore, one may argue that a restraint of trade is a source of a contractual obligation distinct from that of a confidentiality undertaking and vice versa, as both give rise to their own unique rights and corresponding duties. A restraint of trade and confidentiality undertaking are, therefore, separate and distinct from each other irrespective of whether such contractual undertakings are found in the same document or not.

[9] *Automotive Tooling Systems (Pty) Ltd v Wilkens & others* (2007) 28 *ILJ* 145 (SCA) para 10 (*Automotive Tooling*).

[10] *See Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and Another* 1967 (1) SA 686 (W) 689E (*Coolair*).

[11] *Dickinson Holdings (Group) (Pty) Ltd and Others v Du Plessis and Another* 2008 (4) SA 214 (N) para 36 (*Dickinson Holdings*).

or methodologies pivotal to a company's competitive leverage and operational integrity. This includes unique manufacturing techniques and specific customer information — assets that, if revealed, could weaken the firm's competitive standing or lead to unjust market rivalry.[12] Conversely, the collective skills, insights and experiences that employees accumulate, which remain unbound to any company's proprietary information, represent a separate category. These entail professional competencies, sectoral knowledge and technical capabilities that individuals can deploy across varying roles or entities without necessarily compromising or employing confidential data from their former employer.[13] This critical demarcation informs the dialogue on the extent and limitations of restraint of trade agreements, delineating what genuinely warrants protection under such agreements versus what inherently belongs to an individual's realm of professional development and mobility.

Botha points out that an employer's protectable interest can be established under two broad categories: confidential information and trade secrets, and notes that 'not all information an employee has access to during employment at his or her former employer will be regarded as confidential or secret'.[14] However, when information is categorised as 'confidential' or 'proprietary', such information would likely be part of an employer's protectable interest, meaning an employee may not use such information after leaving employment.[15] Considering the significant focus placed on confidential information in recent judgments, it is worth first assessing what is considered confidential information.

Contractually what constitutes confidential information is often addressed by defining the term in the employment contract, confidentiality undertaking or the restraint of trade clause.[16] The definition may consequently be placed in a separate contractual section or an embedded definition could be used. In drafting such a definition, specific categories of information are often considered confidential or proprietary, such as secret or special techniques.[17] However, our courts have stressed that information of a specific type or category does not automatically make such information confidential or proprietary.[18] Instead, information is deemed confidential or proprietary based on its practical application and the possible detriment its disclosure could inflict on the employer.

[12] *Automotive Tooling* n 9 above paras 9-10; *Valuenet Solutions Inc T/A Dinkum USA and Another v Etel Communications Solutions (Pty) Ltd* 2005 (3) SA 494 (W) (*Valuenet*) paras 14-15.

[13] *Automotive Tooling* ibid para 20; *Valuenet* ibid para 19.

[14] M Botha 'Restraint of trade clauses: Anything new from the courts?' (2023) 44 *ILJ* 734 at 737.

[15] *Dickinson Holdings* n 11 above para 36.

[16] See *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W) 426B-C (*Meter Systems Holdings*).

[17] See *Bonnet and Another v Schofield* 1989 (2) SA 156 (D) 161B.

[18] *Dickinson Holdings* n 11 above para 34; *Alum-Phos (Pty) Ltd v Spatz* [1997] 1 All SA 616 (W) 623 (*Alum-Phos*).

Moreover, such information must have demonstrable value in commercial or industrial contexts.[19] Therefore, regardless of the definition used in a contractual mechanism, the nature of information cannot be converted from general information to confidential information by means of a contractual provision.[20]

As mentioned earlier, there is no universally established definition of confidential information. However, *Alum-Phos (Pty) Ltd v Spatz (Alum-Phos)* has indicated that the following elements are relevant:[21]

(i) the information must be capable of application in trade and industry (that is, such information must be useful);
(ii) the information must not be public knowledge or public property (that is, the information must only be known to a limited number of people); and
(iii) the information must be of economic value and must be determined objectively.

Proprietary information has been categorised as including 'trade secrets, confidential information, goodwill or trade connections'.[22] In this regard, our courts have also found that the following instances constitute confidential and proprietary information in the particular circumstances of the case:

(i) generally, customer lists; however, any information that has been retained in the memory of the employee may still be used;[23]
(ii) business opportunities of the employer are generally considered confidential (even if such information was obtained from sources other than the employer);[24]
(iii) information that is received by employees in confidence by virtue of their employment;[25]
(iv) generally, information in the public domain is normally not confidential; however, such information may be confidential where skills and resources were used to gather and compile such information;[26]
(v) information relating to the 'name, design, packaging and marketing of a product', as well as its manufacturing techniques and processes, is generally considered confidential;[27] and

[19] See Botha n 14 above 737.
[20] *Alum-Phos* n 18 above 623.
[21] ibid.
[22] ibid 626.
[23] *Meter Systems Holdings* n 16 above 429D.
[24] ibid.
[25] ibid 429E-430A.
[26] ibid 430B.
[27] ibid.

(vi) prices may be confidential when the information relates to prices tendered for work to be carried out.[28]

Information that has an impact on the employer's competitiveness in the market is often considered confidential. Thus it has been held that '[i]f it is objectively established that a particular item of information could reasonably be useful to a competitor as such, i.e. to gain an advantage over the plaintiff, it would seem that such knowledge is prima facie confidential as between an employee and third parties'.[29] If information is ultimately intended to harm the employer, this would also indicate whether it could be classified as confidential or proprietary.[30] In this context, Marais J has noted that confidential information 'would depend on the circumstances of each case and, in this regard, the potential or actual usefulness of the information to a rival would be an important consideration in determining whether it was confidential or not'.[31] Additionally, Botha notes that the employee's seniority also influences whether the information falls within the scope of an employer's protectable interest.[32]

Nevertheless, it is evident that confidential information is quite a broad concept. Regardless of the above categories, whether information is considered confidential may be determined by the specific factual circumstances of each situation and whether the elements of confidential information are present. In this context, it can be said that the confidentiality of information is neither absolute nor perpetual in protecting the employer's interests.[33] In other words, confidential information as the employer's protectable interest is not unqualified.

Drawing from these principles, one would have to prove two things to show that information is worthy of protection concerning a restraint of trade. The first is that the information is, in fact, confidential and proprietary. The answer to this consideration may be found in various factors, including the elements of confidential information mentioned above, as well as whether the term confidential information is found in the contractual provisions of the employment contract, confidentiality undertaking or the restraint of trade clause itself (which indicates the intention of the parties in relation to confidential information).[34] The relationship between an employer and employee is also important to establish the nature of the information. For instance, if the relationship between the employer and employee is fiduciary (normally the case in employment contracts), the source of information would be contractual

[28] ibid 430D.
[29] *Coolair* n 10 above 689F. See also *Dickinson Holdings* n 11 above para 35.
[30] *Coolair* ibid 689G.
[31] ibid 691B.
[32] See Botha n 14 above 737.
[33] *Meter Systems Holdings* n 16 above 430D.
[34] ibid 426B-C.

as implied by law.[35] If the relationship is not contractual, the use of confidential and proprietary information and any claim resulting therefrom would be determined delictually.[36] The second factor is that the confidentiality of the information should be necessary to protect the employer's business interests and the employee's divulgence of such information would threaten this. However, the employer need not show actual harm. In *Reddy v Siemens Telecommunications (Pty) Ltd*, the principle was established that the potential of harm (and not actual harm) was sufficient to meet the requirement.[37]

Considering the above, the following factors should be considered in determining whether the restraint of trade should be enforced:

(i) Does the employee have possession of an employer's information?[38]
(ii) Is the information worthy of protection?[39] Put differently, is the information confidential or proprietary in nature?
(iii) What are the time constraints for such information to remain confidential and proprietary?[40]
(iv) Would the employee's new position (as a competitor of the original employer) place the integrity and safekeeping of such information at risk?[41] In other words, is there the potential for harm to result from the disclosure and use of the information?

An approach that assumes a breach of confidentiality obligations based solely on employment with a competitor raises questions about how this reasoning would apply when there is a separate confidentiality agreement between the employer and employee. In such cases, the employer's protectable interest in confidential information is directly addressed by the specific confidentiality undertaking, potentially mitigating the perceived threat from the employee's new employment.

The existence of a stand-alone confidentiality agreement, as opposed to confidentiality provisions within a restraint of trade clause, creates a distinct contractual obligation. This separate agreement should, in theory, provide sufficient protection against potential threats to the employer's confidential information without necessitating the broader restrictions of a restraint of trade. However, as will be shown, our courts have not consistently distinguished between these scenarios. Some decisions have applied restraint of trade principles to separate confidentiality agreements, while others have treated them as distinct obligations.

[35] ibid 426H-I.

[36] ibid 426I.

[37] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para 20 (*Reddy*).

[38] Although the court did not expressly list these questions, these have been adapted from the factual circumstances found in *Reddy* ibid para 20 in order to develop a model for the assessment of more recent case law arising from similar factual circumstances as the *Reddy* case.

[39] ibid.

[40] Principle adapted from *Valuenet* n 12 above.

[41] *Reddy* n 37 above para 20.

This inconsistency has created uncertainty in our law regarding how confidential information should be protected and how it factors into an employer's protectable interests when separate agreements exist. This legal ambiguity raises important questions about the interplay between restraint of trade clauses and standalone confidentiality agreements and how courts should balance these different contractual protections when assessing an employer's protectable interests. In the next part, the various approaches by the courts in applying confidential and proprietary information in restraint of trade provisions will be assessed.

3 Recent Case Law Analysis

3.1 *Flowcentric Mining Technology (Pty) Ltd v Smit*

In *Flowcentric Mining Technology (Pty) Ltd v Smit and Others* (Flowcentric) the employer sought to enforce a confidentiality and restraint of trade clause.[42] The employer was a specialist material supplier in dust and combustion suppression in the mining industry.[43] During a period of four years, the employer developed a product called Flowcentric Heatshield,[44] which was unique. The employee was employed as a sales consultant on 1 April 2017, resigned on 24 October 2023,[45] and left the original employer's employ on 30 November 2023.[46] During the notice period, the employee informed the original employer that she intended working for a company called Polomino Plant, which the employee claimed was not a competitor.[47] However, during the employee's notice period, the clients of the first employer began terminating their contracts with the original employer.[48] It transpired that confidential information was being used by a third party (connected with the competitor and operating on behalf of the employee) in approaching the first employer's clients.[49] Moreover, the prospective employer had during this time introduced a competing product called KUP-SEAL-X-PLUS-Foam Seal, which was in direct competition with the original employer's Flowcentric Heatshield product.[50] The original employer attested that it had a reasonable expectation that should the new employer hire the employee, it would result in unfair competition, including that of the

[42] *Flowcentric Mining Technology (Pty) Ltd v Smit and Others* [2023] ZAGPPHC 544 para 1 (*Flowcentric*).

[43] ibid para 32.

[44] ibid para 43.

[45] ibid paras 33-34.

[46] ibid para 34.

[47] ibid para 35.

[48] ibid para 36.

[49] ibid para 38.

[50] ibid para 43.

'[m]isuse of confidential information to advance their own business interests and activities at the expense' of itself.[51]

The existing applicable employment contract between the employer and employee contained a restraint of trade clause, which applied for a period of one year after the termination of the employment contract.[52] Correspondence between the parties concerning the alleged breach of the restraint of trade clause prior to her leaving the original employer's employment led to the employee reaching a further confidentiality agreement with the employer as follows:[53]

> 'For the period of her restraint she will not disclose to Kuphela (the second respondent) any confidential information that she may have come by during the course of her employment that [sic] FCMT (the applicant).'

In court, the employer argued that this confidentiality undertaking was insufficient as it did not address the obligations under the restraint of trade clause, which included returning all confidential information to it.[54] However, the employee argued that the confidentiality undertaking removed the urgency of the application brought to the court.[55]

The court confirmed the principle that restraint of trade provisions are valid unless they are against public policy.[56] It held that the question of public policy is linked to the question of the reasonability of the restraint, which is established by the framework set out in the *Basson* case,[57] reconsidered in *Reddy*, to the effect that a person need not show an actual breach of a restraint of trade clause but merely has to prove 'that the information in possession of the first respondent, if disclosed, could be used to the disadvantage of the applicant'.[58] However, in this particular matter, the risk of harm had already materialised through the development of a competing product. Therefore, the court correctly did not address the contractual obligations arising from the confidentiality agreement but instead focused on the application of the restraint of trade clause in the employment contract, which it upheld.[59]

What is necessary to highlight is that the confidentiality undertaking that the employee provided was a meaningless gesture. As the court noted, the balance of probabilities indicated that a competitor utilised the original employer's confidential information to create a competing product. This information was already utilised prior to the employee's confidentiality undertaking.[60] As such, the court, correctly, did not

[51] ibid para 3.
[52] ibid para 7.
[53] ibid para 12.
[54] ibid para 14.
[55] ibid para 15.
[56] ibid para 27.
[57] ibid para 29.
[58] ibid para 45.
[59] ibid paras 45-46.
[60] ibid.

address the contractual obligations resulting from the confidentiality undertaking (as there was already a breach of the contractual undertaking) but instead focused on enforcing the restraint of trade clause.

This finding indicates that although the operation of the restraint of trade agreement and the confidentiality undertaking are factually connected to the employee's conduct, they are, nevertheless, separate juristic acts which should be considered on their own merits. Furthermore, it illustrates the importance of proactive measures to safeguard confidential information and the potential limitations of post-breach remedies.

3.2 *Micros South Africa (Pty) Ltd v Kleynhans*

In *Micros South Africa (Pty) Ltd and Others v Kleynhans and Others*[61] the court was called upon to consider if a restraint of trade clause could be enforced in instances where an employee had access to confidential information or trade connections that a new employer could exploit. The original employer managed a hospitality portfolio for a group of companies wherein Opera software — used by hotels, for instance, for booking rooms, checking in customers and generating invoices — was distributed to its clients within the hospitality industry.[62] The employee had been employed by Micros SA since November 2017, overseeing Opera products.[63] She had entered into a restraint of trade agreement, as well as a separate non-disclosure agreement (NDA) with her employer, which restricted her from engaging in competing activities for a year after terminating her employment.[64] The restraint of trade clause read as follows:[65]

'22 Restraint of Trade

22.1 The employee … undertakes not to be engaged in the establishing of a business, or as a shareholder, partner, member of a close corporation, director of a company or in any other capacity that directly or indirectly competes with the business of Micros SA or Adapt IT or its subsidiaries. The restraint will endure for a period of one year from [the] date of termination of your employment contract. The restraint is valid unless written confirmation is received from the company authorising any changes contrary to the above.

22.2 The employee, in acknowledging receipt of this contract of employment, agrees that the restraints set out are fair and reasonable in all respects.

22.3 The employee acknowledges that the company may recover any amounts and associated recovery amounts from the employee in the event of such breach.'

However, in July 2023, the employee accepted an offer from a direct competitor of the employer to become its director of operations and

[61] [2023] ZAGPPHC 741 (*Micros*).

[62] ibid para 5.

[63] ibid para 1.

[64] ibid para 5.

[65] ibid.

consequently resigned from Micros SA. She was expected to start her job in November 2023.[66]

The employer applied for urgent interdictory relief to enforce both the restraint of trade agreement and the NDA. It also requested that the court prevent the new employer from competing unfairly with it by employing the employee.[67] The employee and the new employer argued that enforcing the restraint of trade clause would be unreasonable and unenforceable, and claimed the original employer had not demonstrated a proprietary interest warranting protection.[68] The original employer argued that the employee had gained significant knowledge about Opera products, pricing, strategy and customer relationships during her employment, which would be invaluable to a competitor.[69] It believed that the employee would use this knowledge in her new role, violating her contractual obligations and harming the business.

The court's primary considerations were the reasonableness of enforcing the restraint of trade and whether the employer had a valid proprietary interest that required protection.[70] The court held that agreements in restraint of trade were generally valid and enforceable unless they were unreasonable. It noted that '[p]ublic policy under our constitutional dispensation requires that contracting parties honour obligations that have been freely and voluntarily undertaken — the principle of pacta sunt servanda'.[71] A restraint of trade agreement would be deemed unreasonable if it unjustifiably restricted a party from engaging in commerce without a corresponding interest deserving protection.[72] The onus to prove the unreasonableness of a restraint lay with the person who agreed to the restraint of trade provision (the employee in this instance).[73]

The court found that the Opera software solutions were complex and required distribution networks, which had the potential to place a strain on the internal capacity of the employer due to customers' own

[66] ibid para 2.

[67] ibid para 3.

[68] ibid para 6. In *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ) para 17 the court stated as follows regarding the nature of proprietary interests that are worthy of protection: 'It is well established that the proprietary interests that can be protected by a restraint agreement are essentially of two kinds, namely: 17.1 The first kind consists of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "*trade connection*" of the business, being an important aspect of its incorporeal property known as goodwill; 17.2 The second kind consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "*trade secrets*".' See also *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) 502D-F.

[69] *Micros* ibid para 7.

[70] ibid para 8.

[71] ibid para 9.

[72] ibid with reference to *Reddy* n 37 above.

[73] ibid para 10.

internal capacity restraints. In addition, the employee had intimate knowledge of Opera products and had built strong relationships with the employer's customers. Given her expertise and customer relationships, the employee could leverage this knowledge to the detriment of the original employer.[74] As a result, her move to a competitor was a potential threat to the original employer's proprietary interests.

In this case, the court held, the employer did not need to prove an actual breach but merely the risk that the information in the employee's possession, if disclosed, could be used to the disadvantage of the first employer.[75] Further, the extent of a restraint of trade should match the parties' legitimate interests.[76] In the circumstances, the court found that a one-year duration for the restraint was reasonable[77] and that the original employer had protectable interests that were threatened by the new employer.[78] Therefore, the original employer had clear rights, anticipated harm and had no alternative remedy.[79] On this basis, the restraint of trade provision was enforced.

We argue that there are conceptual and principled challenges to upholding the restraint that the court did not consider fully. Firstly, the court's ruling on the restraint of trade raised issues regarding both its duration and geographical scope. The temporal aspect of the restraint was set at one year. However, it is the geographical reach that proves more contentious. The original agreement did not specify a particular region for the restraint. In court, the applicants proposed limiting it to their area of operations. The court subsequently defined this as including the Southern African Development Community (SADC) and Indian Ocean regions. While this was more specific than the open-ended original restraint, it still covered an expansive area. The SADC region alone comprises 16 countries and the addition of the Indian Ocean region further expands this territory. This extensive reach significantly limited the employee's job prospects across multiple countries and diverse markets, many of which may have had minimal overlap with the employer's actual operational footprint. The breadth of this restraint raises questions about its reasonableness and proportionality. It effectively barred the employee from working in her field across a vast and economically diverse region, potentially far beyond the employer's true sphere of influence or legitimate protectable interests. This outcome highlights the need for courts to examine proposed geographical limitations in restraint of trade cases critically, ensuring they are narrowly tailored to the employer's genuine operational reach and protectable interests.

[74] ibid paras 13-16.
[75] ibid para 17.
[76] ibid para 27.
[77] ibid para 28.
[78] ibid para 27.
[79] ibid para 35.

Secondly, the employee was prohibited from disclosing or using the original employer's proprietary and confidential information. From the facts, all the requirements for determining whether the confidential information was a protectable interest (as discussed in part 2 above) were met. However, in this matter, the employee had also signed an NDA. The agreement created additional contractual obligations on the employee to protect and refrain from disclosing confidential information of the original employer.

Although the court considered the NDA, it took the position that simply working for a competitor amounted to a breach of the NDA and thus was a fait accompli.[80] This is not sufficient, however. A breach of contract must be proven; it cannot be assumed upfront. The court relied on the *Reddy* case, where it was held that an employer did not have to establish a breach of the restraint of trade clause but just potential harm. However, this principle is limited to determining an employer's protectable interest concerning the reasonability of a restraint of trade clause as per the *Basson* framework. It was never intended to be expanded to contractual obligations under an NDA because an NDA is a self-standing separate contractual undertaking.

The court's stance overlooked the distinct yet complementary roles of these two agreements in protecting the employer's interests. The restraint of trade clause aimed to protect the employer's broader protectable interests, while the NDA specifically addressed confidential information. By treating these as entirely separate, the court effectively diminished the significance of the NDA. This approach fails to recognise that the NDA creates enforceable contractual obligations specifically designed to protect confidential information. Ignoring the NDA undermined fundamental contractual principles such as freedom of contract and pacta sunt servanda.

Moreover, an NDA could potentially narrow the scope of what needs to be protected under the broader restraint of trade. A more balanced approach would consider both agreements in tandem, recognising their distinct purposes while acknowledging their interplay in protecting the employer's interests. This would allow for a more nuanced enforcement strategy that respects both the specific confidentiality protections in the NDA and the broader restrictions in the restraint of trade clause.

It appears that the court overemphasised the importance of the employer's proprietary interest over the right of the employee to engage in the profession of her choice. The effect was that the court's decision had a negative impact on the employee's employability based on a potential threat that was already protected and mitigated through a contractual undertaking in the NDA. The provisions and contractual undertakings under the NDA were effectively ignored and principles

[80] ibid para 16.

specifically relating to restraint of trade clauses were incorrectly applied to the separate contractual undertakings in the NDA.

The *Micros* case demonstrates the complex interplay between restraint of trade clauses and separate confidentiality agreements. The court's decision to enforce the restraint of trade clause without fully considering the implications of the separate NDA raises questions about the appropriate balance between protecting confidential information and adhering to contractual principles. This case underscores the importance of carefully drafting and harmonising confidentiality undertakings and restraint of trade clauses.

3.3 *Spur Group (Pty) Ltd v Montgomery*

In *Spur Group (Pty) Ltd v Montgomery and Another*[81] the Labour Court was called upon to consider whether a restraint of trade agreement was reasonable and enforceable, as the employee had access to confidential information and this knowledge could provide a competitive advantage to the employee's new employer. The original employer and the employee entered into an employment agreement on 1 March 2010, appointing the employee as an area manager. The agreement[82] contained a restraint of trade clause, which was applicable for 24 months after the termination of the employment agreement.[83] The restraint of trade included the following provision:[84]

'16.2.3 [H]e [the employee] shall not, at any time during the currency of this Agreement or at any time after the Termination Date, either himself utilise and/or directly or indirectly divulge or disclose to others any of the Trade Secrets and Know-How … of the Company [the first employer].'

The employee was promoted to development manager in February 2012 and was responsible for the original employer's Panarottis Pizza & Pasta and Casa Bella brands. During this time, the employee was an integral part of the business development of these brands and also 'had access to the applicant's internal server[,] which included, inter alia, the business cases for all existing and prospective restaurants; business plans; franchise applications (successful and unsuccessful); cash flows; rental negotiation correspondence; landlord rental spreadsheets; leases and lease schedules; and potential sites for new (or relocating) stores'.[85]

On 3 May 2022, the employee left the original employer's employment and joined the new employer, which was a direct competitor of the original employer, as it ran approximately 17 restaurants and intended to expand its franchise activities aggressively.[86] In court, the original

[81] [2023] ZALCCT 21 (*Spur*).
[82] ibid para 12.
[83] ibid para 8.
[84] ibid.
[85] ibid para 12.
[86] ibid.

employer alleged a breach of the restraint of trade agreement and sought its enforcement.

According to the employer, the employee was privy to confidential and valuable trade secrets for its business.[87] The court distinguished between two types of proprietary interest: the first was 'trade connections', which related to the relationships between a business and its customers, amounting in effect to incorporeal property or goodwill; the second was 'trade secrets', described by the court as a 'confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage'.[88] The employer's complaint was related to the compromise of trade secrets. Not only did the employee have access to such information, but it was claimed to be self-evidently confidential. It would provide a competitive advantage to the new employer when selecting locations for its expansion plans.[89]

The employee argued that the agreement was unreasonable and unenforceable while also claiming inconsistent enforcement by the employer.[90] The employee also contended that the information was no longer confidential and had become 'stale', but did not adduce relevant supporting evidence.[91] The employee argued that the restraint was unreasonable because of the employer's inconsistency in enforcing restraints in the case of other employees.[92] The court found that the employee's knowledge and expertise were directly related to the confidential information obtained, which was not stale and could provide a competitive advantage to the new employer.[93]

As the employee had not specifically alleged that the area or period of the restraint was unreasonable,[94] the court focused on the issue of the employee's access to confidential information during employment.[95] In evaluating whether a restraint of trade is reasonable and enforceable in this respect,[96] the court held that consideration should be given to the extent of the employee's knowledge and access to confidential or proprietary information by examining, firstly, the employee's expertise and talent relating to the confidential information obtained during employment and, secondly, the potential competitive advantage that this knowledge could provide to the new employer.[97] Unlike the *Flowcentric* case (where

[87] ibid para 13.
[88] ibid para 20.
[89] ibid para 21.
[90] ibid para 23.
[91] ibid para 22.
[92] ibid paras 22-24.
[93] ibid para 22.
[94] ibid para 23.
[95] ibid para 21.
[96] ibid para 19.
[97] ibid para 20.

the confidentiality undertaking occurred after confidential information was already disclosed to enable the creation of a competitive product) and the *Micros* case (where a separate NDA was concluded in addition to the restraint of trade clause), in this case, a specific confidentiality undertaking (clause 16.2.3 of the restraint of trade agreement — see above) was included in the restraint of trade provision itself, making the consideration of trade secrets and know-how directly comparable to the enforcement of the restraint of trade undertaking. By contrast, in the *Micros* case, the conclusion of a separate NDA allowed for enforceable confidentiality obligations distinct from the restraint of trade undertaking.

This approach highlights the potential benefits of integrating confidentiality provisions into restraint of trade agreements.

3.4 *Universal Blending (Pty) Ltd v Henderson*

In *Universal Blending (Pty) Ltd v Henderson*[98] the South Gauteng High Court held that the use of alleged trade secrets cannot be interdicted if an employer cannot prove that it is the owner of the product.[99] The employee was employed by the first employer in 2014 and became a director and shareholder in 2019. Subsequently, he resigned as employee and director in September 2020 and returned his shares. The employee was not bound by a restraint of trade clause or any other confidentiality undertaking. Nevertheless, the employer alleged that the employee, through his employment, had acquired knowledge of the formula for manufacturing a product called Roadsaver, used to fill and seal potholes and cracks in tarred surfaces.[100] The employer alleged that this formula was a trade secret owned by it[101] and that the former employee was now unfairly using that knowledge to produce the Roadsaver product in competition with it.[102] This, it contended, was unlawful.[103]

The employer contended further that the employee was the only employee who knew the complete formula of the product and that he had refused to divulge this information to it.[104] However, a dispute arose over who was the real owner of the Roadsaver product.[105] The employee alleged that a company called Pilot Lubricant CC was the owner and had supplied the product to the first employer in the past.[106] The employee alleged that while he was employed, his employer had

[98] [2023] ZAGPJHC 266 (*Universal Blending*).
[99] ibid para 35.
[100] ibid para 1.
[101] ibid para 9.
[102] ibid.
[103] ibid para 1.
[104] ibid para 2.
[105] ibid para 10.
[106] ibid para 11.

provided him with information that had allowed him to recreate the Roadsaver product.[107]

The court held that using a company's proprietary information without permission constitutes unfair competition, which may be subject to a legal injunction, regardless of whether a non-competition clause exists.[108] In order to establish a right to relief, the first employer should show that:[109]

(i) it is the owner of the product;
(ii) the product qualifies as proprietary information due to its relevance and potential for practical use in commercial and industrial settings;
(iii) 'it is secret or confidential';
(iv) it is of economic value to the employer; and
(v) the employee is using the product to compete with the employer.

The employer could not prove that it was the owner of the product and it was determined that the product was, as far as could be ascertained, owned by Pilot Lubricant CC.[110] If the employer did not own the formula for the Roadsaver product, it could not restrain the employee from selling the product himself as the company had no protectable interest based on a trade secret and confidential information.

We contend this case does not relate to a contractual undertaking (as in the *Flowcentric*, *Micros* and *Spur* cases). Instead, it deals with vested intellectual property rights. Under South African case law, any intellectual property developed by staff members as part of their official duties becomes the automatic property of their employer.[111]

In this case, the employer alleged that the employee had created the product during the course and scope of his employment and that he was the only person in the company who knew the full recipe for the product. Had the employee acquired this information while fulfilling his professional responsibilities — as indeed was the case — the employer would have been justified in asserting ownership over the knowledge, regardless of whether it held rights to the actual product.[112]

The *Universal Blending* case demonstrates that protecting confidential information is not solely dependent on contractual obligations. The court's recognition that the unauthorised use of trade secrets constitutes unlawful competition, even in the absence of a restraint of trade provision, underscores the inherent value of confidential information. This case highlights legal avenues for safeguarding confidential information beyond contractual undertakings. Nevertheless, greater certainty would have

[107] ibid paras 13-14.
[108] ibid para 5.
[109] ibid para 6.
[110] ibid para 35.
[111] ibid paras 13-16.
[112] ibid paras 2, 15-16.

been created in this matter if there had been a contractual undertaking relating to the protection of confidential information.

3.5 *Beedle v Slo-Jo Innovations Hub (Pty) Ltd*

In *Beedle v Slo-Jo Innovations Hub (Pty) Ltd*[113] (Beedle) the Labour Appeal Court (LAC) held that a restraint of trade had been transferred during the employer's restructuring exercise.[114] The employee began her tenure with Slo-Jo, initially managing sales.[115] Her employment contract contained a restraint of trade clause of two years within the territory of South Africa to prevent the employee from being associated with a potential competitor of the employer. The restraint of trade clause did not contain an undertaking to keep the information confidential; rather, the employee should not deal with or transact with a competitor for the restraint period of two years.[116] The restraint of trade clause read as follows:[117]

'In terms of this restraint of trade, the employee specifically undertakes and agrees:

1. not to be interested in any business in the territory which carries on business manufacturers [sic], sells or supplies any commodity or goods, brokers or acts as agent in the sale or supply of any commodity or goods and/or performs or renders any service, in competition with or identical or similar or comparative to that carried on, sold, supplied, brokered or performed by the company during the period of the employment of the employee up to and including the last day of the employment of the employee;
2. not to solicit the custom of or deal with or in any way transact with, in competition to the company, any business, company, firm, undertaking, association or person which during the period of 2 (two) years preceding the date of termination of the employment of the employee has been a customer or supplier of the company in the territory;
3. not to directly or indirectly offer employment to or in any way cause to be employed any person who was employed by the company as at the termination of the employment of the employee with the company or at any time within the period of 2 (two) years immediately preceding such termination.

Each and every restrain in this entire clause shall operate and be valid and binding for a period of 2 (two) year(s), calculated from the date of termination of the employment of the employee with the company...'.

Thereafter, the employee's role pivoted to research and development, collaborating with suppliers and launching new products.[118] By 2015 the employee had become a key figure in Slo-Jo's newly formed research and development (R&D) team.[119] She was instrumental in building partnerships with key manufacturers, notably Fruition, which utilised

[113] (2023) 44 *ILJ* 2493 (LAC) (*Beedle*).
[114] ibid paras 1 and 3.
[115] ibid para 2.
[116] ibid para 7.
[117] ibid.
[118] ibid para 2.
[119] ibid para 3.

around 60% of Slo-Jo's unique products.[120] In addition, the employee held important relationships with key customers.[121] In 2018, Slo-Jo underwent an internal reorganisation, leading to the creation of three new entities.[122] The employee, along with others, was transferred to one of the entities — the Slo-Jo Innovations Hub. However, management insisted that apart from the employer's name change, the terms of employment remained unchanged.[123] The employee contested this, but evidence from her salary slips showed no alteration in her compensation or benefits. Moreover, her employee code, email and the company's structure stayed consistent.[124] The R&D team's transfer to Slo-Jo Innovations Hub aimed to centralise the R&D function. In essence, besides the employer's name transition, all employment terms, including salaries, roles and benefits, stayed consistent for the transferred R&D team members.[125] The employee eventually resigned from the company and accepted a position at FlavourPro, a direct competitor of the first employer. Slo-Jo Innovations Hub lodged an interdict application to enforce the restraint of trade clause in the employment contract. The employee, however, opposed the application on the grounds that the restraint of trade undertaking had been entered into with Slo-Jo Trading and not with Slo-Jo Innovations Hub.[126]

The Labour Court rejected the employee's submission that the terms of the restraint of trade agreement had not passed from Slo-Jo Trading to Slo-Jo Innovation Hub and that no contractual restraint of trade agreement was in place.[127] The court held that Slo-Jo Innovation Hub was automatically substituted as the employer in terms of s 197 of the Labour Relations Act (LRA).[128] The court also held that the provisions of the restraint of trade were reasonable.[129] Aggrieved by this decision, the employee launched an appeal in the LAC. The employee claimed that there had not been a transfer of the undertaking as a going concern as all that had transferred to the new entity had been certain employees.[130] The employee relied on the case of *Securicor (SA) (Pty) Ltd and Others v Lotter and Others (Securicor)*[131] which held that for a restraint of trade agreement to have transferred from an old to a new employer, it must

[120] ibid.
[121] ibid para 28.
[122] ibid para 3.
[123] ibid paras 3-4.
[124] ibid para 4.
[125] ibid paras 5-6.
[126] ibid para 8.
[127] ibid para 10.
[128] Act 66 of 1995.
[129] *Beedle* n 113 above para 10.
[130] ibid paras 11-12.
[131] 2005 (5) SA 540 (E) (*Securicor*).

have transferred as part of the 'goodwill of the business' and that it could not have been only employees who had transferred.[132]

The LAC held that the *Securicor* case was fundamentally different from the current case, as *Securicor* involved the sale of a business. In the current case, there was 'no sale of a business to a third party'.[133] There was, therefore, 'no consideration of whether the restraint formed part of the "goodwill of a business"'. What had occurred in this matter was 'the transfer of a part of the overall business pursuant to a restructuring of the business'.[134] The employee's conditions of employment had remained precisely the same and the employee considered herself 'bound by the same terms and conditions' that had been applied to her before the restructuring.[135] There was no other contractual basis for her employment.

The LAC held further that the employee had access to trade secrets and sensitive and confidential information possessed by the employer in her capacity as head of the R&D team of the original employer. She also had key relationships with the employer's manufacturers, suppliers and customers. Although courts were duty bound to consider if the terms of a restraint of trade clause could be executed by less restrictive means, the original employer had made a convincing case based on industry practices and product development time-frames why it was necessary to its business for the employee to be restrained for two years when employed by a direct competitor within South Africa. This was to protect the confidential information held by the employee concerning the original employer's products.[136] In addition, the employee could work in industries other than the beverage industry where she could utilise her skills. The restraint of trade clause was found to be reasonable and binding upon the employee.

An essential distinction made in the case is between the sale of a business and an internal business restructuring. In the cited *Securicor* case, the context was the sale of a business, which fundamentally differs from the circumstances in *Beedle*.[137] In the latter, there was no third-party sale, only an internal reshuffling of business entities and functions. This distinction is crucial, as the transfer of the 'goodwill of a business' applies more fittingly to sales than restructurings. The employee's pivotal role in the company, especially her access to sensitive trade secrets, proprietary recipes and critical business relationships, underscores the company's legitimate concern about her moving to a direct competitor.

[132] *Beedle* n 113 above para 14.
[133] ibid para 18.
[134] ibid.
[135] ibid para 19.
[136] ibid para 28.
[137] ibid para 18.

This position gives weight to the argument favouring the enforceability of a restraint of trade clause. The fact that the employee's terms of employment, including her salary, benefits and other conditions, remained unchanged post-restructuring strengthens the company's stance.[138] It implies a continuity of the contractual relationship, suggesting that the restraint of trade agreement should continue to apply.

The *Beedle* case showcases the enduring nature of confidentiality obligations, even in the face of corporate restructuring. The court's decision to enforce the restraint of trade clause, despite the employee's transfer to a new entity, emphasises the importance of maintaining the confidentiality of trade secrets and other sensitive information throughout organisational changes.

3.6 *Emlink (Pty) Ltd v Mathee*

In *Emlink (Pty) Ltd and Others v Mathee and Others*[139] the Johannesburg High Court granted urgent interdictory relief to enforce a restraint of trade agreement and protect confidential information. The court ordered the employee and new employer to cease competing unlawfully.

In 2022 the respondent approached Emlink for assistance with his financially distressed company, which operated in the same field as Emlink.[140] Subsequently, an agreement was reached regarding the respondent's bringing of clients to Emlink. In return, he would receive a 10% share in Emlink through another entity called Clyroscan and could earn commission on the business received from these clients.[141] He started working at Emlink as a contractor, operations manager and salesperson. On 22 July 2022 this relationship was formalised through a shareholders' agreement, which included a restraint of trade clause.[142]

Emlink sought urgent interdictory relief to enforce the restraint of trade clause and the confidentiality undertakings made by the respondent.[143] It alleged he was using their relationships with clients and its confidential information to 'solicit and canvas clients for third-party entities', including a company possibly under the control of his son. This involved diverting transport loads for Emlink's clients to its competitors.[144] Emlink thus argued that the respondent was exploiting its protectable interests, including its client base, client lists and other confidential information.[145]

[138] ibid para 19.
[139] [2023] ZAGPJHC 1242.
[140] ibid paras 2 and 3.
[141] ibid paras 7 and 8.
[142] ibid para 8.
[143] ibid para 3.
[144] ibid para 14.
[145] ibid para 9.

The court found that there was sufficient evidence to show that Mathee had access to confidential information or trade connections that a new employer could exploit and that the restraint of trade was valid. The court held that customer connections formed part of a business's goodwill and were thus protectable under a restraint of trade undertaking.[146] The respondent used the company's relationships, confidential information and trade secrets to solicit and canvass clients for third-party entities. This conduct was deemed to violate the restraint of trade clause, which was valid and enforceable, and amounted to 'unlawful competition and interference with contractual relationships'.[147] The respondent, who bore the onus, had not successfully proved the unreasonableness of the restraint.[148]

The court prohibited the respondent for a period of 24 months from, among other things, soliciting or providing transport services to the company's clients and using or disclosing its trade secrets and confidential information. He was required to return all documents containing confidential information.[149]

The enforcement of a restraint of trade clause is contingent upon it not being prejudicial to the public interest. The court's decision to enforce the restraint suggests that it did not find the enforcement was against this interest. In fact, the court found that '[t]he restraint provisions are unequivocal and contains explicit protection of confidentiality and intellectual property rights'.[150]

Concerning the balance of interests, the court found Emlink's interests in protecting its business information outweighed the respondent's interest in economic activity. The judgment thus balanced the need for contractual certainty and the right to free trade and profession, as enshrined in the Constitution, which guarantees the right to choose a trade, occupation, or profession freely but also allows for this right to be regulated by law.

In conclusion, the judgment aligns with the principles of South African common law and constitutional law regarding restraint of trade agreements. The court's decision to enforce the restraint of trade agreement suggests a careful consideration of the balance between protecting legitimate business interests, the public interest and the parties' constitutional rights.

4 Concluding Thoughts

In reviewing six recent cases that involved the protection of an employer's confidential information, this article has sought to analyse

[146] ibid para 17.
[147] ibid para 14.
[148] ibid para 17.
[149] ibid para 21.
[150] ibid para 14.

the different outcomes reached by the courts. This variation largely depends on the source of the obligation to protect an employer's confidential information, its location and its timing. Several principles may be deduced from the six cases considered. These principles may be summarised as follows:

(i) *Source of obligation*. The source of an obligation may be contractual. This may be established in a separate or embedded confidentiality undertaking within the restraint of trade clause. Insofar as the restraint of the trade clause is contractual, contractual principles must be used to enforce such obligations. Restraint of trade agreements have developed (and to an extent evolved) the principles of contract theory into specific frameworks for enforcement, which are set out in the *Basson* and *Reddy* cases. Confidentiality undertakings, on their own, follow contract theory. The protection of confidential information may be found in intellectual property rights that have nothing to do with restraint of trade provisions. This was evidenced in the Universal Blending case.

(ii) *The exact location of the undertaking*. Both restraint of trade clauses and confidentiality undertakings are contractual obligations underpinned by general contract theory. Although nothing prevents a contract from being reflected in different documents, there must be a clear connection that they form part of the same contractual undertaking. If not, there is a need to address the contractual obligation of each document as separate from each other. This was illustrated in the *Micros* case, and the authors argue that one cannot apply the same rules to establish the enforceability of a restraint of trade clause automatically to a confidentiality undertaking where the contractual obligations are placed in separate and distinct documents. Where the confidentiality undertaking is embedded within the broader restraint of trade clause, as seen in the *Spur* case, it appears that a confidentiality undertaking may be susceptible to the principles of a restraint of trade clause; however, this may be remedied if the clause allows for separate and divisible performance and enforcement of the obligations.

(iii) *Timing of the undertaking*. The timing in which a contractual obligation is created will have an impact on its enforcement. For instance, in the *Flowcentric* case, the confidentiality undertaking was only agreed upon after the breach of the restraint of trade clause, thereby rendering the confidentiality undertaking meaningless and ineffective. Whereas, where the confidentiality undertaking is incorporated within the restraint of trade clause, there appears to be a dual protection afforded to the employer, which can be deduced from the *Spur* case.

The overlap between restraint of trade agreements and confidentiality undertakings has muddied the waters in that, on occasion, our courts

have considered the enforcement of these two contractual obligations in the same manner. This is not necessarily apposite. A failure to consider the source of the obligation, the location of the confidentiality undertaking and the timing of the confidentiality undertaking will affect the protection of the employer's interests and the enforcement of such obligations.

The article has highlighted the complex interplay between an employer's right to protect its confidential information and the enforceability of restraint of trade agreements and the employees' rights to employment mobility against the broader backdrop of public policy. The challenges of protecting confidential information have magnified in an era where digital information can be easily and instantaneously disseminated. With the increasing global mobility of employees, especially in high-tech and specialised industries, there is a growing need to examine the jurisdictional complexities and enforceability of restraint of trade clauses across borders. Restraint of trade cases are numerous and, in the context of the above, it is foreseen that there will inevitably be further legal discourse concerning the protection of confidential information in restraint of trade agreements.

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