REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 48711/2011

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

18 May 2017
DATE

SIGNATURE

In the matter between:

EXPERIAN SOUTH AFRICA (PTY) LTD **APPLICANT**

and

HAYNES, ANDREW MICHAEL **FIRST RESPONDENT**

TRANSUNION CREDIT BUREAU (PTY) LTD **SECOND RESPONDENT**

J U D G M E N T

MBHA J:

INTRODUCTION

[1] The applicant seeks final relief to enforce a contractual restraint of trade and confidentiality undertakings given by the first respondent in favour of the applicant. The applicant seeks enforcement of the restraint until 31 January 2013 and throughout the Republic of South Africa.

[2] The first respondent opposes the application. The basis of the opposition is, briefly, that the applicant is not entitled to enforce the restraint of trade in the employment contract, for the following reasons:

'2.1 The restraint is invalid as:

2.1.1 it is in contravention of section 197(2) of the Labour Relations Act 66 of 1995 ("*the LRA*");

2.1.2 it is unreasonable, unfair and unconscionable for the applicant to enforce the restraint;

2.2 alternatively, the restraint of trade was given under duress; and

2.3 the applicant does not have a protectable interest.'

FACTUAL BACKGROUND

[3] The applicant conducts business in the credit information industry. It provides products and services to its customers consisting of juristic persons such as banks, parastatals, government departments, manufacturing concerns and sole proprietors. An example of the applicant's core business is providing information, against payment of a fee, to its customers in relation to the credit status of a customer who has applied for credit at a bank or retailer.

[4] The applicant's head office is based in Bryanston, Gauteng. It also has offices nationwide in Pretoria, East London, Port Elizabeth, Durban and Cape Town which serve as sales hubs to focus on sales in each particular region. A significant number of the applicant's retail and insurance clients are situated in Cape Town. The applicant's data, including details of all its customers wherever they are located within South Africa, the terms and conditions of their contracts with the applicant, the date of expiration and general details in relation to these contracts is located at the applicant's head office. It is common cause that this data was available to the first respondent.

[5] In 2008 the applicant purchased the business of KreditInform (Pty) Ltd ("*KreditInform*"), a credit bureau offering business information services, as a going concern. At the time of the acquisition, the first respondent had been employed by KreditInform, in an executive capacity, for 25 years and held the

position as head of its sales team. On the transfer of KreditInform's business to the applicant, the first respondent's employment was simultaneously transferred to the applicant.

[6] On 28 November 2008, pursuant to the purchase of KreditInform's business, the first respondent entered into a contract of employment with the applicant. Annexed to the contract of employment is a confidentiality agreement which contains various confidentiality clauses and restraint undertakings in favour of the applicant. The restraint *inter alia*, prevents the first respondent from taking up employment, either directly or indirectly, with a competitor of the applicant, within the prescribed territory, being the Republic of South Africa, for a period of twelve months after the termination of his employment with the applicant.

[7] At the time that he took up employment with the applicant, the first respondent was appointed into an executive position and took up a position on the applicant's EXCO. The applicant, at the time, agreed to recognise the seniority of the position the first respondent had held at KreditInform and he was effectively promoted.

[8] On 3 April 2009 the first respondent's job title changed from that of Executive to Senior Executive: Sales and Business Development. As at 31 October 2011, when he resigned from the applicant's employment, he held the position of Senior Executive: Portfolio Sales and headed the applicant's portfolio sales function. Portfolio Sales is a separate business unit of the applicant and comprises 51 full-time employees. This unit consists of two teams, each of which has a separate business focus. The first team, which is the sales team, is responsible for relationships with existing clients, renewing agreements and cross-selling or up-selling the applicant's other products or services to existing clients. The second team is concerned with new business development and primarily focuses on identifying new clients and the sale of the applicant's products and services to those clients. The business development function was created specifically for the purpose of seeking and acquiring new business which the applicant never had previously.

[9] Upon tendering his resignation from the applicant's employment, the first respondent gave the requisite three month's notice and also indicated his intention to take up employment with the second respondent as the executive head of the second respondent's commercial information line of business, with effect from 1 February 2012. It is common cause that the second respondent is a direct competitor of the applicant in the credit information and credit bureau business and is in fact the applicant's biggest competitor. The applicant's main clients such as the major South African banks, insurance companies, retailers and communications companies, are also clients or potential clients of the second respondent. Furthermore, the second respondent has a bigger share of the credit information market in South Africa than the applicant.

[10] The confidentiality agreement I have referred to, and which the first respondent signed on 1 December 2008, provides *inter alia* that the first respondent:

'10.1 shall not directly or indirectly, during the period of the restraint canvas, influence or try to persuade any customer of the applicant to take its custom elsewhere and/or to purchase the services offered by the applicant from any person other than the applicant or its successor;

10.2 will not during the currency of the agreement and within the period of the restraint, whether directly or indirectly, hold any material interest in any business which is or shall be wholly or partly in competition with any of the applicant's businesses;

10.3 will not whether for reward or not, directly or indirectly, carry on or be interested or engaged in or concerned with or employed by any company, any business, person or other legal entity which within South Africa owns, conducts or carries on, whether wholly or partially, a business which competes with or endeavours to compete with the applicant;

10.4 agrees that he has carefully considered the confidentiality and restraint provisions that he will receive significant benefits arising from the conclusion of the employment agreement and that but for the furnishing by him of the restraints provided for in the confidentiality and restraint provisions, he would not have entered into the employment agreement; and

10.5 acknowledges that the applicant's proprietary interests will be prejudiced if he takes up employment or otherwise becomes involved in and associated with the business of another concern which competes or is likely to compete with the applicant.'

[11] Most importantly, the confidentiality agreement records that the first respondent acknowledges that the restraints contained in the agreement are reasonable as to the subject matter, area, and duration and are reasonably required by the applicant to protect and maintain its goodwill and proprietary interests and may be enforced against him, and that the company will suffer financial harm and loss if he breaches any provision of the agreement.

LEGAL PRINCIPLES APPLICABLE TO AGREEMENTS IN RESTRAINT OF TRADE

[12] The *locus classicus* on this subject is *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A), at 897F-898E, where Rabie CJ summarised the legal position *inter alia*, as follows:

'12.1 There is nothing in our common law which states that a restraint of trade agreement is invalid or unenforceable;

12.2 It is a principle of our law that agreements which are contrary to the public interest are unenforceable. Accordingly, an agreement in restraint of trade is unenforceable if the circumstances of the particular case are such, in the court's view, as to render enforcement of the restraint prejudicial to the public interest;

12.3 It is in the public interest that agreements entered into freely should be honoured and that everyone should, as far as possible, be able to operate freely in the commercial and professional world;

12.4 In our law the enforceability of a restraint should be determined by asking whether enforcement will prejudice the public interest;

12.5 When someone alleges that he is not bound by a restraint to which he had assented in a contract, he bears the *onus* of proving that enforcement of the restraint is contrary to the public interest.'

(See also John Saner "*Agreements in Restraint of Trade in South African Law*" Issue 13: October 2011 at 3-5, 3-6.)

[13] These principles have been reaffirmed in other decisions of our courts. In *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 776H-J to 777A-B, Botha JA stated, in a separate judgment, that:

'The incidence of the onus in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade. In regard to these two opposing considerations of public policy, it seems to me that the operation of the former is exhausted by the placing of the onus on the covenantor; it has no further role to play thereafter, when the reasonableness or otherwise of the restraint is being enquired into.'

[14] The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint, bears the *onus* to demonstrate on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.

[15] The test set out in *Basson v Chilwan and Others (supra)* at 767G-H, for determining the reasonableness or otherwise of the restraint of trade provision, is the following:

'15.1 Is there an interest of the one party, which is deserving of protection at the determination of the agreement?

15.2 Is such interest being prejudiced by the other party?

15.3 If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?

15.4 Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?'

[16] In *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* 1999 (1) SA 472 (W) at 484E, Wunsh J added a further enquiry, namely whether the restraint goes further than is necessary to protect the interest.

[17] 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 *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502D-F.

[18] In *Rawlins and Another v Caravan Truck (Pty) Ltd* 1993 (1) SA 537 (A) at 541C-D Nestadt JA, dealing with the issue of a party's relationship with customers, stated that 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. The learned judge referred to Heydon *The Restraint of Trade Doctrine* (1971) at 108, where it is stated that the "*customer contact*" doctrine depended on the notion that "*the employee, by contact with the customer, gets the customer so strongly attached to him that*

when the employee quits and joins a rival he automatically carries the customer with him in his pocket". In *Morris (Herbert) Ltd Saxelby* (1916) 1 AC 88 (HL) at 709, it was said that the relationship must be such that the employee acquires "... *such personal knowledge of and influence over the customers of his employer ... as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection ...*".

[19] It is trite that the law enjoins confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it (see *Townsend Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33 (C) at 53J-54B, *Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 All SA 321 (W) at 333F).

[20] As I have pointed out above, the *onus* is on the respondent to prove the unreasonableness of the restraint. He must establish that he had no access to confidential information and that he never acquired any significant personal knowledge of, or influence over, the applicant's customers whilst in the applicant's employ. It suffices if it is shown that trade connections through customer contact exist and that they can be exploited if the former employee were employed by a competitor. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant, if its former employee were to take up employment, becomes apparent. See *Den Braven SA (Pty) Limited v Pillay and Another* [2008] 3 All SA 518 (D) at paragraphs [17] to [18].

[21] Where an applicant as employer, has endeavoured to safeguard itself against the unpoliceable danger of the respondent communicating its trade secrets to, or utilising its customer connection on behalf of a rival concern after entering that rival concern's employ by obtaining a restraint preventing

the respondent from being employed by a competitor, the risk that the respondent will do so is one which the applicant does not have to run and neither is it incumbent upon the applicant to enquire into the *bona fides* of the respondent, and demonstrate that he is *mala fides* before being allowed to enforce its contractually agreed right to restrain the respondent from entering the employ of a direct competitor (see *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others* 2004 (4) SA 156 (W) at 166I to 167C). In such circumstances, all that the applicant needs do is to show that there is secret information to which the respondent had access, and which, in theory, the respondent could transmit to the new employer should he desire to do so.

[22] The ex-employer seeking to enforce against his ex-employee a protectable interest recorded in a restraint, does not have to show that the ex-employee has in fact utilised information confidential to it: it need merely show that the ex-employee could do so. The very purpose of the restraint agreement is to relieve the applicant from having to show *bona fides* or lack of retained knowledge on the part of the respondent concerning the confidential information. In these circumstances, it is reasonable for the applicant to enforce the bargain it has exacted to protect itself. Indeed, the very *ratio* underlying the bargain is that the applicant should not have to contend itself with crossing his fingers and hoping that the respondent would act honourably or abide by the undertakings that he has given. It does not lie in the mouth of the ex-employee, who has breached a restraint agreement by taking up employment with a competitor to say to the ex-employer "*Trust me: I will not breach the restraint further than I have already been proved to have done*".

FIRST RESPONDENT'S DEFENCES

SECTION 197(2) OF THE LRA

[23] The first respondent contends that the restraint is illegal or invalid by virtue of the provisions of section 197 of the LRA.

[24] As I have stated above, the applicant purchased the business of KreditInform as a going concern, and on 28 November 2008, pursuant thereto, the first respondent entered into a contract of employment with the applicant. The first respondent contends that s 197 of the LRA is applicable to the transfer of his employment to the applicant having the effect of transferring the exact same terms of his existing contract of employment with KreditInform to the applicant, without the need for him to sign a new contract of employment. The absence of a restraint while employed with KreditInform, so the argument continued, resulted in the applicant not being bound to a restraint upon taking up employment with the applicant. It was contended further that the applicant, in contravention of section 197(2) of the LRA, only entered into the employment contract and recognized the first respondent's seniority in return for him entering into the employment contract and agreeing to the restraint of trade.

[25] The first respondent submits that the applicant was on the transfer of KreditInform's business to it, obliged to take over the first respondent's employment on the conditions applicable between first respondent and KreditInform, which did not include a restraint of trade. As such, the applicant was not entitled to impose additional "*onerous conditions*", such as a restraint of trade, preventing the first respondent from working in the credit information business in which he has been involved in excess of 25 years, anywhere in South Africa for a year in return for employing the first respondent. The first respondent submitted that as the restraint is the fruit of a contravention by the applicant of section 197(2) of the LRA, it constitutes an immoral contract, offends the *boni mores* that violates public policy and it would be unreasonable, unfair and unconscionable to enforce the restraint.

[26] Section 197(2) of the LRA provides:

'*If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –*

(a) *the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;*

(b) *all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;*

(c) *anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and*

(d) *the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.*'

[27] As is clear from its provisions, s 197(2) of the LRA provides *inter alia*, that if a transfer of a business takes place, unless otherwise agreed in terms of s 197(6) of the LRA, all the rights and obligations between the old employer and the employee, at the time of transfer, continue to be in force, as if they had been rights and obligations between the new employer and the employee. However, this section must be read together with s 197(3)(a) which provides that the new employer complies with s 197(2) of the LRA, if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.

[28] The intention of s 197(2), undoubtedly, is that in the absence of agreement between the new employer and employee, no greater or lesser reciprocal rights and obligations can be imposed or conferred upon the employee and the new employer. In a unanimous judgment, the full court per Foreman J (as he then was) in *Securicor (SA) (Pty) Ltd and Others v Lotter and Others* 2005 (5) SA 540 (E) at paragraph [10] held,

'Section 197 of the Labour Relations Act makes inroads on the common-law principle that a contract of employment may not be transferred without the consent of the employee, but it does not, in my view, confer any greater or lesser reciprocal rights and obligations upon either the employee or new employer than that which existed between the employee and the old employer ... its provisions are aimed at facilitating commercial transactions on the one hand while at the same time protecting workers against unfair job losses. Its effect is 'that "the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment"; that the rights and obligations between the old employer and the worker are transferred to the new owner; that the transfer does not interrupt the continuity of employment; and that the employment contract "continues with the new employer as if with the old employer" '. Put another way, its effect is not upon the content of the rights and obligations existing at the time of transfer of a business, but on the identity of the person or legal entity against whom the rights may be enforced and to whom the obligations are now owed.'

(See also *Telkom SA Ltd and Others v Blom and Others* 2005 (5) SA 532 (SCA) at paragraphs [9] to [10].)

[29] As can be seen, nothing contained in s 197 of the LRA prohibits parties, at the time of a transfer of a business as a going concern or thereafter for that matter, concluding a fresh agreement regulating their rights and obligations. Moreover, nothing contained within section 197 indicates that an agreement, consensually and voluntarily entered into between a new employer and an employee, as has happened in this case, at the time of the transfer of a business as a going concern, is illegal. In my view the purpose of s 197(2) is simply to ensure that, as a default position, employees, who find themselves in the position where the business in which they are employed is transferred, are not subjected to terms and conditions which are "*on the whole not less favourable*" than those that applied whilst they were employed by the old employer.

[30] For these reasons, the first respondent's contention that the restraint was invalidly concluded, must fail.

DURESS

[31] The first respondent alleges that the employment contract was delivered to him in the final week of November 2008, and that Kim Jenkins (Jenkins) who was the then managing director of the applicant, as well as a certain Padayatchy, requested him to sign and return it urgently, because the date of the transfer of KreditInform's business to applicant was imminent. He further states that Jenkins had previously made it clear to him that he was left with no choice whether or not to conclude the proposed new employment contract to align with the applicant's terms and conditions of employment, and that he understood all of this to mean that if he did not agree to the restraint, he would lose his senior position and commensurate salary on which he was dependent, and that he would lose his ongoing employment.

[32] The law is clear: a contract concluded as a result of duress can be assailed. In *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 para [36], the court re-affirmed that the party wishing to rely on duress in order to set aside a contract, must allege and prove that there was a threat of considerable evil to the person concerned, or to his or her family, such as to induce a reasonable fear of an imminent or inevitable evil; that the threat or intimidation was unlawful or *contra bonos mores*; and the moral pressure used must have caused damage (see also *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 306A-B).

[33] Flowing from the general principle that an undertaking that is extracted by an unlawful or unconscionable threat of some considerable harm is voidable, is that a form of economic pressure or threat of economic harm could, in appropriate cases, constitute duress, such as to entitle avoidance of a contract. In *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* [2005] 4 All SA 16 (SCA) at para [18], Nugent JA said the following:

'English and American law both recognise that economic pressure may, in appropriate cases, constitute duress that allows for the avoidance of a contract. As pointed out by Van den Heever AJ in Van den Berg & Kie Rekenkundige Beamptes v

Boomprops 1028 BK 1999 (1) SA 780 (T), that principle has yet to be authoritatively accepted in our law. While there would seem to be no principled reason why the threat of economic ruin should not, in appropriate cases, be recognised as duress, such cases are likely to be rare. (The point is underlined by the dearth of English cases in which economic duress was found to have existed.) For it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. I agree with Van den Heever AJ (in Van den Berg & Kie Rekenkundige Beamptes at 795E–796A) **that hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more – which is absent in this case – would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress**.' (emphasis added)

[34] The first respondent's contention that the contract of employment was delivered to him in the last week of November 2008, is patently untrue, in view of the common cause fact that on 14 November 2008, some two weeks before the transfer of the business of KreditInform to the applicant, Jenkins sent an e-mail to the first respondent in which she wrote as follows:

'Please will you make contact with Karthiga (Govender-Padayatchi) if there are any elements within the draft contracts that you would like to discuss with her as well as to confirm finalization details to enable executable versions to be produced for signature. We would like to finalise as soon as possible and want to be sure that any concerns, questions and areas needing clarification are addressed first.'

[35] It is common cause that despite having been expressly asked to provide comments, should he have any issues with the contract, no issues were forthcoming from the first respondent. I therefore cannot accept that the first respondent was presented with his contract of employment in the last week of November 2008 and told to sign it and return it urgently, as he would have it. It is moreover significant that during his entire period of employment with the applicant, at no stage did he question the wording of the restraint agreement. The following factors, in my view, are relevant to show that the first

respondent entered into the new contract of employment with the applicant freely and voluntarily:

35.1 At the time that he took up employment with the applicant, he was appointed at a higher level and a more senior position. He occupied an executive position and was effectively promoted to the applicant's EXCO. The seniority of his position meant that he had greater access to confidential information and customers of the applicant, which quite obviously necessitated a restraint, which previously (at KreditInform) did not arise.

35.2 At the time he took up employment with the applicant he was offered a retention bonus and the terms and conditions of his employment were enhanced in that he received an additional 5 days leave. He also received management training abroad.

[36] It is further significant that the alleged threat to sign the restraint is nowhere to be found in the letter to the applicant, dated 14 November 2011. Nor does he contend that the applicant misrepresented the position to him. On the contrary, he indicates in the said letter that he will be subject to a retention scheme and that he was being offered a "*new position*" in a "*new company*". But it goes further: in his letter of resignation dated 31 October 2011, one likewise looks in vain for any reference to any untoward conduct by the applicant.

[37] Even if I were to accept that some pressure was exerted on the first respondent to sign the contract, such, in my view, would be no more than ordinary '*hard bargaining*' as referred to by Zulman J in *Medscheme Holdings (supra)*, to secure his services. This can hardly, in my view, amount to a form of duress.

[38] I therefore conclude that the first respondent in fact signed the restraint agreement consensually and voluntarily, without demur and his contentions to the contrary are accordingly rejected.

APPLICANT DOES NOT HAVE A PROTECTABLE INTEREST: CONFIDENTIAL INFORMATION IN THE PUBLIC DOMAIN

[39] The first respondent contends that information to which he had access whilst employed by the applicant is not confidential in that it is all in the public domain in that *inter alia*. it is made known to customers of the applicant and can accordingly be obtained from them; the information is made known to the applicant's entire sales team consisting of approximately 40 persons; the manner in which the applicant packages its credit information and its value added services is known to all its customers and thus not known to a restricted number of people. The first respondent contends further, that the deponent to the founding affidavit has herself described the credit information business as incestuous in that all credit bureaus gather credit information and sell it to their customers, and that all customers that require credit information are generally well known and are shared amongst the credit bureaus.

[40] The first respondent accordingly submits that the applicant has failed to demonstrate in reasonably clear terms that any of its information, know-how, technology or method is something peculiar to it and which is not public property or public knowledge, and that in truth, the applicant is merely seeking to prevent competition, which is something it cannot do. In any event, the first respondent so submits, his position with the applicant did not provide him with the opportunity to access any confidential information.

[41] As I have mentioned the first respondent was appointed by the applicant at a high level and in a more senior position. At the time of his resignation from the applicant's employ, the first respondent held the position of Senior Executive: Priority Sales and he reported to the applicant's managing director. The first respondent managed a team of approximately 51 full-time employees and they were responsible for acquiring new business for the applicant and ensuring the renewal of existing contracts. The new business

team of which the first respondent was ultimately responsible, was responsible for finding new clients and thereafter passing these clients on to the sales team whose function was to build a relationship with them for further cross-selling and up-selling of the applicant's products. Significantly, the new business development team was established to aggressively chase business the applicant had not enjoyed.

[42] The first respondent describes his role while employed with the applicant and KreditInform before it in his Linked-In profile, attached to the applicant's replying affidavit, as follows:

'42.1 *Executive manager and overseer of various sales channels including more than 60% of the company revenue responsibility, member of the executive committee, full staff recruitment, development and support, CRM project owner and manager, customer loyalty support manager;*

42.2 *Executive manager of sales teams, 100% revenue responsibility, marketing and brand, CRM projects, staff responsibility, appointed section 24 manager in terms of Employment Equity, alternate director, member of executive/management committees;*'

Concerning his skills and expertise, the first respondent notes in his Linked-In profile that those included inter alia, sales management, marketing communications, customer relations, sales process and key account management.

[43] In my view, the seniority of the first respondent's position resulted in him having access to and coming into possession of the applicant's confidential information. It suffices to refer, for example:

'43.1 He had access to the applicant's two IT systems, the "*CRM on Demand*" and the "*Sales System*" in order to track and monitor the progress of a sales opportunity or to review an existing client's pricing, value of contract, termination date, services rendered and sales information;

43.2 He attended meetings of the applicant's Executive Team at which confidential strategic information was discussed. In fact, in relation to Exco meetings, he admits that he was privy to matters regarding financial feedback, key performance indicators and the status of outstanding debtors;

43.3 He attended strategic initiatives meetings at which strategic key projects were identified and the details of projects already delivered were discussed;

43.4 He attended client meetings where he met with key individuals from certain of applicant's major clients for example Mercedes Benz, and also attended applicant's EMEA strategy workshops and strategy sessions; and

43.5 He had access to the applicant's strategic documents including documents relating to customers which the applicant intended targeting, which customer contracts were up for renewal, new products that the applicant sought to launch, packaging and pricing of existing and new products, possible expansion into new markets and to applicant's confidential information in relation to suppliers.'

[44] All of the above, in my view, constitute confidential information which is proprietary to the applicant and which it is entitled to protect. It follows that first respondent's contention that this information to which he had access whilst employed by the applicant is not confidential cannot be sustained. In any event, the contention is legally untenable in that it is clear from several reported judgments on this issue, that irrespective of whether or not information is in the public domain, the fact that the first respondent has obtained such information within the context of a confidential relationship means that it in fact is protectable. In *Multi Tube Systems v Ponting and Others* 1984 (3) SA 182 at 189C-E, Broome J quoted from *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* 1960 RPC 128, as follows:

'*As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person* ***who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public*** ...

Therefore, the possessor of the confidential information still has a long start over any member of the public.' (emphasis added)

Moreover, in *Van Castricum v Theunissen and Another* 1993 (2) SA 726 at 731F-H, Roos J held that:

'*What is clear from the aforesaid, is that someone who saves himself the trouble of going through the process of compilation of the document,* ***even where it is compiled from information which is available to anybody, such a person would be interdicted if that information had been obtained in confidence****. The reason is simply that confidential information may not be used as a springboard for activities detrimental to the person who made the confidential information available. It would remain a springboard even when all the features have been published or can be ascertained by actual inspection by any member of the public.*' (my emphasis)

[45] The first respondent also admits in his supplementary answering affidavit that he had access to confidential information of the applicant including *inter alia*, that he knew that certain customers of the applicant, including Telkom, required the vetting of large batches of records on prospective customers, that he knew which of the applicant's customers were poor payers and further knew the applicant's strategy to deal with this, as well as customer complaints. He moreover concedes that certain documents containing Portfolio Sales Channel Forecasts for the applicant's financial year ending 2012, were prepared by his team.

[46] That being so, even if it were to be found that this information was already in the public domain, I am of the view that the first respondent should be interdicted from using it, given that he obtained it in a confidential relationship as an employee of the applicant.

CUSTOMER CONNECTIONS

[47] The first respondent claims that he had no customer connections alternatively, that the applicant has not established that first respondent built up a particular relationship with any of applicant's customers so that when he

left applicant's employ, he could easily induce the customers to follow him to his new employer. The first respondent submits accordingly, that the applicant has failed to establish any customer connection worthy of protection.

[48] It is common cause that at the time of his resignation from the applicant's employ, the first respondent was the Senior Executive, Portfolio Sales, and together with his team he was responsible for acquiring new business and ensuring the renewal of existing contracts. Accordingly he and his team had access to applicant's clients and potential clients and obviously developed relationships with them and of necessity also developed relationships with key decision makers employed by certain of the applicant's customers. It is also common cause that during his tenure of employment with the applicant, first respondent facilitated certain client conferences which were either sponsored or co-sponsored by the applicant. An example is the National Credit Controllers Conference for Credit Controllers which was held on 14 October 2011. He was also instrumental in facilitating the Credcon conference held from 10 to 13 November 2011 in Swaziland which was co-sponsored by the applicant and the Transvaal Credit Protection Association. Apparently the first respondent was instrumental in even selecting the clients to be invited and was also involved in compiling the agenda for this conference. Clearly, the first respondent held all these customer connections on behalf of the applicant.

[49] In his Linked-In profile, the first respondent indicates that on 17 February 2012, after he commenced employment with the second respondent, he met with Jacqui Jooste, the Operations Director of Coface South Africa, one of the applicant's biggest clients. He also made contact with Pieter Buitendag, the legal executive of Debtsource another large client of the applicant. According to the first respondent's Linked-In profile, this connection was formed at the beginning of January 2012 and after the first respondent had left the applicant's employ. Most importantly, in his supplementary affidavit first respondent admits that Pieter Buitendag contacted his Linked-In profile 11 days prior to 17 February 2012 and that on 26 August 2011 he had a lunch

meeting with Mark Henderson, the head of Credit of Telkom, also a major client of the applicant.

[50] In my view, the entries in first respondent's Linked-In profile show that he is making contact with key role-players at applicant's clients. Having first denied knowledge of any connection with applicant's customers in his answering affidavit, he now admits that he did meet some of them as I have shown above. His conduct in my view, affirms the necessity for the restraint which the applicant seeks to enforce. Significantly, at the hearing of this matter on 29 February 2012, it was argued on behalf of the first respondent that there is commonality in the customers of the applicant and the second respondent. This argument was presented in an attempt to show that the first respondent was not in breach of his restraint by dealing with or contacting customers of the applicant in as far as they were also customers of the second respondent. During the argument and upon me seeking clarification on the issue concerning a company called Coface, the first respondent volunteered from the gallery that this company was also a customer of the second respondent. Clearly, this reply was intended to show that there was nothing untoward with first respondent making any contact with Coface. However, upon delivering his supplementary answering affidavit, the first respondent conceded that Coface was in fact no longer a customer of the second respondent.

[51] In my view this attempt by the first respondent to bolster his case was both reckless and opportunistic, and demonstrates a mendacity on his part which validly heightens the applicant's concerns and its need for the relief sought in this matter. The restraint undertakings given by the first respondent in favour of the applicant prohibit the solicitation of "*Prescribed Customers*" during the restraint period which phrase is defined to mean "*any person or entity who is or was a client of the applicant at the termination date*". It is accordingly irrelevant, in my view, that there may be an overlap in the clients of the applicant and the second respondent.

[52] An argument was also advanced on behalf of the first respondent that Jacqui Jooste and Pieter Buitendag contacted first respondent and not the

other way round and that, accordingly, he cannot be said to have attempted to solicit these clients. This argument is devoid of merit: it has been held that it makes no difference whether or not an employee contacts the customers of his ex-employer or whether such customers contact him. Both forms of conduct amount to solicitation of the customers of the ex-employer which is impermissible during the restraint period. Moreover, it was held by Nestadt JA in *Rawlins* (542F), that the fact that an employee deals during his employment with a "*pre-existing following*" of customers does not establish that an employer does not have a proprietary interest in such customers, given that an employee may "*form an attachment to and acquire an influence over these customers which he never had before*" by virtue of his employment with his employer. When this happens, the customer goodwill so created or enhanced is an asset of the employer.

[53] The first respondent's argument that his position with the applicant did not afford him access to customer connections and confidential information cannot be sustained. As I have already pointed out, the first respondent was employed by the applicant at a senior level as a senior executive. In matters concerning restraint agreements, the seniority of the employee is an important consideration. In *Pest Control (Central Africa) Ltd v Martin and Another* 1955 (3) SA 609 (SR) at 613G, the court noted:

'It must be remembered that the respondents were senior officials in the inner councils of the applicant Company. ... A restriction, which would be absurd when imposed upon a junior engineer in a huge concern, might be perfectly reasonable in the case of a general manager with the whole business at his finger tips.'
(See also *Dickinson Holdings (Group) (Pty) Ltd v Du Plessis* 2008 (4) SA 214 (NPD) at 226G to 227AI.)

[54] I have accordingly considered the role played by first respondent in the applicant's operations in weighing up whether or not the restraint concluded by him with the applicant ought to be enforced. As I have set out above, there is no dispute that first respondent was a senior employee. One only has to have regard to his *Curriculum Vitae* which appears in his Linked-In profile to

conclude that first respondent was a senior employee who was steeped in the business of the applicant and was privy to and possessed of its confidential information and customer connections.

[55] I am satisfied that the applicant has discharged its *onus* of proving the existence of the contract in restraint of trade, and that the first respondent is in breach of the contract in restraint of trade in that he has taken up employment with a direct competitor of the applicant, being the second respondent. In addition, the applicant has shown that the first respondent has contacted customers of the applicant via his Linked-In profile and has accordingly demonstrated the need for the relief that it seeks.

IS THE AREA OF ENFORCEMENT OF THE RESTRAINT UNREASONABLE?

[56] The first respondent challenges the area of enforcement of the restraint and alleges that it is unreasonable as it operates nationwide.

[57] As I have already shown the applicant, although its head office is based in Bryanston, Gauteng, it has offices countrywide. Whilst a number of applicant's retail, banking and insurance clients are situated outside of Gauteng, the applicant's data including details of its customers wherever they are located, were available to first respondent and there is no question that he would have had contact with these customers and would know their needs, the terms and conditions of their contracts, the date of expiration of their contracts and so forth. In any event, in clause 62 of the restraint agreement the first respondent acknowledged that the restraints contained in the agreement are reasonable as to subject matter, area, and duration and are reasonably required by the applicant to protect and maintain its goodwill and proprietary interests and may be enforced against him. Significantly, in clause 63 of the agreement the first respondent acknowledged that the applicant will suffer financial harm and loss should he be in breach of any provision of the agreement, and that upon the breach of any of these provisions, the applicant

shall be entitled to enforce the restraint and, in addition, be entitled to claim and recover damages from him.

THE APPLICATION TO STRIKE OUT

[58] The first respondent's application to strike out the applicant's replying affidavit cannot succeed. This is in relation essentially, to the contents of the first respondent's Linked-In profile that I have referred to and which only came to the applicant's knowledge after it had delivered its founding affidavit. It is common cause that the applicant accessed the first respondent's Linked-In profile on 17 February 2012, after the first respondent had signed his answering affidavit. Accordingly it cannot, in my view, be subject to the applicant's striking out application as it is not new matter in reply but rather facts that came to light after the founding affidavit was delivered. In any event, the first respondent does not challenge the correctness of the contents of this document.

REQUISITES FOR A FINAL INTERDICT

[59] It is well established that a court granting a final interdict, must be satisfied on three essential requisites: firstly, a clear right; secondly, an injury actually committed or reasonably apprehended, and, thirdly, the absence of any other satisfactory remedy (see *Setlogelo v Setlogelo* 1914 AD 221, *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)).

[60] I am satisfied that the applicant is entitled to final relief as sought as it has shown a clear right which is being infringed by the first respondent in commencing employment with the second respondent, in breach of the agreement, on 1 February 2012. An injury therefore has been committed or is reasonably apprehended and no other satisfactory remedy is available.

I accordingly make an order as follows:

1. The first respondent is interdicted and restrained for a period of 12 (twelve) months ending on 31 January 2013, and in the Republic of South Africa, from -

1.1 remaining in the employ of the second respondent or any other competitor of the applicant;

1.2 holding any material interest in any business which is or shall be wholly or partly in competition with any of the applicant's businesses; and/or

1.3 carrying on or being engaged, concerned or interested in or employed by or solicit business for; and/or

1.4 being a proprietor of or director, shareholder, member or partner in; and/or

1.5 acting as a consultant, trustee, manager, senior manager, executive, agent, representative, partner, advisor, officer or in any other capacity to; and/or

1.6 whether for reward or not, directly or indirectly, carry on or be interested or engaged in or concerned with or employed by any company, any business, person, close corporation, partnership, trust, body corporate or incorporate, association or other legal entity within the Territory owns, conducts or carries on, whether wholly or partially, a business which competes with or endeavours to compete with the applicant;

1.7 soliciting or assist in soliciting in competition with the applicant the custom or business or any of the applicant's clients or Prescribed Customers;

1.8 furnishing any information or advice (whether oral or written) to any person or business entity in the Prescribed Territory which sells Prescribed Goods or goods in competition with the Prescribed Goods or renders the Prescribed Services or services in competition with the Prescribed Services;

1.9 furnishing any information or advice (whether oral or written) to any person or business entity or use any other

means which could result in any such Prescribed Customer terminating its association with the applicant and/or transferring its business to any person other than the applicant.

1.10 soliciting orders from Prescribed Customers for Prescribed Goods or any goods in competition with the Prescribed Goods and/or Prescribed Services or any services in competition with Prescribed Services;

1.11 canvassing business in respect of Prescribed Goods or any goods in competition with Prescribed Goods and/or Prescribed Services or any services in competition with the Prescribed Services from Prescribed Customers;

1.12 selling or otherwise supply any Prescribed Goods or any goods in competition with Prescribed Goods to any Prescribed Customer;

1.13 rendering any Prescribed Services or any services in competition with the Prescribed Services to any Prescribed Customer;

1.14 accepting or facilitating the acceptance of or deal with in competition with the business of the applicant, the custom or business of any relevant client at any time and with whom the first respondent has had personal dealings or contact;

1.15 disclosing to any person, form or company or make use of any Confidential Information in relation to the supply to the applicant from any suppliers who have been supplying materials or services to the applicant at any time;

where:

1.15.1 "*Company's business*" means the business carried on by the applicant at the date of signing of the confidentiality agreement as well as at any relevant time thereafter while the first respondent is employed by the

company and includes, but is not limited to, the business of credit checks, designing software programmes and distributing credit information.

1.15.2 "*Prescribed clients*" means any person or entity:

1.15.2.1 who is or was a client of the applicant at the termination date;

1.15.2.2 who is or was a prospective client of the applicant at the termination date and with whom the first respondent interacted with a view to conducting business with the applicant within a period of six (6) calendar months preceding the termination date;

1.15.2.3 who purchased Prescribed goods from the applicant within a period of six (6) calendar months preceding the termination date; and

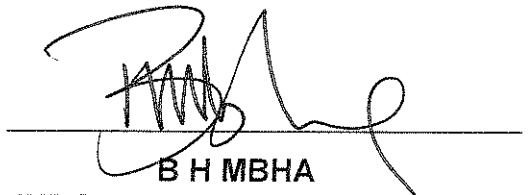
1.15.2.4 to whom Prescribed Services were rendered by the applicant within a period of six (6) calendar months preceding the termination date.

1.15.3 "*Prescribed Goods*" means any goods (including intellectual property) which are manufactured, developed, sold, rented, marketed, designed or distributed by the applicant in the ordinary course of the company's business.

1.15.4 "*Prescribed Services*" means any services rendered by the applicant in the ordinary course of the company's business including but not limited to the sale, installation, rental, hire, design, maintenance and/or support of the Prescribed Goods.

2. The application to strike out the applicant's replying affidavit is dismissed with costs, such costs to include the employment of two counsel.

3. The first respondent is ordered to pay the applicant's costs, such costs to include the employment of two counsel.



B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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INSTRUCTED BY	***GOLDMAN JUDIN INC***
MATTER HEARD ON	***28 FEBRUARY AND 9 MARCH 2012***
DATE OF JUDGMENT	***18 MAY 2012***