REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 20743/2022

In the matter between:

CRAZY SPLASH SWIM SCHOOL (PTY) LTD REGISTRATION NUMBER 201[…]	**Applicant**
And	
TALITHA NORTJE	**First Respondent**
WORCESTER AQUATICS	**Second Respondent**
LANE LEADER TEAM STELLENBOSCH	**Third Respondent**

Heard: 19 May 2023

Delivered: 13 July 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII. The date and time for hand-down is deemed to be 13 July 2023 at 10h00.

JUDGMENT

LEKHULENI J

[1] This is an opposed application in which the applicant seeks to enforce an alleged restraint of trade agreement against the first, second, and third respondents (jointly referred to as "the respondents"). The applicant seeks an interdict against the respondents restraining the first respondent from rendering swimming services within the Worcester area, Western Cape Province, within a radius of 50km thereof for two years. The applicant contends that the restraint of trade was expressly agreed orally in the employment contract concluded between the applicant and the first respondent.

[2] The first respondent opposed the relief sought and averred that there was no restraint of trade applicable to her employment with the applicant. In the event that this court finds that there was a restraint of trade in place, the first respondent denied that same is reasonable and enforceable. The second and third respondents did not oppose the applicant's application, and they did not file any opposing papers.

[3] The matter served before this court in the urgent court on 15 December 2022. However, the application did not proceed on the said day. Instead, the parties agreed on a timetable that regulated further filing of papers, and the hearing was postponed to 23 May 2023 on the opposed roll.

The Parties

[4] The applicant is a company duly incorporated in terms of the Company law of South Africa. It has its registered place of business at Langeruskool, Distillery Street, Worcester. The applicant is doing business as a swim school in Worcester and the surrounding area as far as Ceres.

[5] The first respondent is Talitha Nortje, an adult female swimming instructor residing in Worcester, Western Cape Province. The applicant employed the first respondent as a swimming instructor in March 2016, and the latter resigned from her employment on 08 November 2022.

[6] The second respondent is Worcester Aquatics, a competitive swimming club in Worcester.

[7] The third respondent is Lane Leader Team Stellenbosch, a competitive swimming club offering services of professional swim coaching to its members, situated at HMS Bloemhof, Koch Krigeville, Stellenbosch, also rendering services in Worcester as of 1 December 2022.

The Factual Background

[8] The first respondent took up employment with the applicant as a swimming instructor in March 2016. At that time, Ms Ingrid Van der Westhuizen ("Ms Van der Westhuizen") was the sole director of the applicant. At that time, the first respondent only had a verbal contract of employment with the applicant. In August 2020, Ms Carla Kock ("Ms Kock"), who was also an employee of the applicant, bought 100 percent of the shares in the applicant as a going concern from Ms Van der Westhuizen. Before she bought the business, the applicant also employed Ms Kock as a swimming instructor.

[9] In her founding affidavit deposed to on behalf of the applicant, Ms Kock avers that during her employment with the applicant, before she became the sole owner, the previous owner Ms Van der Westhuizen, on numerous business gatherings, informed the applicant's group of employees, which included the first respondent, of the restraint of trade existing in the employment relationship between the applicant and its employees. Ms Van der Westhuizen also explained the consequences of this restraint of trade provision to the applicant's employees. According to Ms Kock, the first respondent never objected to this term being part of her verbal employment agreement with the applicant. In terms of that restrain covenant, the respondent and all other employees of the applicant agreed that they would not compete directly or indirectly with the applicant as employees or in any other position for the next two years in a radius of 50 Kilometres.

[10] All employees that were employed with the applicant at the time Ms Kock obtained ownership of the applicant continued their employment after she took over the business. She subsequently took over their employment contracts, either it being in writing or verbal agreements in terms of section 197 of the Labour Relations Act 66 of 1995 ("the LRA"). After she took over the company, Ms Kock avers that she noticed that the employment contracts of the employees were not comprehensive enough and some of the employees, such as the first respondent, did not have a written employment contract.

[11] Ms Kock asserted that the applicant's labour broker, Ms Elizabeth Verwoerd ("Ms Verwoerd"), sent a written employment contract to the first respondent in April 2021. However, the latter objected to the content of the contract before signing it. The first respondent emailed the applicant's labour broker, Ms Verwoerd, and questioned the content of the contract; in particular, the first respondent objected to the inclusion of the restraint of trade clause in the contract. The first respondent refused to sign the contract and averred that the inclusion of the restraint of trade in the employment contract she was furnished with was a unilateral change to the terms of her employment contract. In response, the applicant's labour broker informed the first respondent that the inclusion of the restraint of trade was not a unilateral insertion as the first respondent's employment contract with the previous owner also had a restraint of trade clause.

[12] On 07 November 2022, the first respondent informed Ms Kock in a WhatsApp correspondence that she was willing to sign an employment contract on the same terms and conditions she had with the previous owner Mr Van der Westhuizen. Ms Kock informed the first respondent that a restraint of trade existed in the terms and conditions of the first respondent's employment contract with the previous employer. Subsequent to that, the first respondent resigned from the applicant the following day, 08 November 2022.

[13] The applicant contends that on 08 November 2022, the first respondent proceeded to copy the contents of her written resignation and sent it by WhatsApp to the clients /parents of the database of the applicant, confirming that she resigned and that she would now continue to coach swimming privately on her own. The first

respondent also proceeded to advertise her coaching on social media as *Let's Swim* in conjunction with Worcester Aquatics, the second respondent. The applicant then approached an attorney who addressed a letter of demand to the first respondent to refrain from breaching the terms of the employment contract (restraint of trade) and to remove all the advertisement posted on social media.

[14] The first respondent acknowledged receipt and did not adhere to nor comply with the demand. She still proceeded to coach swimming at the swimming pool of Drotsky, which is not the pool where the applicant's swimmers swim. The first respondent did not remove the advertisement of her coaching from social media - Facebook.

[15] Thereafter, the applicant proceeded to launch an *Ex parte* application on an urgent basis on 13 November 2022 at Worcester Magistrates Court in terms of section 30 of the Magistrates Court 32 of 1944 for an order prohibiting the first respondent from breaching the implied restraint of trade. As it happened, the court subsequently granted an interim order. However, the order was anticipated, and the applicant withdrew her application as the applicant's legal representative after reading articles, discovered that a Magistrates Court did not have jurisdiction to have granted the interdict the applicant applied for on 13 November 2022. Thereafter, the parties engaged in settlement negotiations, but the matter remained unresolved.

[16] The applicant then approached this court for an order that the first respondent complies with the alleged explicit restraint of trade contained in the verbal employment agreement between herself and the applicant by terminating all swim coaching, either in the swimming pool or on land, by herself or within a radius of 50 km from Worcester. The applicant also seeks an order that the first respondent refrains from advertising her swim school, being *Let's Swim,* in conjunction with the second respondent, alternatively, any other swim coaching by herself, on social media, albeit WhatsApp, Facebook, or Instagram. In addition, the applicant seeks an order that the second respondent refrains from allowing the first respondent to exercise coaching in conjunction with it and that the third respondent refrains from allowing the first respondent to coach any swimming in breach of the existing restraint of trade provisions.

[17] The applicant also filed the affidavit of Ms Van der Westhuizen (the previous owner) in which she confirms that although the first respondent did not sign a written employment contract, she had a proper knowledge of the contents and terms of the employment agreement, more specifically, the restraint of trade clause. She also confirmed that she discussed, informed, and explained the contents and consequences of the restraint of trade clause to the applicant's employees at numerous gatherings/meetings where the first respondent was also present.

[18] On the other hand, the first respondent avers that she cannot specifically recall whether the erstwhile owner of the applicant (Ms Van der Westhuizen) mentioned restraint of trade provisions during any meeting with other employees. As this was not a term of her employment, and as she never agreed to be bound by a restraint of trade, any discussion in respect thereof could not apply to her. The first respondent contends that she never signed a written contract of employment with the erstwhile employer. However, the basic terms of her employment were agreed upon, such as working hours, leave, remuneration, and the employment conditions contained in the relevant legislation.

[19] The first respondent asserted that her verbal contract of employment with her erstwhile employer did not contain a restraint of trade clause. She averred that she never agreed to any restraint of trade during the entire duration of her employment with the applicant, nor was she specifically requested to agree to it prior to Ms Kock becoming the owner of the applicant. She would not agree to such a clause, as she is a swimming instructor, and this is her only means to generate an income.

[20] When she started working for the applicant in March 2016, she simultaneously worked under the second respondent. The clients (being children) of the applicant would pay a monthly fee to it, and she would coach them. As soon as a child showed progress, they would be registered to start swimming galas under the second respondent. The first respondent asseverated that the applicant was at all times aware of this and, in fact, orchestrated it. The first respondent also contends that it is entirely unclear to her on what basis the applicant seeks to enforce a non-

existent restraint of trade against her and interdict the second respondent from continuing to work with her.

[21] In her view, when Ms Kock bought the applicant as a going concern, the existing contracts of employment had to remain in place in terms of section 197 of the LRA. With the advice of her legal representatives, she refused to sign the contract that the labour broker Ms Verwoerd sent her as it introduced a restraint of trade clause which was not previously contained in her employment terms with the applicant. In this regard, she emailed the labour broker that she did galas under the second respondent and private lessons, which would not be possible with a restraint to trade.

[22] The respondent further stated that Ms Verwoerd confirmed in writing to her that the restraint of trade was a new inclusion that needed to be negotiated. Ms Verwoerd mentioned to her that the erstwhile employment contract contained a restraint of trade clause which was not as defined as the new one, but that there was no written employment contract of the first respondent. The first respondent then informed the applicant – Ms Kock, that she was only willing to agree to the same terms of employment and that she will not agree to additional terms, specifically the restraint of trade. She further stated that she informed the applicant that if the applicant could not offer her employment on the same terms, it could rather offer her a separation package.

[23] Ms Kock, in response, delivered a message to the first respondent in which she stated that there was never consensus about the first respondent's employment terms with the erstwhile owner, but that she knew for a fact that there was a restraint of trade in place. As there was no consensus, Ms Kock informed the first respondent that a new contract of employment was required. The first respondent further stated that due to the pressure, threats, and harassment that was caused by her refusal to agree to the restraint of trade provisions, she resigned from the applicant with immediate effect on 8 November 2022. She sent her resignation letter to Ms Kock, to another employee of the applicant, and to three parents that had scheduled lessons on the day of her resignation. She denied that she enticed or solicited any of the

applicant's clients to join her and to cancel their contracts with the applicant. She simply stated that if they so elect, they are welcome to.

[24] The first respondent further alluded that since 2016, swimming has been her sole source of income and is her only way of being economically active and productive. According to her, the applicant has no goodwill or confidential business information that requires protection. She cultivated her relationship with certain parents of the children she taught, did not retain or take any list of the applicant's clients, and is advertising her services on her social media without reference to the applicant. Furthermore, many of the children that are clients of the applicant were already clients of the second respondent, and many more will move over once they progress and start swimming galas.

Submissions by the Parties

[25] Mr Van Loggerenburg, who appeared for the applicant, argued that the first respondent expressly agreed to a restraint of trade in the oral contract of employment she had with the applicant. Counsel submitted that the material facts that are determinative of this entire application are hinged in paragraph 9 of the applicant's founding affidavit in which Ms Kock averred that during her employment with the applicant and before she became the sole owner of the applicant, the previous owner Ms Van der Westhuizen, on numerous business gatherings informed the group of employees, which included the first respondent of a restraint of trade existing in the employment relationship between the applicant and its employees. In response to this averment, Counsel argued, the respondent stated that she could not recall any meeting in which the erstwhile owner discussed restraint of trade clauses regarding their employment with the applicant.

[26] To this end, Counsel submitted that the first respondent does not deny that a restraint of trade covenant was discussed or mentioned during the meetings with other employees of the applicant. Counsel further contended that the first respondent's failure to deny the submissions made by both Ms Kock and Ms Van der Westhuizen that a restraint of trade provision was mentioned, amounts to a concession on the first respondent's part of her inability to refute the evidence

presented by the applicant and Ms Van der Westhuizen. Counsel further submitted that a failure on the part of the respondent to object to the discussed or mentioned restraint of trade covenant, created an implied restraint of trade according to the terms that were discussed with other employees present during the meeting.

[27] Counsel further submitted that the first respondent, for the first time from the inception of her employment with the applicant, took issue with the existing restraint of trade provision after Ms Kock wanted to have this term recorded in writing. Notwithstanding, the first respondent remained employed by the applicant from 31 March 2020 to 08 November 2022. At that time, the applicant already had written contracts of employment incorporating restraint of trade agreement in respect of all other employees, save for the first respondent, who, due to oversight, only had an oral employment agreement. It was submitted that this renders the first respondent's version inherently improbable.

[28] In addition, Mr Van Loggerennberg argued that the first respondent had access to confidential information that was only disclosed to her in confidence as a potential purchaser of the applicant, as a going concern. The first respondent, however, never ended up purchasing the applicant. Instead, she remained employed and eventually resigned and immediately started to compete with the applicant. Therefore, pursuant to what the courts have referred to as 'spring-boarding,' the applicant is entitled to restrain the first respondent for a reasonable period of 24 months within a trade and designation geographical area to put the first respondent in the position she would have been in had it not been for her spring-boarding her business from the goodwill, database of the applicant.

[29] Meanwhile, Ms Bosch, on the other hand, who appeared on behalf of the first respondent, submitted that the first respondent disputes that her oral contract of employment with the applicant contained a restraint of trade agreement or that she was requested to agree whether expressly or through her conduct, to the provision of a restraint of trade covenant. The restraint of trade was introduced to her contract of employment for the first time in April 2021, when she received the written contract from Ms Kock. The restraint of trade clause did not form part of the first respondent's

employment contract before Ms Kock bought the business; hence, the first respondent objected to the inclusion thereof.

[30] Ms Bosch submitted that the first respondent refutes that she was ever requested to agree to a restraint of trade, and any discussion with other employees, who may have consented thereto, did not apply to her terms of employment with the applicant. In light of the fact that the first respondent did not have a restraint of trade in place, Counsel argued that her failure to object thereto during meetings with other employees is of no consequence. Ms Bosch further submitted that there would be no reason for an employee to object to an employment term that is not applicable to her.

[31] In expanding her argument, Ms Bosch contended that the first respondent was working under the second respondent since the outset of her employment with the applicant and offering private lessons. As a result, a restraint of trade could not apply to her contract of employment. In addition, Counsel argued that in support of this, the applicant's labour broker confirmed in writing that the first respondent works for and receives an income from the second respondent, which is totally separate from the applicant.

[32] Ms Bosch argued that the submission by the applicant's Counsel that the first respondent remained employed by the applicant from 31 March 2020 to 08 November 2022, despite the impasse, rendered the first respondents' version improbable, as meritless. This is so, Counsel argued, because when Ms Kock delivered the written contract of employment to the first respondent in April 2021, the respondent had some questions before she was willing to sign. Thereafter, the respondent emailed the applicant's labour broker and explicitly objected to the inclusion of the restraint of trade clause.

[33] Ms Bosch contended that the first respondent considered the restraint of trade clause as a unilateral change to the terms of her employment. Furthermore, the first respondent objected to the inclusion of the restraint of trade clause from the outset because it was not contained in her previous employment contract. Counsel implored the court to dismiss the applicant's application with costs.

ISSUES TO BE DECIDED

[34] Pursuant to the discussion set out above, this court, in my view, is enjoined to determine the following two disputed issues:

34.1 Whether there was a restraint of trade clause, explicitly or implied, to the respondent's contract of employment with the applicant;

34.2 If such a restraint of trade was in place, whether or not such a restraint of trade covenant was reasonable and enforceable.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[35] For convenience, I will consider the disputed issues cited above sequentially.

Was there a trade restraint, explicitly or implied, to the first respondent's contract of employment with the applicant?

[36] It is common cause that the first respondent is a swimming instructor and that she took up employment with the applicant in March 2016. It is also not in dispute that the first respondent never had a written employment contract with the erstwhile employer, Ms Van der Westhuizen. According to the first respondent, swimming has been her sole source of income since 2016. This is her only way of being economically active and her only passion. It is also not in dispute that when she started working for the applicant, she worked simultaneously for the second respondent with the applicant's blessings. The first respondent's version is that her verbal contract of employment did not contain a restraint of trade clause and that she never agreed to any restraint of trade during the entire duration of her employment with the applicant, nor was she specifically requested to agree thereto prior to Ms Kock becoming the owner of the applicant.

[37] While on the other hand, the applicant, in particular, Ms Kock asserts that during her employment with the applicant and before she became the sole owner of the applicant, the previous owner, Ms Van der Westhuizen, on numerous business

gatherings, informed the group of employees which included the first respondent of the restraint of trade existing in the employment relationship between the applicant and its employees. The applicant further asserted that Ms Van der Westhuizen explicitly stated the consequences of this restraint of trade to the employees.

[38] From the notice of motion, it is common cause that the applicant is seeking a final interdict to enforce the alleged restraint of trade against the first respondent for 24 months and within a 50km radius of Worcester. In my view, from the versions presented above, there is a material dispute of facts on whether the first respondent's employment contract prior to Ms Kock buying the business contained a restraint of trade clause or not.

[39] In a case like this, a final order will only be granted on notice of motion if the facts, as stated by the respondent together with the facts alleged by the applicant that the respondent admits, justify such an order. See *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235. If the first respondent fails to raise a real, genuine, or *bona fide* dispute of fact and the court is satisfied as to the inherent credibility of the applicant's factual averments, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the relief it seeks. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635. In recent times, the correct approach to the assessment of evidence in motion proceedings was described in *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA) para 26, by Harms JA, as follows:

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or

uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[40] From the above authorities, it is evident that in an application for a final relief, save for disputes of facts that are not real, genuine or bona fide, the respondent's version must prevail. In the present matter, the applicant relies on a verbal restraint of trade clause that the previous employer, (Ms Van der Westhuizen) allegedly made to a group of employees of the applicant when Ms Van der Westhuizen still owned the business. The applicant contends that the other employees had written contracts and the restraint of trade clause was enshrined in their contracts of employment.

[41] I have some serious difficulty with this version. The applicant has failed to produce or attach any such written contract of employment with a restraint of trade clause under the previous employer to confirm its allegations. These contracts in my view, should have been readily available at the disposal of the applicant as the sole director of the applicant.

[42] To this end, I share the views expressed by Ms Bosch that as a result of the applicant's failure to attach a contract of employment to its application or even to its replying affidavit, this court has no document before it to demonstrate the extent and nature, or the existence of the restraint of trade provisions applicable to other employees before the business was sold as a going concern.

[43] In addition, a more fundamental hurdle lay in the pathway of the applicant. Ms Kock asserted that when she took over the applicant's business she noticed that the employees' employment contracts were not comprehensive. Employees such as the first respondent did not have a written employment contract. An employment contract was then sent to the first respondent in April 2021. The first respondent explicitly objected to the inclusion of the restraint of trade provisions and was only willing to sign the written contract on the same terms as under the previous employer. The first respondent objected to the inclusion of the restraint of trade and contended that the restraint of trade clause was a new term to her employment agreement. She asserted that such a term could not be unilaterally added to the terms of her

employment contract. In addition, the first respondent contended that she has often done private marketing, and learn to swim squad training. Consequently, if a restraint of trade was included, the respondent's retainer fee would have to be renegotiated.

[44] In response to these assertions, the applicant's labour broker, who acted on behalf of the applicant and negotiated a written employment contract with the first respondent, confirmed that the restraint of trade provision in the written agreement is a new inclusion to the contract and must be negotiated between the parties. The broker also stated that although the contract of employment under the erstwhile owner contained a restraint of trade provision, such provisions were not as defined as in the new contracts. Nonetheless, she stated that the first respondent did not have a written contract of employment with the erstwhile owner.

[45] Furthermore, in a WhatsApp communication between the applicant and the first respondent to cause the first respondent to sign a contract with a restraint of trade provision, the first respondent informed Ms Kock that she had no problem signing a new contract with the applicant to the same terms as per her previous contract of employment, which did not include restraint of trade provisions. In her WhatsApp response to these assertions, Ms Kock stated that there was no consensus about the first respondent's terms of employment between the applicant's previous owner and the first respondent, but that she somehow knew for a fact that there was a restraint of trade in place. She further stated that as there was no consensus, a new contract of employment was required. It is apposite, in my view, to quote verbatim Ms Kock's response. She stated in Afrikaans as follows:

> "2. Daar was nooit consensus oor wat die termes and voorwaardes was tussen jou en Ingrid nie. Wat ek wel weet is dat die ooreenkoms was dat jy by die gym sowel as Crazy Splash moet afrig end dat jy nie dieselfde afriging as my swemskool mag anbied binne 'n radius van 50km nie. Om die rede dat daar geen consensus was nie wou ons 'n nuwe kontrak in plek sit sodat…Ek is nie 'n onredelik mens nie maar wel regverdig."

[46] It is important to note that the first respondent did not have any objection to the proposed written agreements except for the restraint of trade provision. I have

little doubt in my mind that the reference to the lack of consensus that the applicant was referring to in her WhatsApp correspondence, was about the restraint of trade, which the applicant sought to address in the written contract. The applicant believed that the first respondent's verbal contract of employment was not comprehensive enough and therefore wanted to include a restraint of trade in a new contract of employment which the first respondent did not sign and did not agree to.

[47] To my mind, the asseveration of the applicant and her labour broker lends credence to the first respondent's denial that her contract of employment had no restraint of trade provisions. Furthermore, the labour broker's version that the restraint of trade provision is a new clause in the employment contract supports the first respondent's version in all material respect. In light of these averments, the overwhelming probabilities indicate that there was no restraint of trade provision in the first respondent's employment contract. Had there been such a clause, in my view, there would have been no need for the applicant to attempt to negotiate its employment terms with the first respondent.

[48] It was contended that at numerous business gatherings/meetings, the previous owner, Mr Van der Westhuizen, informed the group of employees, including the first respondent of the restraint of trade in the employment contract / relationship. Ms Van der Westhuizen filed a supporting affidavit confirming these allegations. I have some difficulty with these averments. It is not clear on the papers what prompted Ms Van der Westhuizen to make these statements in those meetings especially bearing in mind that all other employees had written contracts and the restraint of trade clause was included in their agreements. It was part of their agreement, and they knew of this clause.

[49] More importantly, the applicant and the previous owner – Ms Van der Westhuizen, do not allege in their affidavits that the previous owner had a single and direct discussion with the first respondent regarding the restraint of trade or requested the first respondent to agree to it. The version of the first respondent is that the applicant never requested her to agree to a restraint of trade before Ms Kock became the owner of the applicant. The first respondent asserted that she would never have agreed to such a clause as swimming is her passion, her only means to

generate an income, and is her only way of being economically active and productive.

[50] The applicant contended that to the extent that the first respondent cannot recall if a restraint of trade was ever discussed during meetings with other employees, she could not refute the evidence of the applicant that Ms Van der Westhuizen addressed the restraint of trade clauses with the employees at their various meetings. In my view, this argument is fundamentally flawed and cannot be sustained. It must be emphasised that the previous owner did not assert that she specifically discussed the restraint of trade provision with the first respondent personally when the first respondent took employment with the applicant. She neither said she addressed this issue with the first respondent at a personal level during the course of the first respondent's employment with the applicant.

[51] Even on the applicant's version, the first respondent was never requested directly or personally to agree to a restraint of trade during her employment with the applicant. Her alleged failure to object to the inclusion of the restraint of trade provision during the alleged meetings or gatherings with employees present who did have written contracts of employment and may have agreed to the restraint of trade provisions cannot be equated to her acceptance of such a term in her contract of employment. In my view, to hold otherwise would be to add a term in the first respondent's employment contract that was not agreed upon and that would restrict her freedom to earn a living in her chosen occupation.

[52] The respondent distinctly refuted that she was ever requested to agree to a restraint of trade. In addition, the respondent contended that any discussion in respect thereof with other employees, who may have agreed thereto, did not apply to her terms of employment with the applicant. To this end, I agree with the first respondent's Counsel that because the first respondent did not have a restraint of trade in place, her failure to object to that during the meetings with other employees is of no consequence. There is no reason for an employee to object to an employment term that is not relevant or not applicable to her.

[53] Notably, the first respondent worked for the second respondent from the outset of her employment with the applicant. This was done with the blessing of the applicant. In 2018, the first respondent decided to get qualified as a level 1 swimming instructor. As such, she enrolled for the 2019 academic year and paid a fee of R3500. When the owner of the second respondent became aware of this, she directed an email on 14 November 2019, to Ms Van der Westhuizen, the erstwhile owner of the applicant. She indicated that the second respondent would reimburse the first respondent half of the enrolment fee and requested that the applicant pay the other half.

[54] Indeed, the applicant and the second respondent reimbursed the first respondent for the enrolment fees in equal shares as the first respondent worked for the two entities. In my view, in these circumstances, a restraint of trade could not apply to her employment contract. This, in my opinion, lends credence to her assertion that there was no restraint of trade to her employment agreement with the applicant. The applicant's labour broker also confirmed in writing that the first respondent worked for and received an income from the second respondent totally separate from the applicant's. The suggestion that the first respondent was moonlighting without the knowledge or consent of the applicant is false and must be rejected.

[55] Lastly, on this disputed issue, the applicant submitted that the first respondent’s failure to object to the restraint of trade agreement when same was discussed during meetings with other employees present created an implied restraint of trade. In expanding this argument, Counsel submitted that the first time the first respondent took issue with the alleged restraint of trade was after Ms Kock wanted to record their term in writing. It was further submitted that despite this, the first respondent remained employed by the applicant from 31 March 2020 to 08 November 2022. Her stay in employment despite the impasses created an implied restraint of trade and rendered the first respondent’s version improbable. I disagree with this proposition.

[56] It must be borne in mind that after the applicant delivered the written employment contract to the first respondent in April 2021, the latter contested the

restraint of trade clause and raised specific questions before she could sign it. The first respondent emailed the applicant's labour broker and objected to the inclusion of the restraint of trade clause. The first respondent contended that the restraint of trade provision was a unilateral change of the terms of her employment. From April 2021 until her resignation in 2022, she accordingly objected to the inclusion of the restraint of trade agreement. She made her views known to the applicant and to the applicant's labour broker. In my view, during the contested period, the first respondent continued to work in line with the provisions of section 197 of the LRA. She continued to work on the same terms as before Ms Kock took over the business.

[57] The upshot is that, on a conspectus of all the evidential material placed before this court and on the objective facts, the applicant has not succeeded in proving that there was a restraint of trade provision in the employment contract of the first respondent with her erstwhile employer.

[58] Ordinarily, this finding would lead to the end of the dispute; however, for the sake of completeness, I deem it prudent to briefly consider the second question, assuming there was a restraint of trade as suggested by the applicant, whether such restraint of trade provision is reasonable. Simply put, whether the applicant on the version proffered satisfied the requirements in respect of such a provision.

[59] For a restraint of trade to be enforceable, it has to be reasonable. Thus, the applicant cannot enforce an alleged restraint of trade if it would be unreasonable. *Lifeguards Africa (Pty) Ltd v Raubenheimer* 2006 (5) SA 364 (D) at para 35. In *Basson v Chilwan* 1993 (3) SA 742 at 767G-I, the Appellate Division, as it then was, formulated the requirements to determine if a restraint of trade is reasonable. The court set the following requirements:

- Is there an interest of one party that needs protection?

- If so, is that interest being threatened by the other party?

- Does such interest weigh up qualitatively and quantitatively against the interest of the other party to be economically active and productive?

- If so, is there any aspect of public policy having nothing to do with the relationship between the parties that require that the restraint of trade should either be maintained or rejected?

- Does the restraint go further than necessary to protect the interest of the applicant?

[60] In the present matter, the applicant contended that numerous parents of swimmers have, up to date, cancelled their contracts with the applicant and that certainly more terminations and cancellations will occur pending the finalisation of the dispute concerning the restraint of trade as the first respondent will continue to use the database of the applicant to encourage swimmers to terminate their contracts with the applicant. The applicant alleges further that the first respondent urged the applicant's clients to cancel their contracts with the applicant, which has caused the applicant astronomical financial loss.

[61] Meanwhile, the first respondent admitted sending the termination notice to the applicant and to another employee and only to three parents that had swimming lessons schedules with her for that day. The first respondent denied ever enticing the applicant’s clients to cancel their contracts with the applicant. She only stated that they are free to continue swimming with her if they elect to.

[62] In my view, the applicant’s contention does not find support from all the documents file of record. Nothing was placed before this court to confirm the applicant's allegations that the first respondent uses the applicant's database to advance her business. Evidently, the respondent informed the three parents of her resignation out of courtesy because they had scheduled training with her that day. It would have been a different case if the first respondent sent her resignation to all the clients of the applicant and informed them that she had resigned and enticed them to follow her to her new employer. Instead, the first respondent independently

advertised her services on social media platforms and had nothing to do with the database of the applicant.

[63] In any event, I am of the view that the applicant does not have a protectable interest worthy of protection. The first respondent has been working for the second respondent since she commenced work with the applicant in March 2016. Many clients of the applicant were already clients of the second respondent, as the children swim galas under the second respondent. The first respondent asserted that as soon as a child that swims at the applicant shows progress, such a child starts participating in galas under the second respondent. In the premise, the applicant could not explicitly identify what specific information was, or the reasons it considers confidential for the restraint clause to be invoked assuming it existed.

[64] Undoubtedly, it cannot be said that there are trade secrets, confidential information or connections that the first respondent took from the applicant or used to the prejudice of the applicant. The first respondent is using her skill and training to practice her profession. The first respondent cannot be prevented from using her stock of general knowledge, skill, and experience to earn a living. *Bonnet v Schofield* 1989 (2) SA 156 AD. Significantly, no person can be unreasonably prevented from earning a living in the public domain. The right to trade and practice a profession is highly prized. *Strike Productions (Pty) Ltd* v *Bon View Trading (Pty) Ltd and Others* [2011] JOL 26664 (GSJ) para 1. In my view, restraining the first respondent to practice her profession under these circumstances, would conflict with section 22 of the Constitution, which guarantees her right to freedom of trade, occupation, and profession.

[65] Crucially, in *Hirt and Carter (Pty) Ltd v Mansfiled and Another* [2007] 4 AII SA 1423 (D), para 55, the following was stated:

> "In my view, for an employer to succeed in establishing that trade secrets and confidential information is an interest justifying protection by the restraint, it should demonstrate in a reasonably clear terms, that the information, know how, technology or method, as the case may be, *is something which is unique*

and peculiar to the employer and which is not public property or public knowledge, and is more than just trivial" (my emphasis).

[66] Overall, the restraint provision the applicant seeks in this matter seems to be aimed at stifling competition with the second and the third respondent. Having considered all the documents filed, it seems to me, that the only objective of the restraint that the applicant seeks is to prevent its competitor, the second and the third respondent, from acquiring the services of the first respondent. A restraint of trade provision with the sole aim of stifling competition is against public policy and is unenforceable. *Aston International College Ballito (Pty) Ltd v Petrus Erasmus and Another* (Unreported case Number: D12967/2002) (KZN) at para 16.

[67] In *Ice Cream Franchise (Pty) Ltd v Davidoff and Another* 2009 (3) Sa 78 (C), at 82H, Davis J, as he then was, observed that in deciding whether a restraint of trade is contrary to public policy, regard must be had to two considerations; *first*, agreements freely concluded should be honoured; *secondly,* each person should be free to enter into business, a profession or trade in the manner they deem fit. The learned justice concluded that for this reasons, unreasonable restraint of trade clauses are contrary to public policy.

[68] In view of all these considerations, I am of the opinion that the applicants' s application for an interdict must fail. Furthermore, nothing was presented to warrant a departure from the norm that costs follow the event.

ORDER

[69] In the result, the following order is granted:

69.1 The applicant's application is hereby dismissed. The applicant is ordered to pay the costs of this application, including any reserved costs orders, as well as the costs of Counsel.

LEKHULENI JD

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	**Adv van Loggerenberg**
Instructed by:	**Wilna Roux Attorneys**
For the first Respondent:	**Adv Bosch**
Instructed by:	**Steyn Attorneys**