SUMMARY ***REPORTABLE***

Case No. LC 75/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

ALEXANDER FORBES GROUP NAMIBIA (PTY) LTD and HEINZ WERNER AHRENS

PARKER J

2011 January 10

Practice- Interim interdict - Such moved by urgent application -Respondent raising a preliminary objection in which he argues that the matter should not be heard on urgent basis - Court finding that applicant has complied with all requirements in terms of Rule 6 (12) (b) of the Rules of Court - Consequently, Court dismissing respondent's preliminary objection and hearing application on urgent basis.

Practice - Interim interdict - Court confirming requirements set out in *Labour Supply Chain Namibia (Pty) Ltd v August Awaseb* Case No. A 426/2009 (Unreported) which applicant must satisfy in the field of unlawful competition and protection of one's right to confidential information regarding one's business and goodwill contained in restraint of trade agreement - Court finding that in instant case applicant's averments justify granting order for interim protection against respondent's continuing infringements in breach of respondent's obligation under the restraint of trade agreement, resulting in applicant's loss of business and income.

Practice - *Locus standi* - Respondent raising preliminary objection that applicant does not have *locus standi* to bring the application -Respondent contending that the *locus standi* of applicant ought to have been explained in the founding affidavit and that the explanation therefor in the replying affidavit constitute new matter which must be struck out - Court observing that in

deciding whether new matter has been introduced in a replying affidavit Court must consider the facts and circumstances of the particular case - In instant case Court finding that on the facts and in the circumstances the matter sought to be struck out does not constitute new matter properly so called and accordingly Court dismissing respondent's preliminary objection.

Interpretation of statutes - Labour Act 11 of 2007, s. 117 (1) (e) - Respondent contending at the threshold that on the interpretation of s 117 (1) (e) the Labour Court does not have jurisdiction to hear present application - Court considered the lexical meaning of each word used in the sentence of s. 117 (1) (e) and, above all, the syntax of that sentence, and also took into account, as was necessary so to do, the long title of the Labour Act in order to arrive at the correct meaning of s. 117 (1) (e) - Having pursued this logical and rudimentary approach to interpretation of statutes, Court holding that the Labour Court has jurisdiction to hear the present application.

Held, that in interpreting a statutory provision, one must always consider the lexical (or, where applicable, the descriptive) meaning of each word used in the provision and, above all, the syntax of the phrase, clause or sentence under consideration and also take into account, where it is necessary so to do, the long title of the statute under consideration in order to arrive at the correct meaning of the provision in question.

Held, further that, the rule of practice that 'new matter' in a replying affidavit may not to be permitted should not be applied blindly and mechanically, without due regard to the facts and circumstances of the particular case.

Case No. LC 75/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

ALEXADER FORBES GROUP NAMIBIA (PTY) LTD **Applicant**

and

HEINZ WERNER AHRENS **Respondent**

CORAM: **PARKER J**

Heard on: 2010 October 25

Delivered on: 2011 January 6

JUDGMENT:

PARKER J:

[1] The applicant, represented by Mr. Corbett, has launched an application by notice of motion, moving the Court on urgent basis to grant interim relief and other ancillary relief in terms appearing in Prayers 1, 2 (i.e. 2.1, 2.2 and 2.3), 3 and 4 of the notice of motion. And the respondent, represented by Mr. Barnard, has moved to reject the application. From the outset I must commend both counsel for their industry in preparing their respective heads of argument; they have assisted the Court.

[2] In *Labour Supply Chain Namibia (Pty) Ltd v August Awaseb* Case No. A 426/2009 (Unreported) at p. 3, a case, which, like the present, also concerned the matter of urgent enforcement of a restraint of trade clause in a contract of employment, I relied on what I had stated in the earlier case of *JA Beukes v R Martins and others* Case No. A 431/2009 (Unreported) at p. 5. In *JA Beukes v R Martins and others,* I stated:

> 'In my opinion, the essence of rule 6 (12) of the Rules is, therefore, that in the exercise of his or her discretion, it is only in a deserving case that a Judge may dispense with the forms and service provided in the Rules. In terms of rule 6(12), as I see it, a deserving case is one where the applicant has succeeded - (1) in explicitly setting out the circumstances which the applicant asserts render the matter urgent and (2) in giving reasons why he or she claims he or she could not be afforded substantial redress at the hearing in due course. *(Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd* Case No.: (P) A 91/2007 (Unreported), where the Court relies on a long line of cases, including the Namibian cases of *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48; *Salt and Another v Smith* 1990 NR 87). Thus, in deciding whether the requirements in (1) and (2) of rule 6 (12) (b) have been met, that is, whether it is a deserving case, it is extremely important for the Judge to bear in mind that it is indulgence that the applicant is asking the Court to grant.'

[3] In the instant application what circumstances has the applicant set out in its papers which, according to the applicant, render the matter urgent (i.e. requirement (1))? From the applicant's papers I find that the applicant has set out - that is, 'distinctly expressing all that is meant; leaving nothing merely implied or suggested *(Shorter Oxford Dictionary,* 6 edn (2007)) - the circumstances on which the applicant relies to render the applicant urgent. In this regard it must be remembered that the circumstances that would render a matter urgent in one case may not reach that mark in another case: it all depends upon the facts and circumstances that are peculiar to the particular matter.

[4] *In casu* the applicant has mentioned them briefly in the notice of motion and expanded on them in the founding affidavit a series of conduct on the part of the respondent that, according to the applicant, are in breach of the respondent's obligations under the service agreement entered into between the applicant and the respondent in September 2000. The following is, therefore, worth noting at this stage of the enquiry, concerning the issue of 'urgency' (requirement (1)); that is to say,

whether the applicant can prove the averments in due course is of no moment; whether the applicant has 'set out' those circumstances with sufficient particularity and clarity so as to be capable of eliciting a response from the respondent is of consequence. In this regard, I am satisfied that the circumstances that the applicant has set out in its papers are not based on some vague and unsubstantial implications and suggestions: they are capable of eliciting response from the respondent, and they have.

[5] I pass to consider requirement (2); and in doing so, it is significant to note that in its papers, the applicant contends that the alleged breach of the restraint of trade clauses of the aforementioned service agreement has already begun and it is continuing and so the applicant has prayed the Court for protection in the interim from the loss of business and income which has been and will be occasioned by the infringements and continuing infringements on the part of the respondent of certain terms of the aforementioned service agreement. In such a situation, it makes no sense to argue, as Mr. Barnard does, that the applicant can be afforded substantial redress, in the form of damages, at the hearing in due course; and so, according to Mr. Barnard - though not in so many words - the applicant must with religious tolerance and Job-like patience endure the continuing infringement of its legal right under the aforementioned agreement. This argument is, with the greatest deference to Mr Barnard, oversimplified and fallacious and self-serving; and so I cannot accept it. I shall return to this conclusion in due course.

[6] For the aforegoing, I am satisfied that the applicant has met the two requirements

(i.e. requirement (1) and requirement (2)) in rule 6 (12) (b) of the Rules of Court. I, therefore, exercise my discretion in favour of hearing the matter on urgent basis.

[7] I now direct my attention to the determination of the question of jurisdiction raised also as a preliminary objection by the respondent. The respondent contends that the applicant has no standing to bring the present application. Mr. Barnard took up the refrain and submitted, The application is brought in the honourable court as the Labour Court of Namibia. The Labour Court is a creature of statute and only has jurisdiction as afforded in terms of the Act.' I respectfully dismiss Mr. Barnard's submission that 'the Labour Court is a creature of statute' because it is pleonastic and absolutely meaningless in the constitutionalism of Namibia: it is a 'lawyerese' cliche touted in some jurisdictions elsewhere. In Namibia, I need say more, there is no competent court which is not a 'creature' of statute. In English, 'creature' means 'a person or organization under the complete control of another *(Concise Oxford Dictionary,* 11th edn).' There is no competent court in Namibia which is not under the control of the Namibian Constitution and, *a priori,* an applicable legislation.

[8] And now, to the interpretation and application of s. 117 (1) (e) of the Labour Act which Mr. Barnard was so much enamoured with in his submission on 'jurisdiction'. The relevant part of s. 117 reads:

> '(1) The Labour Court has exclusive jurisdiction to -
>
> (a) ...

(b) ...

(c) ...

(d) ...

(e) grant urgent relief *including* an urgent interdict pending resolution of a dispute in terms of Chapter 8;...'

[Emphasis added]

[9] In line with his interpretation of s. 117 (1) (e) of the Labour Act, Mr. Barnard boldly submits thus, *verbatim et literatim:*

> 'It is submitted that this clause (sic) means that the honourable court can grant urgent relief pending resolution of a dispute in terms of chapter 8 and that this relief will include an urgent interdict. The clause cannot mean that the labour court has exclusive jurisdiction to grant urgent relief, that is the only court that could grant urgent relief of any nature whatsoever. This would amount to an absurdity. It would mean that the only honourable court can grant urgent relief of any nature whatsoever.'

[10] From what I can understand from the above-quoted written submission, I have not one iota of doubt in my mind that Mr. Barnard completely misreads s. 117 (1) (e), making his interpretation of that provision of the Labour Act completely and indubitably wrong. For instance, Mr. Barnard has decided to disregard the superlatively significant syntactical position of the word 'including' in paragraph (e) of subsection (1) of s. 117 of the Labour Act and has, with respect, put forth an interpretation that suits his misreading and misunderstanding of the clear and unambiguous words contained in the said s. 117 (1) (e) and their formulation. In so doing, with the greatest deference to Mr. Barnard, Mr. Barnard exhibits a lack of appreciation of a logical and rudimentary approach to interpretation of statutes. In interpreting a statutory provision, one must always consider the lexical (or, where applicable, the stipulative) meaning of each word used in the provision and, above all, the syntax of the phrase, clause or sentence under

consideration and also take into account, where it is necessary so to do, the long title of the statute under consideration in order to arrive at the correct meaning of the provision in question. This proposition is, as I say, so elementary and logical that I need not cite any authority in support thereof.

[11] In this regard, it is worth noting that the use of the indefinite article 'an' to qualify 'urgent interdict' and the absence of any such indefinite article qualifying 'urgent relief' in the same sentence, that is s. 117 (1) (e) of the Labour Act, are without a doubt significant. Their irrefragable significance is that as far as the Labour Act is concerned, there is *an unaccountable number of unnamed and unspecified classes of* urgent relief that the Labour Court may grant, and *one named and specified class of* such urgent relief is 'an urgent interdict pending resolution of a dispute in terms of Chapter 8'. (Italicized for emphasis) It is with firm confidence that I say that for any one to argue otherwise - as Mr. Barnard does - is for one to misread, as I have said previously, the clear and unambiguous words and formulation of s. 117 (1) (e) of the Labour Act.

[12] Having considered the lexical meaning of each word used in s.117 (1) (e) and the syntax of the sentence in that provision and having also taken into account the long title of the Labour Act, as I must, I come to the following inexorable and reasonable conclusion respecting the interpretation and application of s. 117 (1) (e) of the Labour Act; that is to say, the Labour Court has exclusive jurisdiction to grant any class of urgent relief, for example, 'an urgent interdict pending resolution of a dispute in terms of Chapter 8' of the Labour Act, so long as the relief sought concerns a matter specifically mentioned in the long title of the Labour Act, as well as any matter that is

incidental to the matters specifically first mentioned therein. And as respects the purpose of a long title of a statute; I observed thus in *HN v Government of the Republic of Namibia* 2009 (2)

NR 752 at 755C-D:

> 'And it has been said of the long title of a statute by GC Thornton in his authoritative work *Legislative Drafting* (Butterworths 1987) at 150 that:
>
> > "Every Act begins with a long title the function of which is to indicate the general purpose of the Act. The long title is part of the Act, being considered because it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope. *(Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 128)"'

[13] Doubtless, the restraint of trade clauses in the aforementioned service agreement concern matters incidental to the basic terms and conditions of employment, within the meaning of the long title of the Labour Act, of the respondent.

[14] In view of all that I have said above concerning the interpretation and application of s. 117 (1) (e) of the Labour Act, I must say, with respect, that I have no use for the case referred to me by Mr. Barnard: it is labour lost. The case is *Transnamib Limited v Poolman and Others* 1999 NR 399 (SC). The case is not of any real assistance on the point under consideration. Furthermore, in view of the aforegoing, I shall not, with the greatest deference to Mr Barnard, waste my time giving any respectable look at other certain submissions put forward by Mr. Barnard respecting the question of jurisdiction. One such glaringly baseless argument by Mr. Barnard is that the Labour Act no longer

applied to the present matter because the respondent is no longer an employee. Mr. Corbett described the argument 'non-sensical' and 'self-serving'. I shall say that the argument is patently fallacious and, above all, sad and unfortunate. Mr. Barnard's argument flies in the teeth of common sense, logic and the law of the Labour Act; an Act which empowers the Labour Court to determine ex post facto whether, for example, the dismissal of an employee by his or her employer that has already taken place and so such employer was no longer employed by such employer is fair, or whether, for instance, an employer is entitled to refuse to pay severance pay to an employee who was no longer employed by the employer.

[15] For the aforegoing reasoning and conclusions concerning the instant point, I hold that this Court has jurisdiction to hear the present application, as I do. The respondent's preliminary objection to the jurisdiction of this Court, therefore, fails. I hasten to add that it is my view that the preliminary objection is frivolous and vexatious.

[16] I pass to consider the other preliminary objection concerning the issue of *locus standi* of the applicant. In this regard, on behalf of the respondent, Mr. Barnard made the following pithy submission; and I repeat it here verbatim:

> 'My Lord ... there is no doubt that the employment relationship was between the respondent and the applicant. There is no doubt to that, My Lord, but the restraint clause, that agreement, that undertaking was not given to the applicant; it was given to a different company. ... this restraint undertaking ... was given to Alexander Forbes Namibia (Pty) Limited. That is a different company. ... The company is Alexander Forbes

Group Namibia (Pty) Ltd, My Lord, and the applicant does not say what the situation is.'

[17] I do not agree with Mr. Barnard that the applicant has not explained 'what the situation is'. The applicant did explain the situation at the next available opportunity in the replying affidavit after its *locus standi* had been challenged in the respondent's opposing papers, instead of waiting for it to be submitted from the Bar, for instance. Thus, as respects this point, I do not accept Mr. Barnard's argument that that is 'new matter'. In any case, in my opinion, the rule of practice that 'new matter' in a replying affidavit may not be permitted should not be applied blindly and mechanically, without due regard to the facts and circumstances of the particular case. It is for this reason that I do not find *Coin Security Namibia (Pty) Ltd v Jacobs and Another* 1996 NR 279 and *Mbanderu Traditional Authority and Another v Kahuure and Others* Case No. SA 20/2007 (Unreported), referred to me by Mr. Barnard, to be of any real assistance on the point under consideration, taking into account the facts and circumstances of the instant matter.

[18] To start with, I find that in the instant matter, it was reasonable for the applicant not to have 'explained the situation' in the founding affidavit, considering certain significant and pertinent communication that had come to pass prior to the launching of the present application. The most important and telling one for our present purposes is the e-mail correspondence, marked Annexure 'HA6', and annexed to the respondent's own opposing affidavit. The following telltale details appear therein:

'Heinz Ahrens (i.e. the respondent)
Financial Planning Consultant
ALEXANDER FORBES FINANCIAL SERVICES

A Division of Alexander Forbes Group Namibia (Pty) Ltd'

[19] Furthermore - and this is also significant for our present purposes - in order to find a peg on which to hang his opposition to the application, the respondent unwittingly relies on the proposition of law enunciated by Goldblatt J in *Info DB Computers v Newby & Another* (1996) 17 *ILJ* 32 (W) at 35 'that unless there are terms to the contrary, a party who has wrongfully caused the termination of a contract of employment cannot rely upon the continued existence of a restraint of trade clause forming an integral of such contract.' In the face of all the above, I fail to see the merit in the respondent's contention that the applicant should have established its *locus standi* in the founding affidavit and also Mr Barnard's argument that any explanation respecting the applicant's standing to bring the present application in the replying affidavit constitutes 'new matter'. Accordingly, I find that the incorrect reference to the applicant cannot on any pan of scale occasion any prejudice to the respondent. The contextual framework of the surrounding circumstances indicates that that is a typographical error; an error of such a kind as to entitle the Court to condone it.

[20] It follows from all the above reasoning and conclusions respecting the point presently under consideration that I should condone the error, as prayed for by the applicant, and read the reference in the aforementioned service agreement to refer to the applicant as the other party. In any case, I hold that the explanation given in the replying affidavit does not constitute new matter properly so called. In my judgment, therefore, the respondent's point *in limine* concerning *locus standi* of the applicant has no merit; this objection, too, fails.

[21] In my opinion, the preliminary objections in respect of jurisdiction and *locus standi*

amount to nothing more than a disingenuous stratagem perpetrated for the sole purpose of assisting the respondent to willy-nilly wriggle out of his obligation towards the applicant under what the respondent himself knows, or ought reasonably to know, is a valid and enforceable agreement, binding him. I shall return to this conclusion in due course when considering the merits of the application in view of what Mr. Barnard boldly and honestly admitted on behalf of the respondent (in the quotation from his submission set out previously) concerning what Mr Barnard called 'restraint undertaking'. That admission buries any attempt by the respondent to challenge the validity and enforceability of the restraint agreement against him; and it is to the merits that I now direct the enquiry.

[22] I have mentioned previously that the present application is the applicant's; and I see from the applicant's papers that what the applicant has prayed for is interim relief. Consequently, the burden of this Court presently is the determination of the interim relief; and that is what I now proceed to do.

[23] In *Labour Supply Chain Namibia (Pty) Ltd v August Awaseb* supra, which, like the present matter, concerned the enforcement of restraint of trade provisions in a contract of employment, as aforesaid, I stated at pp. 5-6 thus:

> '[7] ... the circumstances averred as rendering the matter urgent are that the applicant requires to be protected in the interim from the loss of business and income which would result from continuing infringements on the part of the respondent. The question that arises for decision is this: are the averments by the applicant sufficient to justify an order for interim protection? In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality,*

Cape Town Municipality v L F Boshoff Investments (Pty) Ltd 1969 (2) SA 256 (C) at 267 B-D Corbett J set out the requirements for temporary interdict, which (according to Van Heerden-Neethling, *Unlawful Competition,* 2nd edn: p 86) is often applied in the field of unlawful competition. I see no good reason why the requirements should not apply also to protection of right to confidential information regarding one's business and goodwill against loss of business and income. The requisites are briefly these:

1) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt; that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

2) that the balance of convenience favours the granting of interim relief; and

3) that the applicant has no other satisfactory remedy.

[8] Additionally, in order to succeed in the present application for interim order, the applicant must establish the above-mentioned requisites and also prove that the respondent has committed a wrongful act. (See *Schultz v Butt* 1986 (3) SA 667 (A) at 678.)'

[22] From the papers I am satisfied that the applicant has established on a balance of probabilities that in violation of his 'restraint undertaking' the respondent has used for his own benefit certain information, including the actual names and specific details of the applicant's clients and the leads provided by the applicant to therespondent respecting potential clients of the applicant's. The respondent's conduct is an unlawful act. And I have no difficulty in finding that these pieces of information are confidential and the applicant has proprietary interest in them which merit protection by the Court. (See *Sibex Engineering*

Services (Pty) Ltd v Van Wyk and Another 1991 (2) SA 482 (T).)

[23] The respondent contends that he did not entice the applicant's clients to move their businesses from the applicant's enterprise to the respondent's. In that regard, it was argued by Mr. Barnard on behalf of the respondent that 'a man's skills and abilities are part of himself and he cannot ordinarily be precluded for making use of them by contract of restraint of trade.' That may be so; and if the respondent has skills and abilities to boast about, as the respondent's counsel trumpets them, what then is preventing the respondent from building his own client base and business goodwill (of which he can be proud) within the by far larger remainder of 90% of the total financial industry sector that is not under the wings of the applicant, instead of targeting the selfsame clients of the applicant who - most significantly - had been serviced by the respondent before the respondent's separation from the applicant's employment? The fact that the respondent is not prevented by the 'restraint undertaking' in terms of the aforementioned restraint agreement from plying his trade within the said 90% of the total financial industry sector means that the respondent is not at all being prevented from using his knowledge and skills; but, as I say, the restrictions placed on the respondent - which I find to be reasonable on that score - only prevents the respondent from applying those skills on the applicant's clients for the limited period of 12 months from the date he separated from the applicant's employment. In view of all that I have said previously respecting this point, I respectfully accept Mr. Corbett's submission that customer goodwill and trade connections have long been regarded as a proprietary interest that can be thankful of judicial protection. (See *Recycling Industries (Pty) Ltd v Mohammed and Another* 1981 (3) SA 250 (SE).); *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A).) Keeping this significant conclusion in my mental spectacle and considering it together with the aforementioned honest admission made

by Mr. Barnard on behalf of the respondent as respects the respondent's 'restraint undertaking' and the conclusions I have reached thereanent and further considering all these aspects against the backdrop of my decision on *locus standi* of the applicant, I come to the inevitable and reasonable conclusion that the balance of convenience favours the granting of interim relief that the applicant, as I say, has prayed for.

[24] But the matter does not rest there. Mr. Barnard has canvassed certain important matters on the merits which require treatment. As respects the first of those matters which I have already looked at, Mr. Barnard submitted that on the authority of *Info DB Computers v Newby & Another* (1996) supra *loc. cit.* '*unless there are terms to the contrary,* a party which has *wrongly caused* the termination of a contract of employment cannot rely upon the continued existence of a restraint of trade clause forming an integral part of such contract.' (Italicized for emphasis) I respectfully accept Goldblatt J's proposition of law on the issue at hand; it is good law, but Mr. Barnard's reliance on the proposition is, with respect, misplaced. That proposition of law cannot assist the respondent. In the instant matter 'there are terms to the contrary' in the restraint of trade clause (7). Those terms, in relevant parts, read: 'The Consultant shall not, either before or after the termination of this Agreement ... howsoever caused, solicit or interfere The words 'Howsoever caused' mean exactly what they say; that is, whether the termination was caused by the conduct of the employer or the employee or caused by any other person or by any occurrence under the sun. In any case, nothing has been placed before this Court, tending to show that the applicant, *qua* employer, 'wrongfully' caused the termination of the contract of employment between the applicant and the respondent. In our law only a competent tribunal or court has the

power to decide conclusively whether the dismissal of an employee is unfair, that is, wrongful; and this is *a fortiori.* Mr. Barnard did not point to this Court any such decision by a competent tribunal or court in that behalf. It follows that counsel's present argument falls to be rejected; it is devoid of any merit.

[25] With respect, Mr. Barnard misses the point in his submission *contra* the applicant's contention that the applicant has no adequate alternative remedy. Mr. Barnard submitted with consummate glee and verve thus: '. the applicant sets out exactly why it will be afforded substantial redress in due course, My Lord, 100%, it shoots itself in the foot with respect.' I do not share Mr. Barnard's glee at all. I reiterate what I have said previously. I do not think that on the facts and in the circumstances of this case, the applicant has adequate alternative remedy. I, therefore, accept Mr. Corbett's submission that it is a situation where the applicant stands to lose substantially when an employee who, in breach of a restraint of trade agreement, continues to take away the clients of his former employer (the applicant) by interfering with applicant's entitlement to derive financial benefits from the customer goodwill and trade connections the applicant has cultivated over the years. And what the applicant is asking the Court to protect in the interim in terms of the notice of motion are those interests and entitlement. I extend the essence of this conclusion to the consideration of the requisite of 'irreparable harm' and say that what appears to escape Mr. Barnard is that the quantum of damages mentioned by the applicant in its papers is not fixed. It is an estimate and it may dwindle or escalate with time; and, more important, it is not proven and so the applicant faces the difficulty of having to prove it. On such point, Van Reenen J stated, 'The difficulty of establishing the quantum of damages is

recognized as a factor relevant to the determination of the question whether or not damages would be adequate remedy *(Nampesca (SA) Products (Pty) Ltd and Another v Zaderer and Others* 1999 (1) SA 886 (C) at 901G.)' On the facts and in the circumstances of the instant case, I accept Mr. Corbett's submission that a similar constraint stands in the way of the applicant. Accordingly, I hold that a claim for damages would not be an adequate alternative remedy in the present case.

[27] In the face of all the aforegoing reasoning and its conclusions, I have no doubt in my mind that I should exercise my discretion in favour of granting the interim relief: there is sufficient evidence on the papers to justify an order for interim protection to the extent set out in the order below. I do not think the restrictions contained in the restraint of trade agreement are so unreasonable as to render them contrary to public policy. (See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 984 (4) SA 874 (A) (Head note).) In this regard, I do not think it lies within the province of this Court to concern itself with whether, as Mr. Barnard opined, this applicant works at least in the whole of Southern Africa and it is conceivable it has interests in the whole of Southern Africa The Court is not the SADC Tribunal; its decisions, without more, have effect in Namibia only. Additionally, it is view that if I took a cue from the time limit in clause 7 of the restraint of trade agreement and ruled that the same time limit should apply in clause 6 that would be fair and reasonable, and it will not occasion any prejudice to the respondent; and, what is more, in doing so, I will not be 'rewriting' clause 6 to the extent that it would amount to performing 'major plastic surgery' (to repeat the words of Mr. Barnard; borrowed from *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) at 796C): I would rather be performing cosmetic surgery. I hasten to add that the preponderance of the evidence I have accepted and the circumstances I have found to exist in this case are unaffected by any matters sought to be struck out.

[28] I pass to consider the matter of costs; and in doing so, I think it behoves me to take into account the pithy observation I have made previously, namely, that the preliminary objections concerning *locus standi* and jurisdiction were raised as disingenuous attempts aimed solely at assisting the respondent to wriggle out of his obligation towards the respondent under a contract which he knew (or ought reasonably to have known) to be valid and enforceable against him, as aforesaid. It must be remembered that the legal principle of '*pacta sunt servanda*' is part of our law, and it is at the root of decent behaviour in, and a touchstone of, any civilized legal system, having the notion of rule of law as one of the blocks in its constitutional edifice; and, need I say more, Namibia has such legal system. It follows that in my opinion, by opposing (or 'defending') the application, the respondent acted not only frivolously but also vexatiously; and so I evoke the exception in s. 118 of the Labour Act and grant an order of costs against the respondent.

[29] Whereupon, I grant the relief sought and make the following order:

1) that the non-compliance with the Rules of Court as to forms and service and time limits is condoned and the matter be heard on urgent basis.

2) that a rule *nisi* is hereby issued calling on the respondent to show cause, if any, at 10h00 on 3 February 2011 why an order in the following terms should not be made final -

(a) that the respondent is, for a period or 12 months calculated from 17 August 2010, interdicted and restrained from making use and/or availing himself of and/or deriving any profit from any information or knowledge specifically related to the business and affairs of the applicant or any of its clients which the respondent might have acquired by reason of his

position in, or associated with, the business of the applicant.

b) that the respondent is, for a period of 12 months calculated from 17 August 2010, interdicted and restrained from soliciting and/or interfering with and/or endeavouring to entice away from the applicant any persons, firms or corporations, who or which at any time during or at the date of the termination of his service agreement with the applicant were clients of, or who were in the habit of dealing with, the applicant or any company within the applicant or who, at the said date of termination, were employees of any company within the applicant or who at such date of termination, were holders of any assurance or investment policy or were members of any retirement annuity fund purchased or entered into through any company within the applicant.

(3) that the order in paragraphs 2 (a) and 2 (b) operates as interim interdict with immediate effect, pending the return date of the rule *nisi.*

(4) that the respondent must pay the applicant's costs of suit; such costs to include costs occasioned by the employment of one instructing counsel and one instructed counsel.

PARKER J

COUNSEL ON BEHALF OF THE APPLICANT: Adv. AW Corbett
Adv. RL Maasdorp

Instructed by: LorentzAngula Inc

COUNSEL ON BEHALF OF THE DEFENDANT: Adv. P C I Barnard

Instructed by: Van der Merwe Greef Inc