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# EMPLOYMENT ALERT

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### DAMAGES FOR POACHING, A REMEDY FOR AGGRIEVED EMPLOYERS

Non-solicitation clauses are a common feature of most employment contracts; however, employers are often reluctant to pursue former employees who breach these agreements by facilitating the poaching of their former colleagues. As in the case of *Massmart Holdings Ltd v Theron* (2018) 39 ILJ 870 (LC), pursuing a former employee for breach of their agreements may be a worthwhile endeavour.

# DAMAGES FOR POACHING, A REMEDY FOR AGGRIEVED EMPLOYERS

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**Non-solicitation clauses are a common feature of most employment contracts; however, employers are often reluctant to pursue former employees who breach these agreements by facilitating the poaching of their former colleagues. As in the case of *Massmart Holdings Ltd v Theron (2018) 39 ILJ 870 (LC)*, pursuing a former employee for breach of their agreements may be a worthwhile endeavour.**

Mr Theron was employed by Massmart as their head of business intelligence prior to his resignation in February 2016. When he was first employed, he had signed a confidentiality undertaking which precluded him from directly or indirectly encouraging, enticing or persuading any person employed by the Massmart group of companies to terminate their employment with the group for a period of 12 months following termination of his agreement. Shortly following his resignation and subsequent employment by African Bank Limited, and on 11 April 2016, Mr Theron signed an offer of employment for a Massmart employee, Mr Pillay, his former subordinate. Mr Pillay later accepted the offer and resigned from Massmart. Upon realisation that Mr Pillay's departure was by and in large due to Mr Theron's conduct, Massmart approached the Labour Court claiming breach of contract and damages amounting to R284,961.24, being the cost of recruiting a new employee to replace Pillay.

Massmart presented evidence of two witnesses, Mr Steeneveldt, its group commercial executive and Ms Mnkandla, operations manager of the recruitment agency used to find a replacement for Pillay. Mr Steeneveldt testified that following Mr Theron's resignation

Mr Pillay had been promoted into the position as he was Mr Theron's immediate subordinate at the time. He further testified that shortly after Mr Theron's departure, Mr Pillay had shown him an offer of employment from African Bank that was signed by Mr Theron and that although he was not unhappy at Massmart, he was leaving to work with Mr Theron. Ms Mnkandla testified that the cost charged to Massmart by the recruitment agency to find Mr Pillay's replacement was R284,961.24.

During cross examination, Mr Theron admitted to, among other things, having given Mr Pillay's details to his new employer for the purpose of recruiting an analyst and having signed Mr Pillay's offer. He further admitted that there was no evidence that Mr Pillay had been in contact with African Bank prior to his resignation, that he was bound by his agreement and that he owed Massmart a duty of care in this regard.

The issues before the court was whether Mr Theron breached the undertaking not to solicit Massmart's employees, whether he is liable for damages and whether, at the time of contracting, both parties contemplated that damages may flow from a breach of the undertaking?

# DAMAGES FOR POACHING, A REMEDY FOR AGGRIEVED EMPLOYERS

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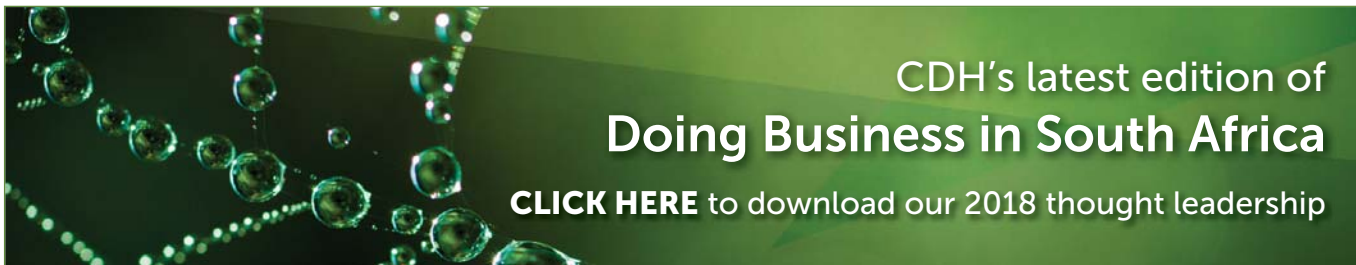


Given the concessions made by Mr Theron during the hearing, the Labour Court found that he was indeed bound by the undertaking and had subsequently breached the undertaking by facilitating Mr Pillay's recruitment to African Bank. On the question of damages, the Labour Court found that the amount claimed was fair and reasonable in the circumstances and flowed directly from Mr Theron's breach. Massmart was awarded R284,961.24 in damages plus interest and costs.

This case illustrates that replacing an employee may be a costly exercise and as such, when the need to replace an employee is due to a former employee's breach of contract, it may be worthwhile to pursue the recovery of those costs from the former employee. Each matter will however have to be evaluated on its own merits.

*Samiksha Singh and Siyabonga Tembe*

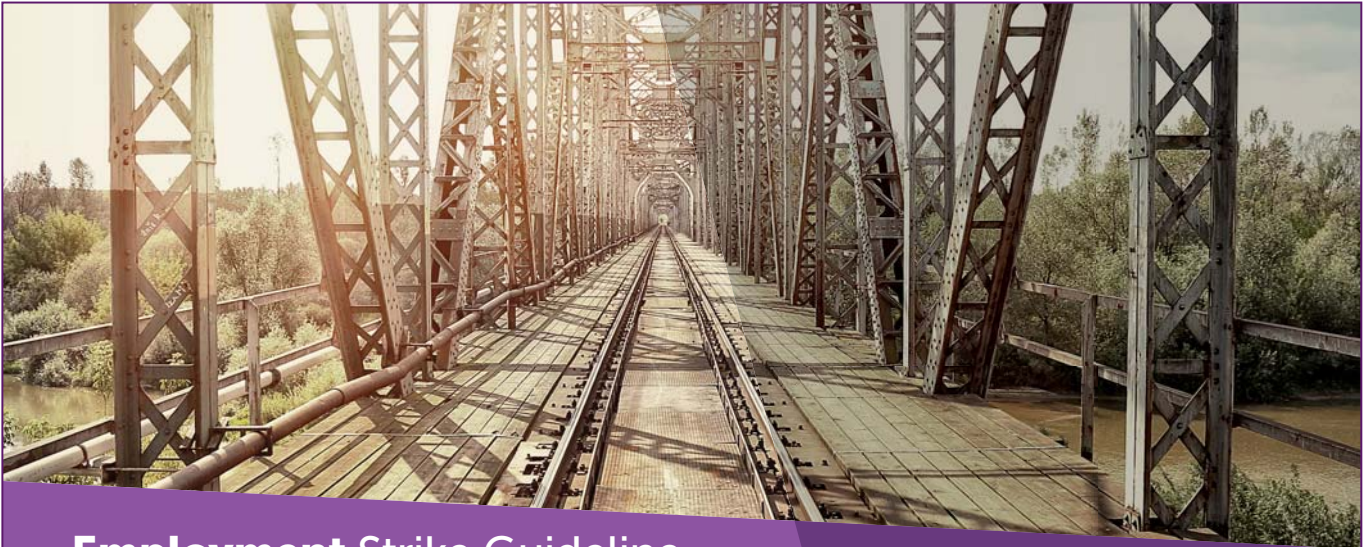
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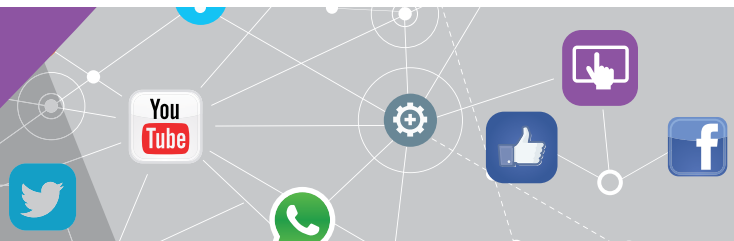
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