



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

**JUDGMENT**

Reportable

Case no: D 426 / 2013

In the matter between:

**JONSSON WORKWEAR (PTY) LTD**

**Applicant**

and

**LAWRENCE JOHN WILLIAMSON**

**First Respondent**

**C & C CLOTHING CONSULTANTS CC**

**Second Respondent**

**Heard: 2 August 2013**

**Delivered: 12 August 2013**

**Summary: Restraint of trade – principles stated – application of principles to matter – issue of protectable interest and infringement of such interest**

**Restraint of trade – nature of confidential information – no evidence of infringement of confidential information**

**Practice and procedure – requirement to make out case in founding affidavit – issue of determining factual disputes in restraint applications**

**Practice and procedure – referral to oral evidence – principles stated – application to refer to oral evidence refused**

**Interdict – no protectable interest or infringement of such interest shown – rule nisi discharged**

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## **JUDGMENT**

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SNYMAN, AJ

Introduction

[1] This matter came before me as a return date on a rule nisi granted on 19 June 2013 in respect of an urgent application brought by the applicant in terms of which the applicant sought to enforce a restraint of trade covenant against the first and second respondents. In terms of a judgment handed down by Gush J on 19 June 2013, a rule nisi was issued in terms of which the applicant was inter alia afforded relief in the form of the enforcement of the restraint of trade by interdicting the first respondent from being employed with the second respondent for a period of 12 months calculated from 22 April 2013 and from being in any way interested in any competing business to that of the applicant. This applied to the territory of the Republic of

South Africa.

- [2] The return date on the rule nisi granted by Gush J as referred to above was 2 August 2013, and the matter came before me on that date. Since the granting of the rule nisi, no further pleadings or affidavits had been filed by the parties. In the hearing of this matter on 2 August 2013, two issues were addressed by the parties, the first being whether or not this matter should be referred to oral evidence, and the second issue being the actual enforcement of the restraint of trade by confirmation or not of the rule nisi.
- [3] Before I deal with the background facts in this matter, I shall firstly determine the issue of the application that the matter be referred to oral evidence, and as an essential part of the determination of this question, what evidence must be considered to determine whether a case for the enforcement of a restraint of trade has been made out and where the burden of proof may rest. The determination of these issues are crucial in deciding what factual matrix should be considered in deciding whether or not to enforce the restraint of trade.

#### The referral to oral evidence

- [4] Before I deal with the issue of the application to refer this matter to oral evidence, I intend to make some observations as to how this application was brought by the applicant. As I will address hereunder, the applicant's founding affidavit was rather sparse where it came to making out the required case to substantiate the issues of the existence of a protectable interest and the infringement thereof. The first respondent filed a comprehensive answering affidavit taking issue with the allegations by the applicant in the founding affidavit in some detail. It was clear, at this stage, that there was a material factual dispute between the parties. What the

applicant however then did was not to apply that the matter be referred to oral evidence, but sought to file a comprehensive replying affidavit. In this replying affidavit, the applicant makes no application for this matter to be referred to oral evidence, and seems to be content to have this matter determined on the papers as it stands.

- [5] When the matter came before Gush J on 11 June 2013, there was equally no application for this matter to be referred to oral evidence. In his judgment of 19 June 2013<sup>1</sup>, Gush J recorded that ‘I am not satisfied however that in the light of the answering affidavit and the replying affidavits filed that it can be said that the applicant has established a clear right and it is therefore inappropriate to grant final relief ....’ Despite this, and with the looming return date, the applicant filed no further affidavits or even a formal and properly motivated application as to why this matter should be referred to oral evidence. The request for a referral to oral evidence was only raised in heads of argument by the applicant filed on 26 July 2013 pursuant to the hearing of the return date of the interim order.
- [6] I accept that there is a material factual dispute between the parties on the two issues of the existence or not of a protectable interest and whether such protectable interest (if it exists) has been infringed. The question is whether it is appropriate and proper to resolve this factual dispute by a referral to oral evidence, considering the above conduct of the applicant and considering the normal principles applicable to factual disputes in motion proceedings (which will be addressed hereunder).
- [7] I agree with Mr Smithers, who appeared for the first respondent, that there is no particular magic in a restraint of trade application that per se necessitates it being dealt with in a manner other than any other interdict application. After all, a restraint

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<sup>1</sup> At para 19

of trade application is nothing but an interdict. The unique requirements of a restraint of trade to be enforced all relate to the issue of the existence or not of a clear right as the first requirement of any interdict application. There is simply no compelling reason why a restraint of trade must be determined differently to any other application for an interdict dealt with by the Courts on a daily basis.

[8] Before I deal with the principles applicable to the determination of an application for referral to oral evidence, I will firstly consider the principles applicable to the determination of factual disputes in restraint of trade motion proceedings in the normal course. In fact, it is perhaps appropriate to first look at the issue of the onus, which seems to be somewhat controversial in restraint disputes. In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*<sup>2</sup> it was held that: 'Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the onus of proving that the enforcement of the condition would be contrary to public policy.' This same approach was followed in *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another*<sup>3</sup>, *Bridgestone Firestone Maxiprest Ltd v Taylor*<sup>4</sup>, *Rectron (Pty) Ltd v Govender*<sup>5</sup>, *David Crouch Marketing CC v Du Plessis*<sup>6</sup> and very recently in *Experian South Africa (Pty) Ltd v Haynes and Another*.<sup>7</sup> On the other hand, some authorities have held that in the new constitutional dispensation, there has been a shift in the onus to the effect that the party seeking to enforce the restraint has the onus to prove that it is enforceable, and reference is made to *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain*<sup>8</sup>, *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn*

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<sup>2</sup> 1984 (4) SA 874 (A) at 875H-I

<sup>3</sup> (2008) 29 ILJ 1665 (N) para 89

<sup>4</sup> [2003] 1 All SA 299 (N) at 302j-303b

<sup>5</sup> [2006] 2 All SA 301 (D)

<sup>6</sup> (2009) 30 ILJ 1828 (LC)

<sup>7</sup> (2013) 34 ILJ 529 (GSJ)

<sup>8</sup> 2001 (2) SA 853 (SE)

*and Another*<sup>9</sup> and *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another*.<sup>10</sup> I do not intend to get involved in this issue in this judgment, and for the purposes of this application, I will accept that the correct position in law is that the onus is on the first respondent to prove the restraint of trade is unreasonable and not enforceable.

[9] What I must however point out that no matter where the onus may lie, this does not change the principle and approach on how factual disputes in motion proceedings should be determined, and in particular, how this restraint application should be determined. In *Reddy v Siemens Telecommunications (Pty) Ltd*<sup>11</sup> the Court said that ‘.... The application was launched as a matter of urgency at the end of February 2006. Since the restraint was for a limited period of 12 months the court a quo correctly treated the matter as being substantially an application for final relief. A final order can only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify the order, and this applies irrespective of where the onus lies.’ The Court in *Reddy* went further and said:<sup>12</sup> ‘.... For in the present case the facts concerning the reasonableness or otherwise of the restraint have been fully explored in the evidence, and to the extent that any of those facts are in dispute that must be resolved in favour of Reddy (these being motion proceedings for final relief). If the facts disclosed in the affidavits, assessed in the manner that I have described, disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.’ What is clear is that the issue of an onus plays no role in exercising a value judgment in order to determine if the restraint is reasonable or not. In *De Reszke v*

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<sup>9</sup> 2008 (2) SA 375 (C)

<sup>10</sup> (2011) 32 ILJ 601 (LC) para 25

<sup>11</sup> (2007) 28 ILJ 317 (SCA) para 4

<sup>12</sup> *Id* at para 14

*Maras and Others*<sup>13</sup> which is a decision of the full bench of the High Court on appeal, the Court said that ‘Even though the *onus* was on the respondents in respect of this second issue, the ‘general rule’ relating to disputes of fact in motion proceedings is applicable.’ Therefore, and in deciding which facts to accept in exercising this value judgment referred to, the normal principles applicable to resolving factual disputes in motion proceedings where final relief is sought apply, even if the *onus* is on the first respondent.<sup>14</sup>

[10] The normal principles to resolve factual disputes in motion proceedings where final relief is sought was enunciated in the now regularly quoted judgment of *Plascon Evans Paints v Van Riebeeck Paints*.<sup>15</sup> In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*<sup>16</sup> this test was most aptly described, where the Court said: ‘The applicants seek final relief in motion proceedings. Insofar as the disputes of fact are concerned, the time-honoured rules .... are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants’ founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent’s version are bald or uncreditworthy, or the respondent’s version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.’

[11] The difficulty the applicant in this matter faces is that none of the disputes of fact as

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<sup>13</sup> 2006 (1) SA 401 (C) para 29

<sup>14</sup> See *Esquire System Technology* (supra) footnote 10 at para 44

<sup>15</sup> 1984 (3) SA 623 (A) at 634E-635C ; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 26 – 27 ; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) para 38 ; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 ILJ 440 (LC) para 32 ; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) para 26

<sup>16</sup> 2009 (3) SA 187 (W) para 19

raised by the first respondent can be considered to be bald or fictitious or implausible or lacking in genuineness. The issues raised by the first respondent in the answering affidavit are properly raised, and with all the requisite particularity. I may mention that the first respondent took it upon himself to provide a detailed answer to what was a founding affidavit lacking in sufficient particularity. There is accordingly no basis or reason for me to reject any of the versions of the first respondent raised in the answering affidavit. I thus intend to determine this matter on the basis of the admitted facts as ascertained by the founding affidavit, the answering affidavit and the replying affidavit, and as far as the disputed facts are concerned, what is stated in the first respondent's answering affidavit.

[12] This then brings me to the applicant's application to refer this matter to oral evidence, being the only other basis upon which factual disputes can be resolved. Rule 7(7)(b) of the Rules for the Conduct of Proceedings in the Labour Court makes provision for this where it is provided that: 'The court must deal with an application in any manner it deems fit, which may include — .... (b) referring a dispute for the hearing of oral evidence.' Rule 6(5)(g) of the High Court Rules provides as follows: 'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.' In *SA Football Association v Mangope*<sup>17</sup> the Court said that in applying Rule 7(7)(b) of the Labour Court Rules, this Rule, being in *pari material* with Rule 6(5)(g), should be construed similarly to that effect. I shall thus consider the applicant's application to refer this matter to oral evidence in the context of and based on the principles applicable to

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<sup>17</sup> (2013) 34 ILJ 311 (LAC) para 10

Rule 6(5)(g) of the High Court Rules as well.

[13] The general principles with regard to applications to refer motion proceedings to oral evidence was set out in *Kalil v Decotex (Pty) Ltd and Another*<sup>18</sup> where the Court said the following:

'The applicant may, however, apply for an order referring the matter for the hearing of oral evidence in order to try to establish a balance of probabilities in his favour. It seems to me that in these circumstances the Court should have a discretion to allow the hearing of oral evidence in an appropriate case. .... Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent.'

And further held as follows:<sup>19</sup>

'It has been held in a number of cases that an application to refer a matter to evidence should be made at the outset and not after argument on the merits (see *Di Meo v Capri Restaurant* 1961 (4) SA 614 (N) at 615H - 616A; *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka* 1980 (2) SA 191 (T) at 204C - 206D; *Spie Batignolles Société Anonyme v Van Niekerk: In re Van Niekerk v SA Yster en Staal Industriële Korporasie Bpk en Andere* 1980 (2) SA 441 (NC) at 448E - G; *Erasmus v Pentamed Investments (Pty) Ltd (supra* at 180H);

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<sup>18</sup> 1988 (1) SA 943 (A) 979F - I

<sup>19</sup> Id at 981D - F

*Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd* 1981 (4) SA 175 (N) at 179B - E; cf *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 24I - 25D). This is no doubt a salutary general rule, but I do not regard it as an inflexible one. I am inclined to agree with the following remarks of Didcott J in the *Hymie Tucker* case *supra* at 179D:

'One can conceive of cases on the other hand, exceptional perhaps,... when to ask the Court to decide the issues without oral evidence if it can, and to permit such if it cannot, may be more convenient to it as well as the litigants. Much depends on the particular enquiry and its scope.'

[14] The judgment in *Kalil* was applied in the judgment in *Bocimar NV v Kotor Overseas Shipping Ltd*<sup>20</sup> where the Court held as follows:

'It would seem that in the Court *a quo* Bocimar's counsel simply applied informally and non-specifically for the hearing of oral evidence, at the end of his argument on the merits, in the event of the Court holding that Bocimar had failed on the papers to establish a genuine and reasonable need for security. No indication was apparently given of who should be required to give evidence or submit themselves to cross-examination nor was any indication given of what evidence new witnesses would be able to give. In *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 981D-G reference was made to 'the salutary general rule' that an application to refer a matter to evidence should be made at the outset and not after argument on the merits. It was pointed out that the rule was not an inflexible one and that in exceptional cases the Court may depart from it. It is, however, a factor to be considered in the present case.'

[15] In *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd*<sup>21</sup> the Court said the following:

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<sup>20</sup> 1994 (2) SA 563 (A) 587B – D

<sup>21</sup> 2005 (6) SA 182 (SCA) para 29

'In *Khumalo v Director-General of Co-operation and Development and Others* 1991 (1) SA 158 (A) at 167G - 168A the Court cited with approval the conclusions of Kumleben J in *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 93E - H regarding the approach to be adopted in applications to hear oral evidence in terms of Rule 6(5)(g). The passage is worthy of repetition:

'(a) As a matter of interpretation, there is nothing in the language of Rule 6(5)(g) which restricts the discretionary power of the Court to order the cross-examination of a deponent to cases in which a dispute of fact is shown to exist.

(b) The illustrations of "genuine" disputes of fact given in the *Room Hire* case at 1163 do not - and did not purport to - set out the circumstances in which *cross-examination* under the relevant Transvaal Rule of Court could be authorised. They *a fortiori* do not determine the circumstances in which such relief should be granted in terms of the present Rule 6(5)(g).

(c) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this Rule, in my view oral evidence in one or other form envisaged by the Rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.

(d) In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinised.'

[16] Based on the above, it is clear that as a general principle, the Court has a discretion to decide whether to refer motion proceedings to oral evidence where there is a dispute of fact that needs to be resolved. In exercising this discretion, a litigant applying for a matter to be referred to oral evidence should at least advance reasonable grounds to support this discretion being exercised in favour of the litigant. Proper and formal application must be made in this regard. It should at least be set out what evidence presented by the other litigating party in the affidavit is lacking in credibility and how the referral to oral evidence will resolve this. The Court should consider to what extent this referral to oral

evidence could tip the scales in support of the litigant seeking the referral. The final issue to consider is convenience to the Court.

[17] The applicant has unfortunately not make out a case for the matter to be referred to oral evidence in terms of the above principles. The applicant has not made a proper application for this relief, and has simply asked for this to happen in heads of argument. The applicant has further not sufficiently motivated as to which of the contentions of the first respondent in its answering affidavit could be successfully discredited by a referral to oral evidence and what kind of evidence would be led to establish this. Considering the nature of the dispute, being that of a restraint of trade and all its consequences, it is simply not convenient to delay its determination any further by a referral to oral evidence. The applicant has thus simply not convinced me to exercise the wide discretion that I have in this regard in its favour.

[18] The applicant has another obstacle in the way of its application to refer the dispute to oral evidence being granted. This is the fact, as set out above, that no such application was made when the matter was argued before Gush J especially considering that no further pleadings have been filed since then in any event. In *Santino Publishers CC v Waylite Marketing CC*<sup>22</sup> the full bench of the High Court on appeal said that 'In practice an application for a referral is typically made at the hearing of an opposed application by the applicant who is faced with the reality of irresoluble disputes of fact having arisen on the papers.' In fact, the approach of the applicant in this case appears to be exactly that kind of approach which the Court was critical of in *De Reszke v Maras and Others*<sup>23</sup> where the following was said:

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<sup>22</sup> 2010 (2) SA 53 (GSJ) para 5

<sup>23</sup> Id at para 33

‘Some younger counsel, in particular, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing success on such argument, will refer such disputes, or some of them, for oral evidence. That is not the procedure sanctioned by the Supreme Court of Appeal. On the contrary, the general rule of practice remains that an application to refer for oral evidence should be made prior to argument on the merits. The Supreme Court of Appeal has widened the exceptions to this general rule, but they remain exceptions.’

[19] In a restraint of trade dispute, the applicant must surely have anticipated a material factual dispute. The prior correspondence between the parties before this application was brought must surely further confirm that a material factual dispute should have been anticipated from the outset.<sup>24</sup> The applicant should have preempted this with a request for the matter to be referred to oral evidence as an alternative prayer from the outset, should the Court not be inclined to determine the factual dispute on the papers in favour of the applicant party. In not doing this, the applicant in fact indicates that it is satisfied that any factual disputes be determined in terms of the normal principles applicable to motion proceedings, referred to above. This was precisely the sentiment exhibited by the Court in *Singh v Adam*<sup>25</sup> which dealt with a restraint application, and where the Court said: ‘In her replying affidavit the applicant revisits the issue by arguing that on receipt of the answering affidavit it has become evident that the anticipated dispute of fact has indeed materialized and that a referral to oral evidence would accordingly be justified. Alternatively, given that the respondent referred a dispute to the CCMA shortly after the launch of the application proceedings, the interim interdict should be granted pending the resolution of the constructive dismissal dispute by arbitration. In my opinion, an application on this basis amounts to an irregular proceeding. Having anticipated a material dispute of fact that could not be resolved on the papers it was inappropriate for the applicant to seek a final interdict by way of notice of motion. ....’. By not anticipating the factual dispute

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<sup>24</sup> Bundle page 41 – 49

that was inevitable in arising in this matter and dealing with it accordingly, it is my view that the applicant cannot now be allowed to remedy this defective conduct by a referral to oral evidence.

[20] I shall now deal with the final issue in this regard, being the failure by the applicant to make out a proper case on the founding affidavit, and then seeking to make out a proper case in the replying affidavit. In *Betlane v Shelly Court CC*<sup>26</sup> the Court said: 'It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time.' This approach applies equally in the Labour Court, and I refer to *De Beer v Minister of Safety and Security and Another*<sup>27</sup> where it was held that 'It is trite law that an applicant must stand or fall by his or her founding affidavit. The applicant is therefore not permitted to introduce new matter in the replying affidavit. The courts strike out such new matter.' The above being the relevant principle, I am thus entitled to exclude any new material in the replying affidavit insofar as it seeks to make out a new case and not simply replying to what is set out in the answering affidavit.<sup>28</sup>

[21] I conclude by pointing out that what the applicant in fact is seeking to do is to establish a proper case though a request for oral evidence, considering the

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<sup>25</sup> (2006) 27 ILJ 385 (LC) para 15 – 16

<sup>26</sup> 2011 (1) SA 388 (CC) para 29 ; See also *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) para 122; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 150; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) paras 29 – 30; *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2008 (2) SA 448 (SCA) ; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636A – B ; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC)

<sup>27</sup> (2011) 32 ILJ 2506 (LC)

<sup>28</sup> See *Dutch Reformed Church Vergesig and Another v Sooknunan* 2012 (6) SA 201 (GSJ) at para 53 where it was said 'Regarding the further complaints in the replying affidavit, with reference to further annexures attached thereto, I am not referring to those in this judgment. The applicants' case should have been made out in the founding affidavit' ; See also *Ex Parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP) para 15

difficulties with its case made out in the founding affidavit. This would be comparative to what happened in the judgment of *Minister of Land Affairs and Agriculture and Others v D and F Wevell Trust and Others*<sup>29</sup> where the Court said: '.... The parties concerned could have made the necessary allegations, but failed to do so. They sought to supplement the allegations made by a referral to evidence. That is not permissible. ....'

[22] I shall therefore, based on the reasons as set out above, exercise my discretion against referring this matter to oral evidence, and decline to do so. I shall further determine this matter on the basis of the normal principles applicable to factual disputes in motion proceedings where final relief is sought. Insofar as new material is sought to be introduced in the replying affidavit, I shall not consider it. Based on these conclusions, I shall now set out the background facts that properly would form the factual matrix for the purposes of the determination of this matter.

#### Background facts

[23] Firstly, and for the purposes of this application, I will accept that at all relevant times the first respondent was employed by the applicant, by virtue of being employed with the applicant's predecessor in title and a transfer of the business having taken place.<sup>30</sup>

[24] The business of the applicant is that of being one of the leading manufacturers and distributors of workwear garments in the Republic of South Africa. This business is, simply put, and as it appears from the papers, the manufacturing of work clothing and

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<sup>29</sup> 2008 (2) SA 184 (SCA) para 58

<sup>30</sup> *Labournet Holdings (Pty) Ltd v McDermott and Another* (2003) 24 ILJ 185 (LC) para 8 and 13

corporate uniforms for corporate customers. The applicant currently provides about 850 different garments to its various customers.

- [25] The first respondent was initially employed by the applicant as what was called a “sample set manager”. At the time of termination of employment he held the position of head of garment technology, being a position he held for about a month following restructuring in the applicant. The applicant has attached a purported job description of the first respondent to the founding affidavit, but the first respondent disputes that this was ever his job description, and in fact explains how this document came about. In terms of the principles enunciated above, I accept the version of the first respondent, and I will accept that the actual duties of the first respondent with the applicant are as set out hereunder, and are not as set out in this purported job description.
- [26] The first respondent was subject to a written contract of employment, voluntarily and properly concluded. This contract of employment contained a restraint of trade covenant. This restraint of trade covenant inter alia prohibits the first respondent from having any interest in, and this includes employment, with any competing business to that of the applicant, for a period of 12 months from termination of employment with the applicant, and for the area of the Republic of South Africa.
- [27] As to the background information of the first respondent before commencing employment with the applicant, the first respondent obtained a diploma in clothing production management on 1988. He then held several clothing production positions at a number of clothing manufacturers in the period between 1990 and 2008, when he joined the applicant. In this time, the first respondent accumulated substantial experience in working with a large variety of clothing production machines, attending to machine maintenance, quality control on work processed, allocation of work loads,

and general management of factory staff. The first respondent also in this time attended regular production meetings at his erstwhile employers. The first respondent thus had all the technical ability, skills and experience in the clothing industry in place when he joined the applicant in 2008 and brought these skills and experience with him. The first respondent acquired no special skills or experience from the applicant.

- [28] There is nothing confidential and unique about the manufacturing of clothes in the applicant. The applicant used the same manufacturing processes used by all clothing manufacturers and the applicant's processes is in fact described by the first respondent as "antiquated". The fact is that the first respondent could apply his own skill and expertise brought with him to the applicant to discharge his duties at the applicant. The clothing made is also "graded" to ensure that universal sizes are applied, and this applies commonly, is an industry standard, and is not confidential.
- [29] The nature of clothing is such that it is not possible to keep as "confidential" any makeup of the clothing. As the first respondent points out, anyone in the clothing industry can take any garment and readily and easily determine how it was made and what materials have been used. Added to this is the fact that once the clothing is sold, it is in the public domain and cannot attract any "confidentiality" thereafter, even if it is accepted that it had some or other form of confidentiality in the first place.
- [30] The first respondent was not responsible for clothing design in the applicant. The first respondent did not deal with customers nor did he have any customer relationships (the applicant does not even rely on trade connections as a protectable interest). On the common cause facts, the applicant and the second respondent in any event share some customers, and specific reference was made to the Spar Group in this regard on the papers. On face value, it does not appear that the large

customers are exclusive in any event.

- [31] The process of garment manufacture is aptly described by the first respondent. What is needed is a pattern, documents that provide what the garment must look like, and a sample. The first respondent created none of these three items. He was responsible to make sure these three items were matched before the clothing was manufactured. When manufacturing was completed, the first respondent did quality control, in the form of making sure the manufactured garments actually matched the three items. If the garments were found to be defective, the first respondent would travel to the factory to investigate why this was so, and to implement remedial measures. This the first respondent was able to do because of the skill and experience in clothing manufacture he “brought to the party”, so to speak.
- [32] The first respondent was not responsible for the creative aspects of the clothing manufacture at the applicant. The first respondent’s responsibility can broadly be described as quality control, which entails the assessment of the finished product. The first respondent did not purchase fabric for the applicant. In fact, the first respondent’s duties towards the end of his employment with the applicant were that if the applicant required productions methods to be improved and to be made more efficient, it would defer to the first respondent who would use his own skill and experience to try and achieve these objectives. However, this meant that the first respondent would spend more and more time in the factory in Lesotho which is what he did not want, and which, according to him, was tiring and time consuming. The first respondent was also dissatisfied with his salary. Finally, the first respondent feared, with the change in emphasis of his position that he would be required to relocate to the factory in Lesotho, which he did not want.
- [33] The first respondent then sought alternative employment for these personal

considerations and used three separate employment agencies for this purpose. He was not recruited by the second respondent. The first respondent went to a number of interviews and accepted the job offer with the second respondent following an interview, for reasons related to better prospects and income, and being closer to his home.

[34] The first respondent then resigned from his employment with the applicant on 18 April 2013 with effect from 17 May 2013. The first respondent disclosed at the time of his resignation to the applicant that he would take up employment with the second respondent. The applicant then required the first respondent to leave immediately and not work out his notice.

[35] The first respondent then took up employment with the second respondent and I accept that the second respondent is a direct competitor of the applicant. The first respondent's duties with the second respondent is that of quality control.

[36] Significantly, the second respondent does not conduct its own manufacturing of garments, and this function is outsourced to a third party. As such, the first respondent would not have to become involved in the manufacturing process, and any knowledge the first respondent may have about manufacturing processes and methods of the applicant in fact have no interest at all to the second respondent, and there is simply no value in the second respondent having such information.

[37] Dealing then with the case made out in the founding affidavit, all the applicant records is that the first respondent "knows everything there is to know" about the applicant's products. The applicant however does go further and states that the first respondent knows of the special material used, the sourcing of its fabrics, garment assembly and sequence of operations, the art work, the manufacturing processes,

the technical packs of the garments, and all aspects of the manufacture and design of the applicant's products. These general statements are not amplified by any particularity and are clearly bald and general in nature. The applicant then further contends that the first respondent's employment with the second respondent as direct competitor of the applicant is breach of the protectable interest per se, especially considering that the work being done by the first respondent at the second respondent is similar to the duties he fulfilled at the applicant..

[38] In answer to the above contentions, and in addition to what has already been set out above, the first respondent says that he had no particular knowledge of the makeup of fabric other than what he could ascertain from the label. The first respondent also says that the fabric is purchased from third party manufacturers as the applicant does not produce its own fabrics and these manufacturers also supply to many other purchasers. The first respondent states that he did not source any fabrics, trims or finishes, and there is nothing confidential about garment assembly. The artwork referred to does not emanate from the applicant, but in fact comes from third parties engaged by the customer of the applicant for that purpose and for branding purposes. The first respondent had nothing to do with design in any event. The first respondent was not responsible for the costing, pricing or selection of materials in the production process. The content of the technical packs are recorded on the applicant's central drive accessible to anyone. There is nothing unique in the applicant's quality control processes. Finally, and as to specifications, garments are made in standard sizes and is consistent throughout the entire industry, and is not confidential.

[39] The first respondent states that the clothing industry in South Africa has diminished substantially, with most clothing production now being done overseas and job opportunities being limited. The clothing industry is all the first respondent knows.

[40] For the reasons as already set out above, I will not consider the new material raised in the replying affidavit, as well as material which contradicts the version of the first respondent referred to above.

### The restraint principles

[41] It is by now trite that restraints of trade are valid and binding, and as a matter of principle enforceable, provided the enforcement of the restraint of trade is reasonable. The general principles in the enforcement of a restraint of trade were set out in *Basson v Chilwan and Others*<sup>31</sup>, where Nienaber JA identified four questions that should be asked when considering the reasonableness of the enforcement of a restraint, being (a) Does the one party have an interest that deserves protection after termination of the agreement? (b) If so, is that interest threatened by the other party? (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

[42] In *Reddy*<sup>32</sup> the Court held that in deciding whether or not to enforce a restraint of trade, the following must be considered:

‘A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to

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<sup>31</sup> 1993 (3) SA 742 (A) at 767G-H

engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. A Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense freedom to contract is an integral part of the fundamental right referred to in s 22.

In applying these two principal considerations, the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest. Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest. An agreement in restraint of trade is concluded pursuant to 'law of general application' referred to in s 36(1). What is meant by this expression includes the law in the general sense of the legal system applicable to all which, in this case, consists of the corpus of law generally known as 'the law of contract' and which allows for contractual freedom and the conclusion of agreements pursuant thereto. The four questions identified in Basson comprehend the considerations referred to in s 36(1). A fifth question, implied by question (c), which may be expressly added, viz whether the restraint goes further than necessary to protect the interest, corresponds with s 36(1)(e) requiring a consideration of less restrictive measures to achieve the purpose of the limitation. The value judgment required by Basson necessarily requires determining whether the restraint or limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

[43] I further refer to the judgment in *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others*<sup>33</sup> where the Court held as follows:

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<sup>32</sup> Reddy (*supra*) footnote 11 at para 15 – 16

<sup>33</sup> (2007) 28 ILJ 145 (SCA) para 8 – 9

'Nienaber JA listed four questions that need to be asked when determining whether a restraint would be upheld. Only the first of these, whether there is an interest of the one party (in this case the employer) which deserves protection once the contract comes to an end, is relevant in this matter. Precisely what the parameters of such an interest are need not now be decided. What is clear, however, is that the interest must be one that might properly be described as belonging to the employer, rather than to the employee, and in that sense 'proprietary to the employer'. The question in the present case is whether the interest that is relied upon - the skill, expertise and 'know-how' that the employees undoubtedly acquired in the techniques for manufacturing these machines - was one that accrued to the employer or to the employees themselves.

The rationale for this policy was succinctly explained by Kroon J in *Aranda Textile Mills (Pty) Ltd v L D Hurn* as follows:

'A man's skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-how or skills. Such know-how and skills in the public domain become attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy.'

Thus the mere fact that the first and second respondents have taken up employment with AMS Manufacturing, assuming that it is in competition with the appellant, does not in itself entitle the appellant to any relief if all they will be

doing is applying their skills and knowledge acquired whilst in the employ of the appellant. It is only if the restriction on their activities serves to protect a proprietary interest relied on by the appellant that they would be in breach of their contractual obligations. The interest sought to be protected in this case, as I understand the submission made on behalf of the appellant, is the special knowledge of how the components of the appellant's machine are put together. The crux of this matter therefore is whether the appellant has a proprietary interest in the 'know-how' that was acquired by the employees. This is a question of fact and in motion proceedings the matter must be decided on the basis of – 'those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent.'

[44] In simple terms therefore, and what needs to be considered in determining whether or not the enforcement of a restraint of trade would be reasonable, are five issues, being (a) the existence of a protectable interest, (b) the breach of such protectable interest, (c) a quantitative and qualitative weigh off the respective interests of the parties, (d) general considerations of public interest, and (e) whether the restraint goes further than necessary to protect the relevant interest. All these considerations need to be determined as a whole, as part of a value judgment to be exercised, in order to finally conclude whether or not the restraint should be enforced.

[45] The next issue to be considered is then what exactly constitutes a protectable interest. In *Dickinson Holdings Group*<sup>34</sup> it was held that a protectable interest would firstly be what is commonly referred to as trade connections, and secondly confidential information. In this matter now before me, Mr Pemberton who represented the applicant conceded that this case had nothing to do with trade connections, and related solely to the issue of confidential information. This

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<sup>34</sup> *Dickinson Holdings* (supra) footnote 3 para 32 ; see also *Basson v Chilwan* (supra) 769 G – H ; *Bonnet and Another v Schofield* 1989 (2) SA 156 (D) at 160B-C; *Esquire System Technology* (supra) footnote 10

concession is in any event confirmed by the founding and replying affidavits where no case is made out that the first respondent has any particular trade connections worthy of protection. I shall accordingly not deal with the principles and requirements relating to trade connections and shall only deal with the issue of confidential information.

[46] In *Dickinson Holdings Group*<sup>35</sup> the Court said the following with regard to the issue of confidential information:

'The categories of protectable confidential information were set out in *Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* and *Meter Systems Holdings Ltd v Venter* as follows:

- '(1) Customer lists drawn by a trader, and kept confidential for the purposes of his own business.
- (2) Information received by an employee about business opportunities available to an employer.
- (3) The information received in confidence by an employee whilst in employment with a particular employer remains protected by a legal duty, implied by the contract of employment.
- (4) Information which, although in the public domain is nevertheless protected as confidential when skill and labour have been expended in gathering and compiling it in a useful form, and when the compiler has kept his useful compilation confidential, or has distributed it upon a confidential basis.
- (5) Information relating to the marketing of a new product, if such proposals are the product of skill and industry and have been kept confidential.
- (6) Information relating to the specifications of a product, and a process of manufacture, either of which has been arrived at by the expenditure of skill and industry or has been kept confidential.

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para 27

<sup>35</sup> Id at para 33 – 35

(7) Information relating to the prices at which one person has tendered competitively to do work for another is confidential in the hands of one who stands in a fiduciary relationship to the tenderer.'

It is so that the type of information alone does not necessarily establish its confidentiality. All of the relevant circumstances must be considered.

Information must be objectively useful to a competitor in order to be confidential as between ex-employee and an ex-employer.'

[47] In *David Crouch Marketing*<sup>36</sup> the Court also dealt with the issue of the meaning of confidential information and said:

'A former employer who wishes to rely on or enforce a restraint of trade agreement in order to protect secrets and confidential information must therefore show that the information, know-how, technology or method is unique and peculiar to its business and that such information is not public property or that it falls within the public's knowledge. In other words, the former employer must show that the interest that it has in the information it seeks to protect, is indeed worthy of protection. In this regard the court in *Hirt* pointed out that the information which the former employer wishes to protect 'must be objectively useful to a competitor in order to be confidential as between ex-employee and an ex-employer' (para 46). Clearly, as already indicated, not all information obtained by the employee during the course of his employment will be secret or confidential (see also *Advtech* at para 20). The following passage referred to by the court in *Hirt* with approval from Colman *The Law of Trade Secrets* (Sweet & Maxwell 1992) at 60 explains the circumstances in which information may be considered to be confidential:

'[The] latest attempt to draw the line between protectable and non-protectable information in English law is to be found in *Faccenda Chicken v Fowler* [1986] 1

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<sup>36</sup> *David Crouch Marketing* (*supra*) footnote 6 para 21

All ER 617 (CA) where it will be remembered that Neill J said that, in order to determine whether information could be classified as so confidential that an employee should not be allowed to use or disclose it after termination of the contract of employment, it was necessary to consider all of the circumstances of the particular case, but the following were among those to which particular attention should be paid:

(1) The nature of the employment; employment in a capacity where confidential information is habitually handled may impose a higher obligation of confidentiality, because the employee could be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reached him only occasionally.

(2) The nature of the information itself; in order to be protected, the information must be of a highly confidential character - no other information could be protected even by a covenant in restraint of trade.

(3) Whether the employer impressed on the employee the confidentiality of the information.

(4) Whether the information can easily be isolated from other information which the employee is free to use or disclose.

The result of this is that if information is not categorised as confidential under Neill LJ's criteria, then it forms part of the employee's general knowledge and skill, which he is free to use for his own benefit or for the benefit of others after the termination of the contract of employment....'

[48] I also wish to make reference to what the Court in *Esquire System Technology*<sup>37</sup> said about confidential information, where the Court held as follows:

‘It was pointed out in *Meter Systems Holdings Ltd v Venter & another* that, while there is no *numerus clausus* as to the type of information which could permissibly be regarded as confidential, our case law has frequently recognized certain categories of information as confidential. These include:

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<sup>37</sup> *Esquire System Technologies (supra)* footnote 10 at para 29

(a) Information received by an employee about business opportunities available to an employer, even if such information could be obtained from another source. The potential or actual usefulness of the information to a rival is an important consideration in determining whether it is confidential or not.

(b) Information relating to proposals or, inter alia, the marketing of a new product.

(c) Information relating to the price at which one person has tendered competitively to do work for another is confidential in the hands of those who stand in a fiduciary relationship to the tenderer.

Information is confidential if it meets the following requirements:

(a) It must be capable of application in a trade or industry.

(b) It must not be public knowledge or public property (in other words, it must be known only to a restricted number or closed circle of people).

(c) It must, objectively, be of economic value to the person seeking to protect it.'

[49] Finally, and recently on the issue of confidential information, the Court in *Experian SA (Pty) Ltd v Haynes and Another*<sup>38</sup> said '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.' What thus must now be done, as part of the value judgment to be exercised in this matter, is to determine whether there is a case made out on the proper accepted facts as to whether the information the first respondent had access to whilst employed with the applicant would fall within the parameters of what could be classified as confidential information in terms of the above authorities, and also whether this information would be of benefit to the second respondent as employer of the first respondent.

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<sup>38</sup> (2013) 34 ILJ 529 (GSJ) para 19

[50] In this matter, there is particular issue of public policy, and as such, it is a neutral factor. What however is further importance and has to be determined in this matter is whether or not, even if the applicant is found to have a protectable interest, it has been shown that the first respondent's employment with the second respondent would infringe on such protectable interest. This is a factual question, based on what the first respondent would actually do at the second respondent and what possible risks the applicant would be exposed to if the first respondent is allowed to remain employed with the second respondent. I accept that as the second respondent is a direct competitor of the applicant, the employment of the first respondent with the second respondent prima facie would be a breach of the protectable interest, but this would always be subject to the determination of the existence of actual infringement on the facts.

[51] This then only leaves the issue of the weighing off of interests of the parties. In this context the issue of seniority of the first respondent is an important consideration.<sup>39</sup> In fact, the following dictum in *Pest Control (Central Africa) Ltd v Martin*<sup>40</sup> illustrates this, where the Court said '.... 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.' The point is that the more senior the position of the employee, the more likely it is that the employee would have access to such kind of confidential information that would be most useful to a competitor and highly prejudicial to an erstwhile employer if revealed. Further on the issue of the weighing off of interests, it must be considered if the employee concerned had particular skills which he or she was possessed of before becoming employed with the employer and would simply

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<sup>39</sup> See *Dickinson Holdings Group (supra)* para 38 ; *SA Breweries Ltd v Muriel* (1905) 26 NLR 362 at 370-371 ; *Stewart Wrightson (Pty) Ltd v Minnitt* 1979 (3) SA 399 (C) at 404B-C; *Random Logic (Pty) Ltd t/a Nashua, Cape Town v Dempster* (2009) 30 ILJ 1762 (C) para 32 ; *Experian (supra)* para 43

remain using. This could even include special skills developed in the course of the employee applying his trade in the employer. In *Automotive Tooling Systems*<sup>41</sup> the Court said ‘In my view, the facts establish that the know-how for which the appellant seeks protection is nothing other than skills in manufacturing machines albeit it that they are specialised skills. These skills have been acquired by the first and second respondents in the course of developing their trade and do not belong to the employer - they do not constitute a proprietary interest vesting in the employer - but accrue to the first and second respondents as part of their general stock of skill and knowledge which they may not be prevented from exploiting. As such the appellant has no proprietary interest that might legitimately be protected.’

[52] Further on the issue of the weighing off of interests, the Court in *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another*<sup>42</sup> held as follows: ‘Factors which may play a role in the process of determining the reasonableness or not of the ex-employee's conduct are the following: The duration of the employee's period of service. The vocational status and position of the employee in the undertaking. The economic and competitive significance of the trade secrets for the particular business or economic sector. The personal contribution of the employer to the development of the trade secret and the motive of the employee.’ As to what may weigh in the interest of the employer would be unique and special business activities, processes and methodologies in the employer<sup>43</sup>, the motives of the competitor and how the employee could assist and contribute in such motives,<sup>44</sup> whether there is something peculiar to the employer not readily available in the market

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<sup>40</sup> 1955 (3) SA 609 (SR) at 613G

<sup>41</sup> *Automotive Tooling (supra)* footnote 33 at para 20

<sup>42</sup> 2008 (2) SA 375 (C)

<sup>43</sup> *Automotive Tooling (supra)* para 15 ; *Hirt and Carter (Pty) Ltd v Mansfield and Another* (2008) 29 ILJ 1075 (D)

<sup>44</sup> *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) para 40 – 42

elsewhere,<sup>45</sup> or where the circumstances would in fact amount to unlawful competition.<sup>46</sup>

[53] Having set out all the legal principles applicable to the determination as to whether the enforcement of a restraint of trade would be reasonable, I shall now proceed to apply these provisions to the facts of this matter.

#### The merits of the application

[54] As this matter now concerns the issue of the granting of a final interdict, the applicant must satisfy three essential requisites: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.<sup>47</sup>

[55] The first question is thus whether the applicant has demonstrated a clear right. In the context of this matter, this means whether the applicant has a protectable interest. In my view, the applicant has failed to demonstrate a clear right in the form of a protectable interest, for the reasons set out hereunder.

[56] The applicant has simply not made out a case on the founding affidavit, as required. There is not nearly enough particularity given about why the information the first respondent was privy to was in fact confidential. As opposed to this, the first respondent has stated exactly what he did at the applicant, and from this appears that none of the information he had was confidential. The applicant this

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<sup>45</sup> *David Crouch Marketing* (supra) para 57

<sup>46</sup> *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) para 35

<sup>47</sup> *Setlogelo v Setlogelo* 1914 AD 221 at 227 ; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20 ; *Royalservice Cleaning (Pty) Ltd v Democratic Union of Security Workers and Others* (2012) 33 ILJ 448 (LC) para 2 ; *Esquire System Technology* (supra) at para 38 - 40

in essence makes bald statements about information being confidential. With regard to this kind of approach, the Court in *Automotive Tooling*<sup>48</sup> said ‘There are, I think, a number of difficulties that confront the appellant. First, the mere assertion by the appellant that the processes and methodologies in the design, manufacture and commissioning of customized marking machines are confidential does not make it so. The appellant does not identify any part of the process or method which is unique nor point to any other reason why such process or method is deserving of protection. There is no indication on the papers that the first and second respondents were placed in possession of any formulae, or designs or special methods of manufacturing relating to the processes and methodologies which, if done on a confidential basis, would have amounted to an interest worthy of protection.’ In *David Crouch Marketing*<sup>49</sup> the Court said: ‘The applicant in its founding affidavit also submits that its modus operandi and products as well as its services are indeed confidential and worthy of protection. The applicant again does not elaborate or give any details as to why these products, modus operandi and services are worthy of protection. Why these aspects are so unique is not clear from the founding affidavit. I am again in agreement with the submission advanced on behalf of the respondent that, without elaborating on the details of the applicant's alleged unique modus operandi, products and services, it must be accepted that the applicant has no unique modus operandi, products or services that are worthy of protection.’ In my view, these ratios in *Automotive Tooling* and *David Crouch Marketing* directly apply in the current case. There is simply nothing unique demonstrated by the applicant with regard to any aspect of its manufacturing process, and no such case has been made out. The version of the first respondent, which is to be accepted, confirms this.

[57] An important consideration in this matter is the fact that the second respondent does not conduct its own manufacturing. As such, it could not prescribe to its third party contractors on how to conduct manufacturing. The second respondent orders a finished product from the manufacturer. Any information the first

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<sup>48</sup> *Automotive Tooling* (*supra*) at para 20

respondent may have about the manufacturing process of the applicant is of no use and value to the second respondent. The first respondent has no information about trade connections and the applicant's case in any event is not based on this. The first respondent was not involved in design and fabric sourcing. As the applicant does not manufacture its own fabric, the first respondent cannot have any information about unique fabric manufacture processes. Therefore, and other than the skill and experience and expertise the first respondent brought with him to the applicant, the first respondent has no information about the applicant of value or use to the second respondent.

[58] The applicant makes some mention of the risk the first respondent's employment with the second respondent creates with specific reference to the customer, the Spar Group. I have difficulty in understanding the applicant's case in this regard. On the applicant's own version, the Spar Group is an existing customer of the second respondent as well, and the Spar Group insists on having two suppliers. There is also no evidence at all of any special relationship the first respondent may have with the Spar Group and again, as stated, the case of the applicant is not even based on this. The crisp point is that this pertinent issue raised by the applicant in the founding affidavit cannot establish a protectable interest because the Spar Group is not an exclusive customer. In *Hirt & Carter (Pty) Ltd v Mansfield and Another*<sup>50</sup> the Court said that '... in my view, the less exclusive the relationship between a service provider and a client, the more impersonal is the trade connection likely to be.'

[59] The first respondent came to the applicant with a wealth of skill, expertise and experience in the industry. He did not acquire this from the applicant. In fact, there is no evidence of the first respondent acquiring any specialized skill or

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<sup>49</sup> *David Crouch Marketing (supra)* at para 31

<sup>50</sup> *Hirt & Carter (supra)* at para 84

training or expertise from the applicant. On the contrary, it appears that the applicant was utilizing what the first respondent brought to the party, so to speak, and which, in terms of the above principles, belongs to the first respondent. As the Court said in *Aranda Textile Mills (Pty) Ltd v Hurn and Another*<sup>51</sup> ‘A man's skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade.’

[60] The first respondent's employment position with the second respondent is that of quality control. Although this is very similar to the position occupied by the first respondent in the applicant, it is simply not the kind of position that could expose the applicant to risk or prejudice. The position, at its core, assesses the quality of finished garments, and then recommends and implements steps to assure and improve such quality. It has nothing to do with design or patterns or sourcing of fabrics. The recommendations as to how to maintain and improve quality actually come from the first respondent's own skill and expertise, and not from what was imparted on him by the applicant. The position is also not senior in the context of being involved in strategic decision making, customer relationships, pricing and IP. It is, for the want of a better description, a simple “working” position.

[61] In this matter, there is in my view a strong inclination that all that the applicant is trying to do is to stifle competition from one of its principal competitors. I am inclined to accept that the applicant actually realises the value of the first respondent and wishes to deprive the second respondent as its competitor of such value. This is not what is envisaged as a protectable interest in a restraint of trade. I refer with agreement to what the Court said in *Esquire System Technologies*<sup>52</sup> where it was held that ‘It is not in the public interest - interpreted in the

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<sup>51</sup> [2000] 4 All SA 183 (E)

<sup>52</sup> *Esquire System Technologies* (*supra*) at para 50

light of the Constitution - to enforce a restraint of trade clause as broad as this one on an employee in the position of Ms Cronjé. As I have stated above, it would serve merely to stifle competition and not to protect any real interests worthy of protection. It would, instead, be in the public interest to allow the employee to exercise her constitutional right to exercise her occupation freely.’

[62] Dealing then with the information itself, and in terms of the legal principles set out above, there is simply very little that is confidential about the information the first respondent had access to. I accept that that the methodology of manufacturing clothing, as the first respondent says, has remained unchanged for decades. As the first respondent says, making a shirt is making a shirt, no matter where and in what form. There is simply nothing unique in what the applicant does.<sup>53</sup> Virtually all the information the applicant refers to is actually in the public domain.<sup>54</sup> If the applicant has a protectable interest, it would lie in the realm of trade connections or unique patterns and designs, which are issues the first respondent was not involved in. The first respondent’s duty with the applicant related to the end product, and not how the product came about. I also accept that all a competitor need do is take a garment made by the applicant, and which is in the market place, and analyse it, and would know all it needs to know about the product from this analyses. I have not been provided with any evidence relating to anything particular or unique and in the pipeline at the applicant, so to speak, which the general market would not have.<sup>55</sup> The first respondent has no knowledge of the pricing of the applicant and does not deal with customers. Finally, and as set out above, and as the second respondent does not manufacture, the involvement of the first respondent in the manufacturing process of the applicant has no value to

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<sup>53</sup> In *David Crouch Marketing* (*supra*) the Court said: ‘*In my view, for an employer to succeed in establishing that trade secrets and confidential information are interests justifying protection by the restraint, it should demonstrate in 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.*’

<sup>54</sup> See *David Crouch Marketing* (*supra*) at para 29

the second respondent. There is, in my view, nothing confidential in the information the first respondent may have accrued at the applicant.

[63] With regard to the issue of possible motives, there is simply no evidence at all of the employment of the first respondent being solicited by the second respondent with the view of procuring confidential information of the applicant. In fact, the first respondent left the applicant for personal considerations. He applied for a number of positions, went to a number of interviews, and in essence accepted the best job offer. There is simply no ulterior motive to be found in these circumstances. The first respondent has simply remained in the industry he started out in, that he knows, and that he has acquired his own skill and experience in over decades. The current employment opportunities in the industry are limited. On a quantitative and qualitative weigh off in this matter, I have little doubt that this balancing act must come down in favour of the first respondent.

[64] In my view, the applicant has thus failed to demonstrate a clear right in this matter. I conclude that the applicant has no protectable interest, the employment of the first respondent at the second respondent does not infringe any protectable interest the applicant may have in any event, and on the quantitative and qualitative weigh off favours the first respondent. To enforce the restraint of trade in these circumstances would be unreasonable. As the applicant has not demonstrated a clear right, this is where the enquiry stops. The applicant has thus not discharged the onus on it to obtain the relief sought. The applicant's application falls to be dismissed, and thus the rule nisi must be discharged.

### Costs

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<sup>55</sup> See for example *Poolquip Industries (Pty) Ltd v Griffin and Another* 1978 (4) SA 353 (W) at 362B-E

[65] This then only leaves the issue of costs. There is no reason why costs should not follow the result. There is no ongoing relationship between the parties. With regard to costs, I must however point out that that the costs order made by Gush J in paragraph 20(d) of the learned Judge's judgment is a final order and not part of the rule nisi, and there is no basis for me to interfere with the same. I shall therefore only limit the costs order in this judgment to the proceedings in respect of the return date of the rule nisi.

### Order

[66] In the premises, I make the following order:

- 66.1 The rule nisi issued on 19 June 2013 is discharged.
- 66.2 The applicant is ordered to pay the first and second respondent's costs only for the period after the handing down of the rule nisi on 19 June 2013.
- 66.3 The costs order of Gush J in paragraph 20(d) of the judgment dated 19 June 2013 stands.

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Snyman AJ  
Acting Judge of the Labour Court

APPEARANCES:

APPLICANT:

Mr R C W Pemberton of Garlicke & Bousfield Inc

RESPONDENTS:

Mr M D C Smithers SC

Instructed by Barkers Attorneys