Reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J 2442/10

In the matter between:

ESQUIRE SYSTEM TECHNOLOGY (PTY) LTD

T/A ESQUIRE TECHNOLOGIES **Applicant**

and

ILSE CRONJÉ **First respondent**

MIRO DISTRIBUTION **Second respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] This is an urgent application to enforce a restraint of trade agreement.

[2] The applicant seeks to interdict the first respondent, Ilse Cronjé, from entering into any work agreement with direct competitors of the applicant within the provinces of Gauteng, Mpumalanga, KwaZulu-Natal, Western Cape and Eastern Cape for a period of three months[1] from the date of her resignation on 30 November 2010.

[1] The restraint of trade clause specified a restraint period of six months. The applicant offered in the course of this application to shorten the restraint period to three months.

BACKGROUND FACTS

[3] The applicant, Esquire Technologies, employed the first respondent (the employee) as a "sales executive" at its Samrand branch in Midrand. She started working for the company on 9 July 2010. She left its employ on 30 November 2010.

[4] Although the company described the employee as a "sales executive" in its founding affidavit, she is perhaps more appropriately described as a "sales assistant", as she is indeed titled in her contract of employment. As she points out in her answering affidavit, the title "sales executive" is misleading. She did not hold an executive position. Nor was she involved in management. The position was more akin to that of a junior assistant and she earned a gross monthly salary of R 4500 – hardly the remuneration associated with an executive position in the South African companies of today. The nomenclature of "sales executive" is certainly not commensurate with her position. It appears, rather, to be part of the unfortunate but seemingly ineluctable trend to award employees with grand-sounding titles instead of actual positions of authority.

[5] The employee's duties are set out in the most general terms. It is expected of her to "satisfactorily carry out all the tasks and duties normally associated with the position"; and to "obey all reasonable and lawful orders and instructions which may be given by any person employed by the employer who is in a managerial or supervisory position." This latter clause, in itself, suggests that the employee was not employed "in a managerial or supervisory position."

[6] Yet the employee's contract of employment contains a rambling restraint of trade clause comprising some 32 clauses and subclauses over three closely typed pages of what looks like an 8pt font in single spacing. Some of it is nonsensical. For example, clause 16.3 reads thus:

> "16.3 Without derogating from the EMPLOYEE'S [*sic*] obligations in terms of the confidentiality undertakings provided in This Agreement [*sic*], the EMPLOYEE shall not for the restraint period of **6 (six)** months from date of termination of his/her employment, whether as proprietor, partner, director, shareholder, member, executive, consultant, contractor, financier, agent, representative, sales

assistant, trustee or beneficiary of a trust or otherwise and whether for reward or not, directly or indirectly:

16.3.1 carry on; or Employer [*sic*]

16.3.2 be interested or engaged in or concerned with or employed by any Competing Business of the Employer in any of the Prescribed Areas; provided that the EMPLOYEE shall not be deemed to have reached these restraint undertakings by reason of: "

and that is where it ends. The reader waits in suspense to see what the dangling colon at the end of that clause, like an offensive intestine, might relate to; but there is nothing to follow.

[7] The restraint clause is liberally spattered with references to the “Prescribed Goods” and “Prescribed Services”. The former is defined as "any Computer Hardware, Software, Computer Accessories and/or Digita [*sic*] Lifestyle products and all related products, accessories and other goods which I dealt with or in by the COMPANY (or Group) in the ordinary course of business."[2] The latter is defined as "any services rendered by the COMPANY (or Group) in the ordinary course of business, including, but not limited to the sale and/or rental and/or hire, and/or importation and/or exportation and/or licensing and/or distribution of the Prescribed Goods and/or any other services rendered in respect of the Business." The concepts of "the Business" and "the Group" are not defined. Nowhere in the founding papers is any reference to “Digita Lifestyle products” to be found. One does not know whether the employee did, indeed, that any Internet knowledge of such lifestyle products. The company blandly says in the founding affidavit deposed to by the managing director that the employee "in essence required detailed knowledge of all services and products of the applicant, its pricing and margins and services to be provided to [*sic*] customers. First respondent also has intimate and direct knowledge of all essential and critical issues relating to all aspects of the applicant's operations. "

[8] Clause 16.7 of the restraint of trade covenant states that:

[2] The unnecessary and distracting use of capitalization is as in the original.

> "The EMPLOYEE undertakes not to accept or seek employment from any concern falling within the definition of Competing Business (**any business howsoever conducted which manufactures, imports, sells and/or distributes Competing Goods and/or renders Competing Services**) within the restraint period, or during his/her employment period without the knowledge and consent of Management first being obtained in writing."

Yet "competing goods" and "competing services" are not defined.

[9] The applicant also states in its founding affidavit that the restraint would apply in the provinces Gauteng, Mpumalanga, KwaZulu-Natal, Western Cape and Eastern Cape. Yet the restraint clause itself makes no mention of the Western Cape. There is no basis on which the applicant may seek to extend the operation of the order it seeks to the Western Cape. It remains to decide whether it is entitled to the rest of the relief it seeks.

[10] The employee gave notice of her resignation on 28 October 2010, with her last day of employment with Esquire intended to be 30 November 2010. Immediately after she left its employ, she took up employment with a neighbouring company, Miro Distribution (the second respondent).

[11] The applicant contends that Miro is its direct competitor. Miro has not entered the fray and abides the decision of this court. The employee disputes that Miro is in direct competition with the applicant. She contends that the applicant's main business entails the sale of computers, computer hardware and related products. These comprise, amongst others:

11.1 PC components;

11.2 Digital Lifestyle and consumer electronics;

11.3 Gaming components such as graphics cards, interactive gaming consoles and accessories for Sony Playstations, Nintendo Wii and PC's;

11.4 Official licensed products;

11.5 Notebook computers; and

11.6 Accessories and peripherals.

[12] Miro's business, she says, is different. Its "core focus" is providing network solutions for customers' communication requirements. It distributes wireless, networking, VOIP[3] and IP video products. Its core business is not the sale and distribution of computer related products but rather the creation of network solutions for its customers.

[13] In reply, the applicant has pointed out that the two companies do sell some of the same products, such as desktop switches, USB adapters, modems and routers.

THE LAW PERTAINING TO RESTRAINTS OF TRADE

[14] With regard to the legal principles generally applicable to restraints of trade, the leading case on restraints in South Africa remains ***Magna Alloys and Research (SA) (Pty) Ltd v Ellis***[4]. The following principles were adopted by the Appellate Division (as it then was) in the ***Magna Alloys*** case:

14.1 *Prima facie* every restraint agreement signed by a restrainee is enforceable. Where a restrainee wishes to be released from his restraint obligations, the onus lies on the restrainee to show that the restraint is not only unreasonable, but *contra bonos mores*, that is, contrary to public policy.

14.2 In determining whether a restraint is *contra bonos mores*, a court will look at the facts and circumstances at the time that the restrainor is attempting to enforce the agreement against the restrainee and weigh up two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair [*pacta sunt servanda*]. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions freely. Expressing this differently, it is detrimental to society if an

[3] Voice Over Internet Protocol
[4] 1984 (4) SA 874 (A)

unreasonable fetter is placed on a person's freedom of trade or a person's freedom to pursue a profession.

14.3 In determining whether a restraint is *contra bonos mores*, a court will consider, among others, the following factors:

14.3.1 the duration of the restraint;

14.3.2 the area in which the restraint applies;

14.3.3 whether a restraint payment was paid to the restrainee;

14.3.4 whether the restrainee still has the ability to earn a living;

14.3.5 the "proprietary interest" or capital asset that the restrainor seeks to protect.

[15] The four questions which a court would typically pose in assessing the reasonableness of a restraint were formulated thus in ***Basson v Chilwan***[5]:

> "Vier vrae moet in dié verband gestel word:
>
> (a) Is daar 'n belang van die een party wat na afloop van die ooreenkoms beskerming verdien?
>
> (b) Word so 'n belang deur die ander party in gedrang gebring?
>
> (c) Indien wel, weeg sodanige belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy ekonomies nie onaktief en onproduktief moet wees nie?
>
> (d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te make het nie maar wat verg dat die beperking gehandhaaf moet word, al dan nie?
>
> Vir sover die belang in (c) die belang in (a) oortref, is die beperking in die reël onredelik en gevolglik onafdwingbaar. Dit is 'n kwessie van beoordeling wat van geval tot geval kan wissel."

[5] 1993 (3) SA 742 (A) at 767

The law in the light of the Constitution

[16] The principles set out above have come under attack in the light of the provisions of the Bill of Rights contained in the Constitution. In ***Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain***[6] the High Court was asked to hold that restraint of trade agreements are unconstitutional by virtue of section 22 of the Constitution, which provides:

> *"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."*

16.1 The court referred to a number of earlier cases decided under the corresponding section of the Interim Constitution (section 26), where it was held that notwithstanding the provisions of the Constitution the position set out above, i.e. that restraints of trade agreements are *prima facie* enforceable and that the onus rests on the person seeking to be released from the restraint on the basis that it is unreasonable, was still good law. The court cited with approval what was stated in ***Knox D'Arcy Ltd v Shaw***[7], namely:

> *"The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions. As long as there is no overriding principle of public policy which is isolated thereby, the freedom of the individual comprehends the freedom to pursue, as he chooses, his benefit or his disadvantage.*
>
> *It is generally regarded as immoral and dishonourable for a promissory to breach his trust and, even if he does so to escape the consequences of a poorly considered bargain, there is no principle that inheres in an open and democratic society, based upon freedom and equality, which would justify his repudiation of his obligations. On the other hand the enforcement of a bargain (even one which was ill-considered) gives*

[6] 2001 (2) SA 853 (SE)
[7] 1996 (2) SA 651 (W)

recognition to the important constitutional principle of the autonomy of the individual."

16.2 The court held that insofar as a restraint of trade agreement is a limitation of the right contained in section 22 of the Constitution, the common law (of *pacta sunt servanda*) complies with the provisions of the limitations provision of the Constitution (section 36). In terms of this provision, a right in the Bill of Rights may only be limited in terms of a law of general application (which the common law is) to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

16.3 The court held that provided that the requirements of ensuring that the restraint sought to be enforced are met, namely that it is reasonable and not contrary to the public interest, such a restraint will comply with the provisions of section 36 of the Constitution.

16.4 Without deciding the point, the court observed that the effect of the Constitution on restraint of trade agreements might be that the onus should shift from the person seeking to be released from the restraint (to show that the restraint is unreasonable) to the person seeking to enforce the restraint (to show that it is reasonable and complies with the provisions of the Constitution).

[17] However, in a number of subsequent cases the courts held that the onus remains on the party seeking to be released from the restraint to show that it is unreasonable and contrary to the public interest. (***Townsend Productions (Pty) Ltd v Leech and Others***[8]; ***Walter McNaughtan (Pty) Ltd v Schwartz and Others***[9].)

[18] As far as I could ascertain, the only case in which a court has held that the onus has shifted to the party wishing to enforce the restraint to show that it

[8] 2001 (4) SA 33 (C)
[9] 2004 (3) SA 381 (C)

is reasonable, was Davis J in ***Advtech Resources t/a Communicate Personnel Group v Kuhn***[10]***.***

[19] The ***Advtech*** decision was roundly criticised in the subsequent case of ***Den Braven SA (Pty) Ltd v Pillay***[11]***.*** In that case, Wallis AJ[12] summarised the approach of the Constitutional Court to be that contractual obligations are enforceable unless they are contrary to public policy, which is to be discerned from the values embodied in the Constitution and in particular the Bill of Rights. "Where the enforcement of a contractual provision would be unreasonable and unfair in the light of those fundamental values it will be contrary to public policy to enforce the contract or the contractual term in question. This does not, however, mean that compliance with contractual obligations freely and voluntarily undertaken is irrelevant to the inquiry into public policy."***[13]***

[20] In ***Den Braven***[14]***,*** the court referred to Ngcobo J's judgment in ***Barkhuizen v Napier:***

> "On one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda,* which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self autonomy or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity."

[21] Wallis AJ in ***Den Braven*** then criticised Davis J's judgment in *Advtech* and said:

> "To the extent that the learned judge was suggesting that contractual autonomy is not in appropriate circumstances reflective of freedom and gives effect to the

---

[10] 2008 (2) SA 375 (C)
[11] 2008 (6) SA 229 (D)
[12] as he then was
[13] ***Den Braven*** at para [32]
[14] Para [32]

central constitutional values of freedom and dignity, that approach is contrary to the views of both the Constitutional Court and the Supreme Court of Appeal."[15]

[22] The current state of the law with regard to restraints of trade is interpreted and summarised by the court in ***Den Braven*** as follows:[16]

> "The importance of the decision in *Magna Alloys* is that it removed restraint of trade agreements from being a special and isolated type of contract looked upon with particular approbation by courts and placed them squarely within the mainstream of the law of contract as agreements concluded and enforceable in the ordinary course, but unenforceable where their enforcement would be in conflict with public policy. Bearing in mind the range of circumstances which may give rise to the conclusion of a restraint of trade agreement, spanning the spectrum from the hugely successfully businessperson who sells the business that he or she has built up for massive amounts of money and is required to sign a restraint of trade agreement in order that the purchaser may protect its investment, to relatively humble employees who may be required to sign such an agreement as a matter of rote and possibly *in terrorrem* to deter them from seeking a more advantageous position, it is more appropriate that, like other types of contract, their enforceability should depend, not on an arbitrary classification as a type of contract not favoured by the law, but on the flexible yardstick which public policy provides. Secondly, there seems to me to be no legitimate basis for treating restraint of trade agreements as warranting a particularly jaundiced approach by the courts. We have a developed jurisprudence designed to ensure fairness in the competitive arena of trade and business. Thus our law prohibits passing-off and other forms of unfair competition such as the misappropriation of another's designs; the appropriation of information gathered from the public domain by another for commercial purposes; the use of a get-up misappropriated before it could be placed in the public domain; misrepresentations regarding one's own or a competitor's business; and the use by a competitor of confidential information. The person who sells a business and then seeks to make use of the trade connections that he sold will be interdicted from doing so even in the absence of a restraint of trade agreement. The employee who seeks to turn their employer's confidential information, trade secrets or trade or customer

[15] *Den Braven* at para [33]
[16] at para [35]

connections to their own account for the benefit of themselves or a competitor of their employer acts in a no less reprehensible fashion and I can think of no good reason why our law should not afford a remedy to a business that seeks protection against this type of unfair competition. Where the business has sought to protect itself by securing a restraint of trade undertaking from the employee there is no reason for the courts or the law to view this with disfavour. It is only where the bounds of public policy are overstepped that the court will withhold its assistance."

[23] But, as Davis J retorted in *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff & another*[17]:

"The challenge of our Constitution is ... not to reproduce uncritically the shibboleths of the past, but to transform (as opposed to abolish or ignore) legal concepts in the image of the Constitution. Contract law cannot be reduced to a museum of past jurisprudence. Expressed differently, the methodology mandated by s 39(2) of the Constitution needs to be implemented whenever a dispute such as the present is placed before a court. This permits a far less deferential approach to the formal contractual provisions than if the case of *Den Braven* is followed."

[24] I find myself in respectful agreement with the sentiments of Davis J. But I am bound by the authority of the higher courts and I will try to apply the principles as outlined by those courts – unsettled as they may be – as best I can.

[25] As discussed above, then, restraints are generally enforceable unless they are shown to be contrary to public policy. As long as there is no overriding principle of public policy at play in the particular case, the freedom of the individual comprehends the freedom to pursue, as he chooses, his benefit or his disadvantage. The enforcement of a bargain (even one which was ill-considered) is said to give recognition to the important constitutional principle of the autonomy of the individual.

[17] (2009) 30 *ILJ* 1750 (C)

Proprietary interest

[26] A restraint is valid if there is a proprietary interest which justifies protection. Those interests are usually in the nature of trade secrets, know-how, pricing or customer connections. Therefore, a restraint would be an enforceable restriction on the activities of an employee who (for example) had access to the company's customers and could use his/her relations with the company's customers to the advantage of a competitor and to the detriment of the company.

[27] The protectable interests which traditionally underpin a restraint of trade are confidential information and the existence of a relationship between the restrainee and the customers or suppliers of the restrainor.

[28] It was pointed out in ***Meter Systems Holdings Ltd v Venter***[18] 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 recognised certain categories of information as confidential. These include:

- 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.

- Information relating to proposals or, *inter alia,* the marketing of a new product.

- 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.

[29] Information is confidential if it meets the following requirements:

- It must be capable of application in a trade or industry;

[18] 1993 (1) SA 409 (W)

- 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); and

- It must, objectively, be of economic value to the person seeking to protect it.

[See ***Aranda Textile Mills (Pty) Ltd v Hurn***[19]]

[30] A protectable customer or supplier relationship exists where an employee has personal knowledge of, and influence over, the customers (or suppliers) of his employer so as to enable him, if the competition were allowed, to take advantage of his former employer's trade connections (***Rawlins & Another v Caravantruck (Pty) Ltd***[20]).

[31] A customer connection exists where a customer belongs to the employer and the employee obtains influence over the customer by virtue of his employment.[21]

[32] The following remarks may be relevant to the position of sales executives in particular cases:

"The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business."[22]

[33] In ***BHT Water Treatment (Pty) Ltd v Leslie and Another*** [23] the court remarked as follows:

---

[19] [2000] 4 All SA 183 (E)
[20] 1993 (1) SA 537 (A) at 541 E; 543 C – G
[21] ***Den Braven SA (Pty) Ltd v Pillay*** 2008 (6) SA 229 (D) para [6]; ***Lifeguards Africa (Pty) Ltd v Raubenheimer*** 2006 (5) SA 364 (D) paras 40-41; ***Walter McNaughtan v Schwartz*** 2004 (3) SA 381 (C) 386-7, 390-392; ***Nampesca (SA) Products (Pty) Ltd v Zaderer*** 1999 (1) SA 886 (C) 899-900; ***Dickinson Holdings v Du Plessis*** 2008 (4) SA 214 (N) para [30] ff.
[22] *Rawlins v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) 541 D-H, cited with approval in *Den Braven* para [6].
[23] 1993 (1) SA 47 (W); See also ***Fidelity Guards v Pearmain*** 2001 (2) SA 853 (SE) 859 D-I

"In my view, all that the applicant can do is to show that there is secret information to which the employee had access, and which in theory the employee could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the employee... In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the employee would act honourably or abide by the undertakings that he has given."

[34] In ***Reddy v Siemens Telecommunications (Pty) Ltd***[24], a recent decision of the Supreme Court of Appeal, the SCA upheld a 12 month restraint against an employee who had joined a competitor (Ericsson). Malan AJA stated that it was not necessary for the court to find that the employee *would* use his previous employer's trade secrets and confidential information in his new employment but that it was sufficient if he *could* do so:

"Reddy is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively, is obvious. Reddy will be employed by Ericsson, a 'concern which carries on the same business as [Siemens]' in a position similar to the one he occupied with Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist. The restraint was intended to relieve Siemens precisely of this risk of disclosure. In these circumstances the restraint is neither unreasonable nor contrary to public policy."

[35] The court restated the following principles in the ***Reddy*** case:

35.1 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

[24] 2007 (2) SA 486 (SCA)

should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom in forming the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life.

35.2 In applying these two principal considerations, the particular interest 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. The court accepted that the four questions posed in ***Basson v Chilwan*** by Nienaber JA is still good law.

35.3 The common-law approach in balancing or reconciling the concurring interests in this manner, the court held, gives effect to the limitation clause in s 36(1) of the Constitution.

[36] In the recent case of ***Arrow Altech Distribution (Pty) Ltd v Byrne***[25] Nicholson J referred to *Reddy v Siemens* and usefully set out the present position of the law including the application of the Constitution. This case and the cases quoted by the court may be summarized in the following manner. Part of what is set out is a verbatim quote from the various cases and part is a summary thereof.

36.1 Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work.

[25] (2008) 29 *ILJ* 1391 (D)

36.2 Insofar as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case.

36.3 Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time the enforcement is sought.

36.4 Where the onus lies in a particular case is a consequence of the substantive law on the issue.

36.5 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.

36.6 A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint.

36.6.1 The first is that the public interest required that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt.*

36.6.2 The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. 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.

THE LAW APPLIED TO THE FACTS

[37] The applicant seeks final relief. It therefore has to establish that it has a clear right to the relief sought. If it does, it would, in my view, succeed in the light of the other requirements for a final interdict. It would therefore be more convenient to deal with those aspects first.

Irreparable harm

[38] Should the restraint be enforceable and should the applicant have interests worth protecting, it would suffer irreparable harm if it is not enforced. The harm caused by an employee who divulges trade secrets to a competitor cannot be easily remedied by a damages claim in due course. The question remains whether the applicant does have such interests worthy of protection – a question I will deal with under the heading of a clear right.

Alternative remedy

[39] This criterion overlaps to a great extent with that of irreparable harm in restraint of trade cases. As I have stated above, the alternative remedy of a damages claim is cold comfort to an applicant that seeks to enforce a legitimate restraint of trade covenant. By the time a damages claim is heard, the horse had bolted and the harm is done. That harm is very difficult to repair. I am satisfied that, where a restraint of trade is enforceable, the alternative remedy of a damages claim in due course is more apparent than real.

Clear right

[40] That brings me, then, to the question of a clear right. The onus is on the applicant to establish that it has a clear right; but in considering whether it has done so, I accept that, in the light of the weight of authority outlined above, the employee still bears the onus to show that the restraint is not enforceable. In deciding whether it is enforceable – and thus, whether the

applicant has established a clear right – I will apply the test as set out in *Basson v Chilwan* and developed in *Reddy v Siemens* and *Arrow Altech Distribution.*

Protectable interest

[41] What is, according to the applicant, the interest deserving of protection?

[42] The applicant's legal representative glibly states in his heads of argument that it "clearly had an interest worthy of protection". He goes on to say that the employee had access "to all the applicant's trade secrets, customer particulars, pricing and all other confidential operational information".

[43] But is this borne out by the facts? In order to establish that, I have to consider the facts as set out in the pleadings in accordance with the well-known principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[26]

[44] The employee says that, employed as she was in the relatively junior position of sales assistant, she does not have knowledge of the applicant's trade secrets and confidential information. She has, in the five months that she has worked for the applicant, acquired some general skills in sales and marketing. Although she has knowledge of the applicant's products and services, these are generally available on the open market and can hardly be described as trade secrets. In her new employment, she will not compete with the applicant or deal with its customer base. She has no documentation setting out the applicant's sales margins or pricing of products.

[45] Based on this evidence of the employee, it does not appear to me that the applicant has an interest worthy of protection that is threatened by the employee.

[26] 1984 (3) SA 623 (A)

Protectable interest prejudiced by employee?

[46] Even if the applicant had established interests worthy of protection, it does not appear from the evidence before me that the employee is in a position to prejudice those interests. She has shown that she does not possess any trade secrets or exclusive customer connections. The information to which she is privy is readily accessible on the open market; and the nature of the second respondent's business is not in direct completion to that of the applicant, with the result that they do not in any event target the same customers.

Interest of the employee

[47] Even if the applicant had passed the two threshold tests set out above, I must still weigh that up against the interest of the employee to be gainfully employed – in the words of *Basson v Chilwan*, "dat sy ekonomies nie onaktief en onproduktief moet wees nie"; or, in the words of the Constitution, "to choose her trade or occupation freely".[27]

[48] On the facts of this case, it appears to me that the generic restraint of trade clause inserted into the contract of employment is aimed at little more than stifling competition. The clause is not directed specifically at an employee such as Ms Cronjé. I also take into account that she received no consideration to compensate her for the period of unemployment that enforcement of the restraint would almost inevitably lead to. If it were to be enforced, she would be restrained from working in any sales environment dealing with computers and computer equipment in most of the economically active provinces in South Africa. It seems to be me to be so broad, when weighed up against her interests, as to be unenforceable.

The public interest

[49] It is not in the public interest – interpreted in the 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

[27] Constitution s 22.

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. Even though the applicant only seeks to enforce it for the relatively short period of three months, that does not detract from the principle.

CONCLUSION

[50] The applicant has not established a clear right for the relief it seeks. There is no relationship between the parties any longer and the first respondent, an individual employee who earned the princely sum of R4 500 per month, has had to incur significant legal costs to oppose this application on an urgent basis. I can see no reason in law or fairness why costs should not follow the result.

[51] The application is dismissed with costs.

_____

ANTON STEENKAMP

JUDGE OF THE LABOUR COURT

Date of hearing: 9 December 2010

Date of judgment: 17 December 2010

For the applicants: Attorney JF du Toit

Kloppers Theron Inc

For the respondent: Adv PH Kirstein

Instructed by: VFV Mseleku attorneys