FORM A

FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT

PARTIES:

GENTECH ENGINEERING PLASTICS CC **Applicant**
v
SIVALINGUM KEVIN REDDY and others
Respondents

- Case Number: **1419/08**
- High Court: **PORT ELIZABETH**
- DATE HEARD: **31 JULY 2008**
- DATE DELIVERED: **08 AUGUST 2008**

JUDGE: **GREENLAND A.J.**

LEGAL REPRESENTATIVES –

Appearances:
- for the Applicant: **ADV A P JOUBERT SC**
- for the Respondent(s): **ADV R P VAN ROOYEN SC**

Instructing attorneys:
- Applicant(s): **RUSHMERE NOACH INC**
- Respondent(s): **FRIEDMAN SCHECTER**

CASE INFORMATION -
- ***Nature of proceedings*:** **MOTION PROCEEDINGS**
- ***Topic:*** **RESTRAINT OF TRADE**
PERIOD OF RESTRAINT
- ***\Key Words:*** **INTERDICT**
REASONABLENESS

UNLAWFUL COMPETITION
SPRINGBOARDING

Facts - Respondents, comprising three employees of Applicant, one cc set up by them, one cc especially set up and a member of the latter, clandestinely set themselves up to compete with the Applicant.

Unlawful competition - In doing so they used applicant's confidential information including customer lists, supplier lists, profit report by Analysis Code and profit report by supplier - They also secured a contract with one of Applicant's clients - Held that the conduct of Respondents constituted spring-boarding and unlawful competition - Interdict and restraint therefore justified.

Period of interdict and restraint - Respondents tendered to be restrained for three months - Applicant contended that they be interdicted and restrained from soliciting Applicant's clients for eighteen months.

Reasonableness - Court holding that the criterion for fixing the period of restraint is reasonableness – Consideration of all the circumstances important in making determination - The intention is not to punish - It is to balance the need to protect the Applicant from unlawful competition against the interest that Respondents have to trade freely - Period of twelve months set as reasonable.

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

CASE NO: 1419/08

In the matter between:

GENTECH ENGINEERING PLASTICS CC **APPLICANT**

and

SIVALINGUM KEVIN REDDY **1st RESPONDENT**

KEITH BLAKE BELLING **2ND RESPONDENT**

SHELDON MAURICE ZIMMER **3RD RESPONDENT**

UREFLEX CC **4TH RESPONDENT**

TRIPLE K'S PROPERTIES CC **5TH RESPONDENT**

WILMA PRINSLOO **6TH RESPONDENT**

JUDGMENT

GREENLAND A J: -

[1] This matter arises in terms of an urgent application on Notice of Motion. The relief sought is an interim order pending the outcome of an action to be instituted for identical relief.

Relief Sought

[2] The terms of the order sought are summarised as follows –

1. Normal rules to be dispensed with so as to sanction the matter being dealt with as urgent;

2. Pending institution of an action to be instituted within one month of the date of order –

2.1 An interdict/restraint against use of Applicant's information, as particularised and listed.

2.2 An interdict/restraint from unlawfully competing with Applicant.

2.3 An interdict/restraint from "contacting or soliciting the Applicant's clients, agents and suppliers listed in a annexure "X" and from continuing to deal with Cadbury (Nigeria) and Transwerk".

2.4 Return forthwith of all copies of Applicant's confidential information.

2.5 Deletion, in the presence of Applicant's representatives, of all Applicants' confidential information on computer hardware possessed by 2nd Respondent.

3. Costs.

The Issue

[3] Although the papers are voluminous, at over 754 pages, with allegations, accusations and counters, thankfully the dispute has, in effect, been distilled down to the issue stated as 2.3 above. For this the court is indebted to the standard of representation on both sides and, in particular to counsel.

Respondents have tendered compliance with the other terms of relief sought

and costs to date of hearing.

As regards 2.3 they tender acceptance of the interdict and restraint prohibiting dealings with Cadbury (Nigeria) and Transwerk. They also tender acceptance of a period of three (3) months as being sufficient to protect the interests of Applicant as regards not contacting or soliciting the Applicant's clients, agents and suppliers listed in annexure "X". Applicant contends that the period should be eighteen (18) months and certainly not less than twelve (12) months.

In the result the main issue for determination, apart from costs of hearing, is whether the interdict stipulated in 2.3 above is to subsist for a period of three (3) months or some longer period not exceeding eighteen (18) months. It is necessarily the case that I must be satisfied as to the Applicant's entitlement to such relief.

Legal approach

[4] It is as well to quote Christie, THE LAW OF CONTRACT IN SOUTH AFRICA, 5TH ed at page 361 –

"The law of contracts in restraint of trade was greatly simplified by a trilogy of Full Bench decisions which were examined and selectively approved in *Magna Alloys and Research (SA) (Pty)Ltd v Ellis* 1984 4 SA 874 (A). The effect was neatly summarised by Didcott J in *J Louw and Co (Pty) Ltd v Richter* 1987 2 SA 237 (N) 243 B-D:

> "From the judgments that were delivered one learns the following, all of which is now clear. 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. In so far 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. 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 enforcement is sought."

Rabie CJ's judgment in *Magna Alloys* can properly be described as a landmark. No dispute about the enforceability of a contract in restraint of trade can now be decided without reference to the principles it lays down, and many of the earlier judgments can be relegated to the pages of legal history." (My underlining)

From the above can be abstracted the proposition that the issue of *reasonableness* or *unreasonableness* inevitably permeates the adjudication of restraint of trade disputes as regards upholding/enforcing such covenants and as regards upholding/enforcing the terms thereof.

Thus at p 376 Christie states – "When the reasonableness of the restraint does not hinge on its nature alone it may hinge on its area or time (period) or operation or on all three of these elements taken together or on any two of the three in combination."

Put simply the learned author is saying that *reasonableness* is the test for upholding a restraint in any of its components, i.e*., nature*, *area* and *period*. This approach is fully borne out by the authorities cited by counsel. As regards area and *period* see *African Theatres Trust Ltd v* Johnson 1921 CPD 25 *(variety artist); Estate Mathews v Redelinghuys* 1927 WLD 307, *Ntsanwisi v Mbombi* 2004 3 SA 58 (T) (medical practitioners); *Savage and*

Pugh v Knox 1955 3 SA 149 (N) (medical specialist); *Muller v Harris* 1958 2 SA 344 (N) (general dealer); *Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll* 1986 1 SA 673 (O) (estate agent); *Gero v Linder* 1995 2 SA 132 (O) (franchise holder); *Mathewson's Micro Finances BK v Lombard* [2004] 2 All SA 422 (NC) (micro-lending).

The concept of reasonableness is necessarily abstract and philosophical in essence. However it cannot be applied in this way but must be determined in the light of the particular facts and circumstances of the matter at hand. It is apparent and unsurprising that this determination is made having regard to considerations such as public policy[1], public interest[2], the constitution[3] and fairness and justice (what is justifiable[4]) whose applicability is induced by such facts and circumstances.

The concept of reasonableness, whilst not being an unruly horse is certainly a feisty one. Thus it is that the Applicant in this case contends that a period of eighteen (18) months is reasonable whereas the Respondents tender three (3) months.

In *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A) 794B-E EM Grosskopf JA said:

> "In determining whether a restriction on the freedom to trade or to practise a profession is enforceable, a court should have regard to 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. The

1 *Magna Alloys*, *supra*
2 *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A) 794B-E
3 *Waltons Stationary Co (Edms) Bpk v Fourie* 1994 4 SA 507 (O) 510D – 511E; *Kotze & Genis (Edms) Bpk v Potgieter* 1995 3 BCLR 349(C) 352E-F; *Knox D'Arcy Ltd v Shaw* 1995 12 BCLR 1702 (W) 1708F-1712E; *Fidelity Guards Holdings (Pty) Ltd v Pearmain* [1997] 4 All SA 650 (SE)
4 *Mathewson's, supra*

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 or, expressing it differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations a court will obviously have regard to the circumstances of the case before it. In general, however, it will be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade." (My underlining).

Circumstances of the Case

[5] As the circumstances of the case are important to adjudication of the matter they are summarised as –

Applicant

a) Applicant is a long established company involved, in the main, in the manufacture and distribution of products using various engineering plastics. Manufacturing of products is in terms of its own exclusive and well developed technological processes many of which are state of the art. Often products are manufactured in accordance with client specification. In the result some products are unique to applicant and its clients in concept, nature and design. Distribution is as agent for other companies in terms of long established relationships. The products are marketed as alternatives to competing products with Applicant's products touted as advantageous over rival products. With a good book of clients it has traded for over thirty (30) years and is well

established enjoying good security of market share. So its present position is the product of many years involving the sustained application of capital, time, energy, and skills in innovative technology and resources.

It is my finding that the above summarises a position and interests that have sufficient uniqueness and content as to be deserving of meaningful protection. This is not a company that is simply marketing products sourced from others. Its products and services are largely "home –grown". Similarly the market it is involved in comprises relationships that have been built up over time in terms of fairly unique mutual need and benefit.

Sivalingum Kevin Reddy

b) 1st Respondent ("Reddy") was employed by Applicant, since 31 May 1995, as a production and development manager having enjoyed previous employment with Applicant from 1985 to 1991. He became a sales representative in 2005.

It can be safely accepted that Reddy was a key man in Applicant's organisation with high level of knowledge regarding Applicant's products, client base, customer lists and pricing structure.

Keith Blake Belling

c) 2nd Respondent ("Belling") was appointed by Applicant as a sales specialist on 28 November 1988. In 1989 he was promoted to the position of sales manager and then general manger in 2000 reverting to the position of sales

manager about nine (9) months later.

As with Reddy it can be safely accepted that Belling was a key man in Applicant's organisation with high level of knowledge regarding Applicant's products, client base, customer lists and pricing structure

Sheldon Maurice Zimmer

d) 3rd Respondent ("Zimmer") has been with Applicant since 1988 except for a four (4) month break. On 18 May 2001 he was promoted to the position of product specialist manager.

As with Reddy and Belling it can be safely accepted that Zimmer was a key man in Applicant's organisation with high level of knowledge regarding Applicant's products, client base, customer lists and pricing structure

Ureflex CC

e) 4th Respondent ("Ureflex") was incorporated in 1998 by Reddy and Zimmer. In terms of its Founding Statement the main object of this closed corporation is stated as "Manufacturing of polyurethane products". The manufacture of such products is central to Applicant's business. It was apparently dormant. Such status ensured its readiness for utilization in the scheme in question.

Triple K's Properties CC

f) 5th Respondent ("Triple K's") was incorporated and

registered on 22 February 2008 and its members listed as Reddy, Belling, Zimmer and a Mrs Prinsloo a member of an entity, with which Applicant enjoys a close relationship, styled "A1 Plastics" to whom Applicant sub-contracts the manufacture of products from plastics it does not utilise. There is little doubt that this entity was created to provide domicile for the marriage between the existing partners and A1 Plastics.

Wilma Prinsloo

g) 6th Respondent (Prinsloo) is the member of A1 Plastics referred to above.

Unlawful Conduct

h) On the papers one can be satisfied beyond reasonable doubt, let alone balance of probability, that the Respondents cooperated clandestinely to set themselves up in business in direct competition with Applicant which scheme was uncovered in consequence of investigations including the employment of surveillance by private investigations, "wire tapping" of telephone conversations and computer data audit and recovery. As regards the latter it was discovered, *inter alia*, that Applicant's customer lists, supplier lists, profit report by Analysis Code and profit report by supplier had been downloaded by Belling from Applicant's computer server.

It is clear from the evidence unearthed and produced that the Respondents mustered their own and the Applicant's resources for the

purpose of starting business in direct competition with Applicant. The purpose behind their actions was to use Applicant's information, designs and processes to "spring-board" their new business in direct competition with Applicant. The "spring-board" concept is referred to in ***SCHULTZ v BUTT* 1986 (3) SA 667 (A); *JUTA & CO LTD AND OTHERS v DE KOKER AND OTHERS** 1994 (3) SA 499 (T); *WASTE PRODUCTS UTILISATION (PTY) LTD v WILKES AND ANOTHER* 2003 (2) SA 515 (W)** at page 583 -

"The concept was embellished upon in Cranleigh Precision Engineering Ltd v Bryant and Another; Same v Same [1965] 1 WLR 1293 (QB) at 1317 - 18:

'As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public. The brochures are certainly not equivalent to the publication of the plans, specifications other technical information and know-how. The dismantling of a unit might enable a person to proceed with plans or specifications, or other technical information, but not, I think, without some of the know-how, and certainly not without taking the trouble to dismantle. I think it is broadly true to say that a member of the public to whom the confidential information had not been imparted would still have to prepare plans and specifications. He would probably have to construct a prototype, and he would certainly have to conduct tests. Therefore, the possessor of the confidential information still has a long start over any member of the public. The design may be as important as the features. It is, my view, inherent in the principle upon which the Saltman case rests that the possessor of such information must be placed under a special disability in the field of competition in order to ensure that he does not get an unfair start; or, in other words, to preclude the tactics which the first defendants and the third defendants and the managing director of both those companies employed in this case.'

In terms of the springboard doctrine, an interdict against the use of confidential information may be limited by the duration of the advantage obtained, or the time saved, by reason of having had access to the confidential information. See in this regard Knox D'Arcy (above) and Multi Tube Systems (Pty) Ltd v Ponting and Others 1984 (3) SA 182 (D). But in Knox D'Arcy Stegmann J found that the interdict need not be limited in time where the confidential information sought to be protected is a trade secret - that is, a category (a) type of confidential information."

The effect of the concept was neatly put by L T C Harms SC in his submission in ***SCHULTZ v BUTT, supra -***

"The nub of the respondent's case was that the appellant had filched the respondent's design by using a hull manufactured by the respondent as a plug for the manufacture of a mould which in turn was used to manufacture hulls for boats manufactured by the appellant as a commercial venture. The Court a quo relied upon a number of decisions dealing with confidential information and the so-called doctrine of a "spring-board" and held that, in the light of those authorities, "anyone who is attracted by the design of the hull is entitled to incorporate features of the Butt-Cat hull in a hull of his own design. What he may not do, if he intends to conduct business in competition with the applicant, is to take a short cut, as it were, and construct hulls not to his own design, but according to applicant's drawing and plans (if such existed), or, what is even more reprehensible in my view, by using a mould made by applicant and upon which applicant has expended his time, labour, expertise and money." (My underlining)

Success of the scheme is evidenced by the fact that two (2) orders from Cadbury (Nigeria), a client of Applicant, netting R60 000 and R100 000 respectively were processed through A1 Plastics.

Produced as Annexure "FA 24" is a document authored by Belling in which the scheme is exposed in all its shameful details. By this is meant that the Respondents cooperated clandestinely to set themselves up in business in direct competition with Applicant using Applicant's information and resources.

As the purpose of the restraint is not to punish it is unnecessary to set out *in extenso* full details of Respondents' conduct. What is important is that it is safe to make the finding that their actions represent a classical instance of the spring-board concept and the commencement of what is termed unlawful competition.

The conduct of the Respondents was deviant in that it lacked the fairness and honesty that was required of them in all the circumstances and also transgressed the standard of societal *boni mores* applicable to their situation. Their conduct had the character of unlawfulness as envisaged in ***WOODLANDS DAIRY (PTY) LTD v PARMALAT SA (PTY) LTD* 2002 (2) SA 268 (E) at 279 B-F :**

"A litigant who seeks relief from competition which he contends is unfair must establish, inter alia, that his opponent has committed a wrongful act. The unlawfulness which must be proved is not limited to unlawfulness falling into a category of clearly recognised illegality. Fairness and honesty in competition are criteria that have been emphasised in many of the decided cases. In Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others 1981 (2) SA 173 (T) Van Dijkhorst J said the following at 188H - 189A:

'I have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the *boni mores*, manifested in the public opinion.

In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal. As this norm cannot exist *in vacuo*, the morals of the market place, the business ethics of that section of the community where the norm is to be applied, are of major importance in its determination.'"

The situation is akin to that stated ***WASTE PRODUCTS UTILISATION (PTY) LTD v WILKES AND ANOTHER**, supra* at page 854:

"Accordingly, but for the theft of the fruits of the plaintiff's labour and confidential information, EMR would never have been able to establish itself in competition with the plaintiff."

See also ***INTERFLORA AFRICAN AREAS LTD v SANDTON FLORIST AND OTHERS* 1995 (4) SA 841 (T) at 849 -**

"The modus operandi of the second respondent, Weir-Smith and Zeelie can properly be described as piracy by stealth. Objectively tested, the general sense of justice of the community, the boni mores, would condemn this modus operandi.

In the Dun and Bradstreet case (at 219C-D) Corbett J referred with approval to the following extract from the American textbook, Prosser Law of Torts 2nd ed at

571:

'Though trade warfare may be waged ruthlessly to the bitter end, there are certain rules of combat which must be observed. "The trader has not a free lance. Fight he may, but as a soldier, not as a guerilla." In the interests of the public and the competitors themselves, boundaries have been set by the law, and numerous practices have been marked out as "unfair" competition. . . .'

The second respondent, Weir-Smith and Zeelie may be described as not fighting as soldiers but as guerillas or, as mentioned above, as pirates. The appellant has over many years built up and established a carefully planned network which is highly efficient. The second, fourth and fifth respondents have acted as aforesaid solely to enable the second respondent to reap where it has not sown. Analysed from all angles, the scheme devised and carried out by them is dishonest and can only be stamped as unfair competition."

Resolution of the issue

[6] In setting the period of restraint it seems to me that the following considerations are paramount in terms of a reasonableness test set out in [4] above –

a) There can be no intention to punish the Respondents. See

***NTSANWISI v MBOMBI 2004* (3) SA 58 (T).**

KNOX D'ARCY LTD AND OTHERS v JAMIESON AND OTHERS

1996 (4) SA 348 (A) at 528:

Where the confidential information is of type (b), the first respondent and the second respondent would be free to use it provided that they had not, by breaching their fiduciary duties to the applicants, wrongfully and unlawfully prepared themselves a 'springboard' to save themselves the time and trouble and expense of having to find and cultivate their own customers in the way the applicants have had to do. A temporary interdict (and also a final interdict) which aims to deprive the respondents of that unfair and unlawful advantage, must be appropriately limited in time. Its object is to provide fair protection to the rights of the applicants for the period for which the unfair advantage may reasonably be expected to continue. The object is not to punish the respondents nor to prevent them from competing lawfully with the applicants (Roger Bullivant v Ellis (supra at 183-4 per Nourse LJ; and at 185-9 per May LJ))……. (My underlining)

b) Details of their actions to date reveal that the mischief

that the restraint seeks to avoid is real and that in the absence of a meaningful period the Applicant stands to be effectively and efficiently prejudiced on account of the unlawful resourcefulness of the Respondents. The Respondents, individually and collectively have the means to follow through on the unlawful (spring-board) start they affected and do irretrievably damage to the Applicant in its business.

c) Against that consideration is now well established acceptance of the notion that under the letter and spirit of the Constitution, in particular, there is an imperative that a person should not be denied the opportunity to work, sell his/her skills and compete in the open market even against his/her previous employer utilising the skills and knowledge acquired whilst so employed.

d) There is also the general imperative that in a free and open society there must be open competition and one should guard against, in effect, encouraging and according monopolies special protection.

e) It is also the case that, although the matter presents as an application for interim relief, the effect of the order will be final as it is difficult to see what Respondents would achieve by resisting an action "to be instituted" for the same relief. As to final substance trumping interim form

see ***Zuurbekom Ltd v Union Corporation Ltd*** **1947 1 SA 514 (A) 530-540;** ***Fourie v Uys*** **1957 2 SA 125 (C) 126E;** ***Cape Tex Engineering Works (Pty) Ltd v SAB Lines*** **(Pty) 1968 2 SA 528 (C).**

f) To my mind the period must reflect all of the above considerations in the context of the approach set out in the last paragraph of [4] above by Grosskopf JA in *Sunshine Records (Pty) Ltd v Frohling, supra,* and achieve a situations where the Applicant is protected for a fair and reasonable length of time without unduly penalising Respondents or permitting them from competing for the same business.

The "object is to provide fair protection to the rights of the applicants for the period for which the unfair advantage may reasonably be expected to continue" per ***KNOX D'ARCY,*** *supra.* The unfair advantage envisaged herein is that acquired by the Respondents in their illicit enterprise to date and inherent to the springboard effect they have secured.

g) Marginal weight is attached to the fact that 1st, 2nd and 3rd Respondents had covenants in their employment contracts with Applicant restraining them from employment in competition with Applicant. In the case of Reddy and Belling the period was twelve (12) months. In the case of Zimmer it was eighteen (18) months. This court is not being asked to enforce the covenants as, in

any event, they would be subject to the same test of reasonableness that I am confronted with herein. What is useful is that the periods stipulated are, at the very least, an indication of what persons involved in the business would be inclined to view as reasonable.

h) There is no reason why Applicant should not succeed as regards costs.

Order

[7] In the circumstances the following order is made –

1. The usual forms and services provided for in the Uniform Rules of Court are dispensed with and this application is dealt with as urgent pursuant to the provisions of Rule 6(12) of the Rules of Court.

2. Pending the outcome of an action to be instituted by the applicant for final relief within one month from the date of this order, the respondents are –

2.1 Interdicted and restrained from utilising the applicant's confidential information and documentation in any manner or form, and in particular, but without limitation, any information relating to the applicant's clients, agents, suppliers, designs and pricing structures as set out in schedule "X" attached to the

notice of motion and in the annexures attached to the replying affidavit as:

2.1.1 "RA 1";
2.1.2 "RA 4" and
2.1.3 RA 10' and "RA 11".

2.2 Interdicted and restrained from unlawfully competing with the applicant;

2.3 Interdicted and restrained for a period of twelve (12) months from contacting or soliciting the applicants' clients, agents and suppliers listed in annexure "X", and from continuing to deal with Cadbury (Nigeria) and Transwerk.

2.4 Ordered forthwith to return to the applicant copies of all confidential information in the respondents' possession.

2.5 Directing the second respondent to permanently delete in the presence of representatives of the applicant all information contained on his computer mass storage device (flashdrive) and computer(s) relating to the aforesaid confidential information.

3. Respondents are to pay costs, including costs of two counsel, jointly and severally, the one paying the other to be absolved.