IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No. 6688/08

In the matter between:

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| WHOLESALE HOUSING SUPPLIES (PTY) LTD | Applicant |
| and | |
| CELESTE BRAMLEY | First Respondent |
| ARKAM PLUMBING AND TRADING (PTY) LTD | Second Respondent |

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JUDGMENT

[1] While the first respondent was employed by the applicant, she was required to sign a restraint of trade agreement on 27 September 2007. She left the employ of the applicant on 31 January 2008 and is presently employed by the second respondent. The applicant seeks to enforce the restraint of trade agreement against the first respondent, and it seeks interdictory relief against her and the second respondent to prevent them from competing unlawfully with it.

[2] In the notice of motion the applicant seeks final interdicts against the respondents, alternatively interim interdicts pending the outcome of an action to be instituted against them for final relief. Many of the facts relevant to the determination of the issues are in dispute. Adv. L. Halgryn, who appeared for the applicant, informed me that the applicant was only seeking interim relief *pendent lite*. The existence of disputes of fact on material issues is no bar to the granting of temporary interdicts [see: Ndauti v. Kgami & Others, 1948 (3) SA 27 (WLD), at pp 36 – 37].

[3] Substance, however, prevails over form in deciding whether an interdict being sought is temporary or final. The restraint in issue was for a limited period of 12 months, and, if ordered, will run out by the 31st January 2009, which is long before the matter could be ready for trial.

'The substance is that an interdict is being sought which will run for the full unexpired time of the restraint. In substance therefore final relief is being sought although the form of the order is interim relief.'

[per Marais J, in BHT Water Treatment (Pty) Ltd v Leslie and Another 1993 (1) SA 47 (WLD), at p 55A – F].

[4] The Supreme Court of Appeal, in Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA), endorsed the approach followed by Marais J. At p 491 para [4], Malan AJA said this:

'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.[1] 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.[2]'

[5] The first respondent challenges the enforcement of the restraint on the grounds that its enforcement would unreasonably restrict her freedom to work and would accordingly be contrary to public policy. Its enforcement, according to the first respondent, would prevent her from partaking in the type of employment that she has been performing all her adult life without the existence of a corresponding interest on the part of applicant worthy of protection.

[6] The Supreme Court of Appeal, in the Reddy case (*supra*) at pp 496E – 497B, held that a court must make a value judgment in determining whether the restraint under consideration is reasonable or not. The value judgment is made within the context of the constitutional values of dignity and of one's free choice of trade, occupation or profession. Malan AJA said this at pp 497C – 498F:

'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.[24] Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest. In *Basson v Chilwan and Others*,[25] Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint: (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 restrained be maintained or rejected? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.[26]

The common-law approach in balancing or reconciling the concurring interests in this manner gives effect to the precepts of s 36(1) of the Constitution:

'The rights in the Bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.'

… 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,[28] corresponds with s 36(1)(e) [of the Constitution] 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.'

[7] Many of the facts concerning the reasonableness or otherwise of the restraint are in dispute. Such disputes of fact are not capable of resolution on the papers and they should accordingly be decided on the first respondent's version irrespective of the incidence of the *onus* [see: Rawlins and Another v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A), at pp 541J – 542A; Reddy (*supra*) at pp 495 – 496, para [14]].

[8] The applicant, *inter alia* through its Saffer and Stability divisions, trades as a wholesale distributor of plumbing material, sanitary ware and general hardware. Its Saffer and Stability divisions operate independently. Saffer sells locally manufactured plumbing products acquired from suppliers such as Cobra and Kwikot, and Stability sells imported plumbing and hardware products. The applicant describes its business as that of a *'speculative trader.*' It purchases products from suppliers and, in turn, sells them to its customers at a profit. The products are universally available. The applicant, and other similar suppliers in the market, such

as the second respondent, purchases their products from the same suppliers and, according to the first respondent, at much the same prices. Customers also do not purchase from one supplier, such as the applicant, exclusively, but they, according to the first respondent, have business relationships with at least two and often more suppliers.

[9] From 1994 until 2005, except for a period of six months during 2003 when the first respondent worked for the applicant's Stability division in Durban, she was employed by the applicant in its Saffer division – first as a sales representative earning a basic salary that was complimented by the earning of commission and later as a sales agent earning commission only. Her employment duties were limited to Pretoria, Krugersdorp, Potchefstroom, Klerksdorp and the in-between towns. Due to personal reasons and at her request, the first respondent was transferred to Johannesburg during 2005 - first in the position of product manager, but such position did not materialise, from August 2005 in a sales position for the Johannesburg North area, and from May 2006 in the position of Key Account Manager for one of Saffer's larger customers. The applicant was not happy in this position and she resigned from her employment with the applicant's Saffer division at the end of May 2007. She took up employment as a sales agent with a company called KLM International.

[10] The applicant, relying on a restraint of trade agreement that had been concluded with the first respondent on 10 July 2002 while she was employed in its Saffer division, demanded that she terminate her employment with KLM International. The first respondent acceded to such demand and was appointed as a

sales representative by the applicant in its Stability division from the end of May 2007. She attended to customers of the applicant's Stability division on the West Rand, Honeydew, the southern suburbs of Johannesburg and Alberton. She was thereafter promoted to the position of Sales Manager: Plumbing for the Johannesburg and Pretoria areas with effect from 1 September 2007. She resigned her employment with the applicant's Stability division on 31 January 2008. She took up employment with the second respondent from 1 February 2008.

[11] The first respondent was required to enter into a restraint of trade agreement upon her promotion to the position of a Sales Manager in the applicant's Stability division (*clause 8.2 of her contract of employment dated 20 September 2007*). The restraint agreement was signed by her on 27 September 2007, to *'…restrain* [her] *from competing with the Company'* (clause B) in *'…the plumbing sanitary ware and hardware wholesale industry'* (clause 2.7) *'…for 12 (twelve) months from the date of termination of her employment with the Company'* (clause 2.5), and the restraint was made applicable throughout the Republic of South Africa (clause 2.6).

[12] Adv. CJ Bresler, who appeared for the respondents, contended that the applicant has not proved a proprietary interest which is presently deserving of protection; that the restraint clause is too wide and therefore unreasonable and contrary to public interest; and that the applicant is not entitled to now seek an order to enforce only part of the restraint.

[13] Adv. L. Halgryn, who appeared for the applicant, contended that the applicant's trade connections deserve present protection through enforcement of the restraint.

[14] The applicant's protectable interest in its trade connections is said to lie in the unique relationship its sales personnel establish with its customers. The first respondent admits that she introduced customers to the applicant and that she was responsible for establishing and nurturing relationships between the applicant and its customers in her positions as a sales representative or agent. She, however, left her employ in the applicant's Saffer division at the end of March 2007, and she was only a sales representative in the employ of the applicant's Stability division for a brief period from May 2007 until the end of August 2007. She only had very limited contact with the applicant's Stability customers in her position as a sales manager at Stability from 1 September 2007 until the end of January 2008, and in that capacity she did not deal with customers on an ongoing basis.

[15] The applicant states: *'Customers are often fickle when it comes to loyalty and the best price is without exception the determining factor.'* And also: *'To maintain the customers' loyalty, the relationship with them must be nurtured and the best way to do just that, is to be able to offer them the best price.'* It accordingly seems to me that loyalty from its customers is more determined by the prices offered to them than by their attachments to the applicant's sales representatives [see: Rawlins and Another v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) at p 541D – F]. The applicant also does not suggest that, because of the first respondent's personality and activities, she was able to get the applicant's customers *'so strongly attached'* to her

or that she gained *'influence'* over them which enables her to take advantage of the applicant's trade connections [see: The Concept Factory v Heyl 1994 (2) SA 105 (T), at p 114B – D].

[16] The applicant also seeks to protect its confidential information. The high water mark for the applicant's claim of a protectable interest in its confidential information is its *'discount matrix'*, price lists and customer lists. There are numerous other pieces of confidential information that the applicant also seeks to protect, but they are either baldly referred to in the founding papers [see: Radebe and others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at p 793D; Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279 (TPD) at p 324F], or the applicant's privity to such information or the quality of confidence about the information is subject to irresoluble disputes of fact.

[17] It is common cause that the applicant utilises a *'discount matrix'* in giving discounts to customers and that such discounts are based on the product type, quantity or volume purchased, and the particular customer involved. The first respondent states that she was never privy to and has no knowledge of the methodology followed in calculating the figures and discounts offered to clients in terms of the discount matrix. All she, as a sales representative at the applicant's Saffer division, was given was a list of items reflecting the list price (manufacturer's recommended price) less the discount prescribed for the particular customer. The discounts that the applicant offers to specific customers for specific items at specific times change continuously. Apart from the prices that she could offer to the applicant's customers, she had no knowledge of the pricing strategies, structures or

policies. The information given to her became obsolete within a short time span varying from weeks to months. The first respondent did not retain a copy of the *'discount matrix'*, she did not memorise it, and it was last seen by her in March 2007 before she left her employ at the applicant's Saffer division. The *'discount matrix'* was, according to the first respondent, only used by the applicant's Saffer division and not by its Stability division.

[18] At Stability the first respondent only had a brief exposure to pricing information. All sales managers were denied access to pricing information from 1 January 2008. Similar to the situation at Saffer, pricing information and price lists become obsolete as soon as a specific special offer is over or when new stock is bought from suppliers. The first respondent was never privy to the determination of prices by the applicant's Stability division, its strategies or factors taken into account in the determination of prices. She was only privy to the actual prices at which she, and the sales representatives working under her, were entitled to sell the products to the applicant's customers. She did not retain any of the price lists when she left her employ on the 31st January 2008, and she does not know to what extent the applicant's prices have changed over time.

[19] Until her resignation during March 2007, the first respondent was in possession of the applicant's customer lists relevant to the areas in which she was employed to sell its products. Until her resignation at the end of January 2008, the first respondent was in possession of Stability's customer lists for the Pretoria and Johannesburg areas. The customer lists also indicate the type and quantity of products that a particular customer was likely to purchase.

[20] I am of the view that the evidence does not justify the conclusion that the interests on which the applicant relies should presently outweigh the first respondent's interest of being economically active and productive in employment of her choice. The first respondent has been selling plumbing and sanitary ware essentially for all her adult life. She does not have the knowledge, training or experience to do any other work. The first respondent resigned her employment with the applicant *inter alia* because her working hours were increased to include some early mornings, evenings and Saturdays and the possibility of reducing the basic salaries of the sales personnel was raised. The Saffer and Stability divisions of the applicant operate independently. The second respondent, on the respondents' version, competes with Saffer and not with Stability. The first respondent's restraint with Saffer was for a period of one year. She has left Saffer more than one year ago. The first respondent was employed at Stability for a short period of time and she had little exposure to its customers, pricing and other information. There are presently only about 4½ months remaining of the second respondent's Stability restraint. The first respondent only had knowledge of the actual prices that she could offer customers, and she was not privy to pricing strategies, structures or policies. She was clearly not part of the senior management of the applicant. The first respondent has no confidential information belonging to the applicant in her possession since she left its employ. The price lists utilised by the applicant at the time of the first respondent's leaving its employ at the end of January 2008 are presently outdated.

[21] Accepting the facts stated by the first respondent together with the admitted facts in the applicant's affidavits, I am unable to conclude that the first respondent is

presently in possession of confidential information belonging to the applicant other than pieces of information which cannot prevent her from being employed in her field of expertise and in employment of her choice for the balance of the restraint in issue [compare: Advtech Resourcing t/a Communicate Personnel Group v Kuhn 2008 (2) SA 375 (CPD) at pp 396J – 397A, para [62]].

[22] If I am wrong in this conclusion then I am nevertheless of the view that the restraint is unreasonably wide and should not in the circumstances of this case be cut down and enforced in a truncated form.

[23] In terms of its notice of motion, the applicant seeks to enforce all the terms of the restraint agreement. I find it difficult to appreciate how the applicant has any present legitimate interest for seeking to prevent the first respondent from being employed by any competitor throughout the Republic of South Africa, or of even becoming a mere shareholder of any competing undertaking, and for the restraint to apply to the *'sanitary ware and hardware wholesale industry*.*'*

[24] The first respondent's version is that she was only involved in selling locally manufactured plumbing products for Saffer, and imported plumbing products for Stability. She was never involved in the sales of hardware products for the applicant. Stability has discontinued selling sanitary ware. The first respondent's activities were limited to and she was only privy to information pertaining to the applicant's customers within the areas in which she worked for the applicant. She had no knowledge of and never dealt with the applicant's customers outside the areas of her appointment.

[25] The restraint agreement is too wide and it is, in my view, for this reason unreasonable. The question of enforcing only part of the restraint was not canvassed in the affidavits. Only the question of reducing the area of the restraint to the areas where the first respondent had acted as a sales agent, representative, or manager during the period of her employment with the applicant was raised in argument. I accordingly refrain from considering which parts of the restraint are too wide and whether those that are too wide should be severed [see: National Chemsearch (SA) (Pty) Ltd v Borrowman 1979 (3) SA 1092 (T) p 1116D; Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A), at p 896A-E; Sunshine Records (Pty) Ltd v Frohling 1990 (4) SA 782 (A), at p 794G – 796D; BHT Water Treatment (Pty) Ltd v Leslie 1993 (1) SA 47 (W) at p 53A].

[26] The first respondent also resists the enforcement of the restraint agreement on the ground of duress. The elements that need to be established to set aside or resist the enforcement of a contract on the ground of duress based upon fear are set out in Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C), at pp 305 – 306B. The first respondent alleges that she was coerced into signing the restraint of trade agreement. She was allegedly told by the managing director of the applicant's Stability division that she would not get paid at the end of the month unless she signed it. She accordingly signed it on the 27th September 2007.

[27] There is much veracity in Adv. Halgryn's submission that the paucity of the facts furnished by the first respondent, who bears the onus to show that she would not have concluded the restraint agreement had it not been for the duress [see:

Savvides v Savvides and Others 1986 (2) SA 325 (T), at pp 329 – 330], casts serious doubt on the validity of her allegations in support of this defence.

[28] It was further submitted on behalf of the applicant, with reference to the probabilities, that the first respondent has failed to show a legally significant fear, which was reasonable and imminent [see: Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SE) at p 441 D – F]. It is not necessary for me to decide this issue on the probabilities that emerge from the affidavits and no purpose will be served in referring it for the hearing of oral evidence in view of my findings on the enforceability of the restraint [see: Administrator Transvaal v Theletsane 1991 (2) SA 192 (A), at pp 196I – 197D].

[29] I now turn to the interdictory relief which the applicant seeks on the ground of unlawful competition. Competition *per se* is not unlawful [see: Matthews and Another v Young 1922 AD 492 at p 507] and, in accepting the facts stated by the respondents together with the admitted facts in the applicant's affidavits, I am unable to find any existing use or threatened use by the first respondent or the second respondent of any confidential information or trade secrets of the applicant [see: IIR South Africa BV v Hall (aka Baghas) 2004 (4) SA 174 (WLD) at pp 179E – 181A, para [13]].

[30] The first respondent denies that she used any of the applicant's information, that she disclosed any such information to the second respondent or that she will or is able to do so. The instances referred to in the applicant's founding affidavit of customers that have been attended to by the first respondent on behalf of the

second respondent after the termination of her employment with the applicant turned out to be customers of the second respondent from before the applicant commenced her employment with the second respondent.

[31] In the result the application is dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

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| Date of hearing: | 6 August 2008 |
| Date judgment delivered: | 17 September 2008 |
| For Applicant: | Adv. L. Halgryn<br><br>Van Veijeren Inc.<br>32 St Johns Road<br>Houghton<br>Johannesburg<br>Tel. 011 487 1091 |
| For Respondents | Adv. C.J. Bresler<br><br>Glover Inc.<br>18 Jan Smuts Avenue<br>Parktown<br>Johannesburg<br>Tel. 011 482 5652 |