IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION-EAST LONDON)

CASE NO: EL 1248/2012
ECD2948/2012
Heard on: 11 November 2012
Judgement delivered: 8 January 2013

REPORTABLE

In the matter between:

BURMBUILD (PTY) LTD Applicant

and

SIBABINI NDZAMA Respondent

JUDGMENT

DUKADA J:

INTRODUCTION

[1] In this application applicant seeks an order enforcing a written restraint clause contained in a contract of employment between the applicant and the respondent, and effectively interdicting and restraining the latter from remaining or being in the employ of Vincent Hardware, East

London or any other similar business for a period of twelve (12) months from 1 October 2012, alternatively the date of granting of the order.

[2] A certificate of urgency was brought before me while on duty on the 4th October 2012 and I gave directions that the application papers be issued and set down for hearing on Thursday the 11 October 2012, papers to be served on respondent by Friday the 5 October 2012 with respondent to deliver answering affidavits, if any, by Monday the 8 October 2012, applicant to deliver replying affidavits, if any, by 16H00 on Tuesday the 9 October 2012 and Heads of Argument to be delivered on or before 12H00 on Wednesday the 10 October 2012.

[3] The Notice to oppose, answering affidavits, replying affidavits, and Heads of Argument were delivered as directed. This matter was accordingly argued on the 11 October 2012.

[4] The orders sought by the applicant are set out as follows in the Notice of Motion:-

(i) interdicting and restraining the respondent from remaining and/or being in the employ of Vincent Hardware, 47 Devereaux Avenue, Vincent, East London for a period of twelve (12) months from 1 October 2012, alternatively the date of granting of this order; and

(ii) interdicting and retraining the respondent for a period of twelve (12) months from 10 October 2012 alternatively the date of granting of this order from being involved with Vincent Hardware or with any other business, firm, partnership, business entity or company which carries out the same or similar functions/business as the applicant within a radius of 150 km from the East London City Hall, in any capacity whatsoever; and

(iii) costs of this application on the scale as between party and party.

[5] As the applicant is seeking relief of a final nature against the respondent and there are disputes of fact, the proper approach to follow was set out by *Corbett JA in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[1] as follows:-

"*Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent justify such an order..... In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine, or bona fide dispute of fact.....If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court .....and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks....."*

FACTUAL BACKGROUND

[6] Applicant is trading as Burmeisters at Bonza Bay Road, East London and is a sister company to Burmeister & Co (Pty) Ltd ("*Burmeisters*"), both of whom are owned by the Burmeister family.

[7] Respondent was first employed by Burmeister & Co (Pty) Ltd on a temporary basis during or about 2000. He was permanently employed on 8th March 2003 and transferred to her paint department. When applicant commenced her business operations during or about mid

[1] 1984 (3) SA 623 (A) at 634 H-635C

2005 in Beacon Bay, East London as a further outlet of Burmeister & Co (Pty) Ltd, the respondent was transferred together with a number of other employees and took up employment with the applicant. In order to protect her intellectual property, trade secrets and confidential information prior to and during the currency of the employment of the respondent, applicant resolved to have all employees employed in the paint department sign the necessary and appropriate restraint of trade agreements. Restraint of trade clauses were then included in all applicant's employment contracts.

[8] The respondent signed a written contract of employment on the 4th March 2003 and also signed a written restraint of trade agreement on the 10th April 2004. In his answering affidavit the respondent seemed to dispute the validity of the contract of employment on the ground that it was not signed by the persons authorised to do so in the contract, and so also was the restraint of trade which was also so signed. He also raised the question of urgency. However from the argument by Counsel on behalf of the respondent those aspects were not raised and I assume they are no longer being pursued. For that reason I will not deal with those aspects in this judgement.

[9] The respondent tendered his resignation from the applicant's employment on the 31st August 2012 effective at the end of September 2012. On 1st October 2012 the respondent took up employment with Vincent Hardware. The respondent admits to have taken up employment with Vincent Hardware as from 1 October 2012 but states that he is employed as a General Assistant and not specifically in the paint department.

[10] The restraint clause in question reads as follows:-

"1. *The employee undertakes not to be engaged or employed in establishing of a new or existing business with similar products or of a similar nature to Burmeisters be it direct or indirect or as*

a shareholder, partner, member of a close corporation, director of a company or in any other capacity within one year after termination of this agreement in the area known as within 150 km radius from East London City Hall.

2. *The employee acknowledges and agrees that the aforesaid restraint is fair, reasonable and necessary for the protection of his employer, his employer's trade name and goodwill attached thereto.*

3. *Without prejudice to any other rights which the employer may have in law the employee acknowledges that the agreed damages due to his/her employer will be an amount of the average of his/her last three months' basic salary in respect of each calendar month during which any breach of the aforesaid restraint continues and that the employer shall be entitled to recover such amount and any associated recovery costs, from the employee in respect of such breach.*

4. *I agree that the above be part of my contract of employment*"

[11] Applicant states that Vincent Hardware conducts the same business as the applicant and is a seller and distributor of paint and related products in and around East London and surrounding areas. As such it is her competitor. She further states that by virtue of respondent's employment he obtained and has an intimate and detailed knowledge of the applicant's customer base, the customer's specific needs, the customer's specific purchasing volumes, discount parameters, mark ups, pricing structures, product specifications and product capabilities. Applicant further states that the respondent, as a sales person dealt with her customers and products on daily basis. She avers respondent had at all times, since the beginning of his employment, access to the applicant's main computer data-base by way of terminals in the paint department from which data-base he could have gleaned, obtained and

downloaded all the information at will. Applicant further states that as the respondent has joined her competitor, he and his new employer have the edge on the applicant in that they will be able to approach applicant's customers and offer them similar goods at carefully calculated rates well-knowing the applicant's rates and discount parameters in order to alienate their customers from the applicant.

[12] The respondent denies the afore-mentioned allegations. He states that the applicant generally serviced DIY requirements-individuals and not contractors, retail customers, factories, tradesman and construction companies who tend to purchase from applicant's sister business at Fleet Street, East London. He further states that his computer username did not allow him access to the customer data base. He is not aware of any customer's specific needs as the clients he assisted were individuals and regular customers. He also did not have customers who regularly bought in volumes from him. He also states that he is not privy to discount parameters and was unable to give discounts when customers requested same without obtaining permission from Clide Martin who is the Head of applicant's paint department. He was not privy to mark up information and did not take part in budgeting or forecasting as those were determined by people with a far higher job grade than himself namely Clide Martin and other members of Management. Respondent admits that he is privy to information on product specifications and product capabilities as he learnt it from paint suppliers and it is also written on the face of the paint tin. He maintains, however, that such formation is also available to the members of the public and also that the product-data sheets are kept by any person who works with paint. He admits that as a sales person he deals with numerous customers on a daily basis just as any salesman in any business. He deals with products which are sold nationally. He admits to have had access to applicant's main computer data base by way of terminals but such access was restricted to his user code. He was not allowed to activate and transfer stock, activate a non-order, he could only see if it was possible to give a discount once

Clide Martin had approved same and to print stock take forms. He did not have access to the debtor master list, the stock master file and customer information or details.

Respondent emphatically denies to have gleaned or obtained or downloaded any information relating to the customer data base, customer needs, discount parameters, mark ups or pricing structures as he did not have access to them. He denies that his present employer has an edge on the applicant and states that he will in no manner or form be able to approach the applicant's customers to offer them better prices or to alienate their custom from applicant.

[13] Applicant further states that the respondent prior had no experience in the paint industry prior to joining Burmeisters. The respondent gained all his skills, knowledge and training of applicant's industry whilst in the employ of the applicant and her predecessor, Burmeisters. During the period of his employment over the past approximately seven years, apart from in-house and on the job-training, the respondent received extensive training from suppliers of the applicant such as *Plascon, Woodock, Tile & Floor, Duram and Dulux.*

Respondent admits that he had no knowledge in applicant's industry prior to joining Burmeisters. He, however, sates that all employees working with paint are exposed to the same extensive training from suppliers such as *Plascon, Woodock, Tile & Floor, Durum and Dulux*. He states that he gained his skills, knowledge and training about paint from the representatives of these suppliers and not from the applicant nor Burmeisters as all training came from external suppliers and not in-house. Respondent further states that he has commenced employment with Vincent Hardware who not only sells paint but other hardware goods. Respondent admits that the restraint per se is not unreasonable either with regard to time or territory but he states that the knowledge that he has acquired is his own and there is no proprietary interest to which the applicant is entitled to place reliance on the restraint. He further avers that the third clause of the restraint which is not severable from the agreement is against public policy.

ISSUES

[14] The only issue remaining in my view is whether this restraint clause is enforceable against the respondent in the circumstances of this case.

THE LAW

[15] Since the decision in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis*[2], contracts in restraint of trade are in principle valid and enforceable, and will only be unenforceable if they are contrary to public policy or public interest.

Didcott J puts it aptly as follows in J. Louw and Co v Richter & Others[3].

"*Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent, 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 the 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."*

[16] As far as the incidence of onus is concerned the applicant who is seeking to enforce the restraint need no more than to invoke the restraint agreement and prove the breach; the respondent who seeks to avert the enforcement bears the onus to prove on a balance of

[2] 1984 (4) SA 784 (A) at 791-792
[3] 1987 (2) SA 237 (NPD) at 243 B-D

probabilities that in all the circumstances of this case it will be unreasonable to enforce the restraint[4] .

[17] In *Reddy v Siemens Telecommunications (Pty) Ltd*[5] Malan AJA remarked as follows:-

"*A court must make a value judgment with two principal considerations in mind in determining the reasonableness of a restraint. The first is that public interest requires that the 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 engage in trade and commerce or the professions. Both considerations reflect not only common law but also constitutional values."* [6]

In paragraph 16 Malan AJA remarked further as follows:

"*In applying these two principal considerations the particular interests must be examined. A restaurant would be unreasonable 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 public interest."*

[18] In determining the reasonableness of a restraint agreement, Nienaber JA, in *Basson v Chilwan and Others, supra, at 767 C-H*, stated that the following questions should asked:

"(a) *Is there an interest of the one party which is deserving of protection at the termination of the agreement?*

(b) Is such an interest being prejudiced by the other party?

(c) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?

---

[4] Basson v Chilwan and others 1993 (3) SA 742 (A) at 776 i-j
[5] 2007 (2) SA 486 (SCA) in para 15
[6] See also Sunshine Records (Pty) Ltd v Frolling and Others 1990 (4) SA 782 (AD) at 794 C-E

(d) Is there another fact of public policy having nothing to do with the relationship between the parties but which requires that the restraint should be maintained?"

[19] 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 interest.[7] *Malan AJA, in Reddy's case supra at 498 D-F,* adds a fifth question to the four questions identified in Basson, remarking as follows".

"*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 s36(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 democratic society based on human dignity, equality and freedom."*

[20] Applicant relies for the enforcement of the restraint agreement on her trade secrets or connections, confidential information and the "*know-know"* that was acquired by the respondent in her business.

[21] Stegmann J in *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* [8] remarked as follows on protectable proprietary interests:- "*The proprietary interests that could be protected by such a restraint were essentially of two kinds. The first kind consisted of the relationships with customers, potential customers, suppliers and others go to make up what is compendiously referred to as the 'trade connection' of the business, being an important aspect of its*

[7] Reddy v Siemens Telecommunactions (Pty) Ltd, supra, at 497 E-F
[8] 1991 (2) SA 482 (TPD) at 502 D-F

incorporeal property known as goodwill. The second consisted of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as 'trade secrets".

[22] Discussing the term "trade connection" in *Rawlins and Another v Caravantruck (Pty) Ltd*[9] Nestadt JA quotes with approval Heydon: The Restraint of Trade Doctrine (1971). Heydon says at page 108 saying:-

"*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".* Heydon further says that the "customer contract" doctrine depends on the notion that:-

"*The employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket."*

Nestadt JA further quotes with approval *Morris (Hebert) Limited v Saxelby [1916] 1 AC 688 (HL) at 709* where it was said that the relationship must be such that the employee acquires :-

"s*uch personal knowledge of and influence over the customers of his employer ……..as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection….."*

(This statement has been applied by our Courts (for example, by Eksteen J in *Recycling Industries (Pty) Ltd v Mohamed and Another 1981 (3) SA 250 (E) at 256 C-F)*.

The learned Judge of Appeal further remarked at 541 G-H as follows:

"*Whether the criteria referred to are satisfied is essentially a question fact in each case, and in many, one of degree. Much will depend on the duties of the employee, his personality, the frequency and duration*

[9] 1993 (1) SA 537 (AD) at 541

of contact between him and the customers, where such contact takes place, what knowledge he gains of their requirements and business, the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are, in the case of a salesman, the type of product being sold, and whether there is evidence that customers were lost after the employee left (Heydon op cit at 108 - 120), and see also Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) at 307 G-H and 341 C and G".

[23] For information to qualify as confidential information it must comply with three requirements:-

"*First it must involve and be capable of application in trade or industry i.e it must be useful (Van Heerden & Neetling, Unlawful Competition at 225). Second, it must not be public knowledge and public property i.e objectively determined it must be known only to a restricted number of people or to a closed circle (Harvey Tiling Co (Pty) Ltd v Rortomac (Pty) Ltd, 1977 (1) SA 316 (T) at 321 G-H; Van Castricum v Theunissen and Another 1993 (2) SA 726 and the cases cited therein). Third, the information objectively determined must be of economic value to the person seeking to protect it. (Cooler Ventilator Co. (SA) (Pty) Ltd v Liebenberg 1967 (1) SA 686 (W) at 691 B-C, Van Castricum v Thaunissen, supra at 732 A-F).*

[24] Reverting to the case at hand, applicant seeks protection of the following strategic information which she regards as confidential:-

(i) Technical details, techniques, know-know, method of operating, cost and source of material, pricing, names of customers, buying capacity of customers and product preferences of customers;

(ii) Customer data base including information from each customer such as their preferences and discount arrangements,

(iii) Identity of each cash and credit account customer and the prices charged to them for the item.

(iv) Names and contact details.

[25] Except for the technical details, technique and know-how, the other items of confidential information to which applicant seeks protection seem to me to be protectable interests. Respondent, however, denies having access to such information.

[26] The other aspect in this matter is the training, acquisition of skill, experience and know-how which the respondent gained while in the employ of the applicant, which the latter avers will be utilized to her disadvantage if the restraint clause is not enforced. In paragraph 38 of applicant's founding affidavit she says:

"*To the best of my knowledge, the respondent, prior to joining the Burmeisters, had no experience in the home and building retail sector and, in particular, had no experience in the paint industry. The respondent gained all his skills, knowledge and training of this specialized industry whilst in the employ of the applicant and its predecessor, Burmeisters. During the period of his employment over the past seven years, apart from in- house and on- the job- training, the respondent received extensive training from suppliers of the applicant such as Plascon, Wood Tile and Floor, Duram and Dulux*"

[27] Dealing with a matter concerning the enforcement of restraint of trade clause, Kroon J, in *Aranda Textiles Mills (Pty) Ltd v Hum and Another*[10], remarked as follows:-

"*A mans 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*

[10] [2000] 4 All SA 183 (E) at 192 g-j

eyes 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 anyway 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. (See also Automotive *Tooling System (Pty) Ltd v Wilkens & Others 2007 (2) SA 271 (SCA) at 279 D-G and Townsend Productions (Pty) Ltd v Leach & Others 2001 (4) SA 33 CPD at 50 1-51E, Basson v Chilwan & Others, supra at 778 D, Sibex Engineering Services (Pty) Ltd v Van Wyk and Another 1991 (2) SA 482 (T) 478 G-I 570 G-F, Advtech Resourcing (Pty) Ltd v Kuhn & Another [2007] 4 All SA1368 (C) in para 20.*

Chachalia AJA *Automative Tooling System (Pty) Ltd v Williens and Others, supra, at 279 D-E r*emarked as follows:-

"*In practice, the dividing line between the use by an employee of his own skill, knowledge and experience which he cannot be restrained from using, and the use of his employer's trade secrets or confidential information or other interest which he may not disclose if bound by a restraint is notoriously difficult to define."*

I fully agree with this observation.

[28] Turning again to the case at hand the respondent obtained the training, skill, experience and know-how while in the employment of the applicant. In my view those skills, know-how and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a restraint clause. It is understandable that the applicant who took trouble to have the respondent trained and afforded him the opportunity to acquire the skills and knowledge he might otherwise not have had an opportunity to acquire, has an obvious interest in restraining the services of the respondent.

[29] A restraint of trade clause being a contractual term is subject to constitutional rights. Courts will invalidate and refuse to enforce agreements that are contrary to public policy.[11] Section 22 of the Republic of South Africa Constitution Act, 1996 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."

Although some cases[12] dealt with the impact of section 26 of the interim Constitution of 1993 (Republic of South Africa Constitution Act 200 of 1993) on the restraint of trade clause, their view-point seem to hold still even in respect of the Republic of South Africa Constitution Act, 1996. Thus in my view the principles set out in the preceding paragraphs relating to restraint of trade agreements remain fully of application.

[30] A further aspect which needs consideration in this exercise is the dignity of work which was commented on as follows by the full Court in *Affordable Medicines Trust and Others v Minister of Health of RSA and Others*[13].

"*What is at stake is more than one's right to earn a living important though that is. Freedom to choose a vacation is intrinsic to the nature of the society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and it is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as profession and to make that activity the very basis of his or her life. And there is a relationship 'between work and the human personality as a whole.' It is a relationship that shapes and completes the*

[11] Advtech Resourcing (Pty) Ltd v Kuhn & Another, supra, in para 26; Barkhuizen v Napier 2007 (7) BCLR 691 (4) paras 29+29 and other cases cited therein
[12] Waltons Stationery &Another 1994 (1) BCLR 50 (o) and Arande Textile Nulls (Pty) Ltd v Hum & Another, supra, at 193 a-b
[13] 2006 (3) SA 247 (CC) para 59

individual over a lifetime of devoted activity, it is the foundation of the person's existence."

[31] In *Advtech Resourcing (Pty) Ltd v Kuhn and Another*, supra in paragraph 31, Davis J raises the value of ubuntu as a further consideration though the time constraints did not permit him to develop more fully on this aspect, he concluded by stating that there is powerful and important argument which should prompt Courts to grasp the mettle and either through the prism of section 8 or section 39 (2) revisit the entire issue of restraint of trade within the context. The Honourable Judge remarks in paragraphs 25 that "*the duty to develop the common law to promote the spirit, purport and object of the Bill of Rights is particularly present where a Court deals with value-laden concepts such as public policy which must arise in the present dispute."*

He referred to a number of cases, viz: Brisley v Drotsky 2002 (4) SA 1 (SCA) paras 90 and 91; Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA); Napier v Barkhuizen 2006 (4) SA 1 (SCA) paragraphs 6-14.

The value of ubuntu is one of the important society values which embodies attributes of humaness, fairness and justice between man and man ("*man" in the sense of a human being)*. Madala J in S v Makwanyane 1995 (6) BCLR 665 (cc) in paragraph 237 described the concept ubuntu as follows:

"*The concept carries in it the ideas of humaness, social justice and fairness."*

Dealing in that case with the aspect of irrevocability of the death penalty, Madala J remarked as follows in paragraph 241: "*as observed before, the death penalty rejects the possibility of rehabilitation of the convicted persons, conderning them as 'no good' once and for all, and drafting them to the death row and the gallows. One must then ask whether such rejection of rehabilitation as a possibility accords with the concept of ubuntu."* In paragraph 44 he states that our Courts, have found room for the exercise of ubuntu and referred in his support to a number of cases. With such support for the infusion of the concept ubuntu in sentencing coming from Madala J as set out about, it seems

the voices arguing to prompt Courts to grasp the nettle and either through the prism of section 8 or section 39 (2) revisit the entire issue of restraint of trade with the concept of ubuntu in particular, to have positive prospects. Another positive factor of the infusion in favour of the concept of ubuntu into our law is as reflected in paragraph 232 of the judgement of Madala J where he says "*…..it is a concept that permeates the Constitution generally and more particularly chapter 3 which entrenches fundamental human rights". Although the Honourable Judge was commenting on the interim Constitution of the Republic of South Africa Act No. 200 of 1993 in my view, his remark still hold in respect of the new Constitution (Constitution of the Republic of South Africa Act No. 108 of 1996) (the Constitution) as the latter Act seems to me to retain the spirit, purport and objects of the former Act, more particularly Chapter 2 which contains the Bill of Rights.*

Section 39 (2) of the Constitution provides:

"When interpreting any legislation, and when developing the common law or customary law every court, tribunal or forum .must promote the spirit, purport and objects of the Bill of Rights." One is mindful of the misgivings expressed in *Brisley v Drotsky, supra* about "*over-hasty or unreflective importation into the field of contract law of concept of boni mores" a*s put by Cameron JA (as he then was) in Afrox case, *supra.* He commented further saying at 35 C-E:-

"*What is evident is that neither the Constitution nor the value system it embodies gives the Courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith".*

However, in my view, the legislature in section 39 (2) provided Courts with power to develop common law so as to promote the spirit, purport and objects of the Bill of Rights and if the circumstances of a case justify such development a Court will have to exercise the power conferred upon it or else our jurisprudence will lag behind in the path for the future development of our law ushered or beckoned by our

Constitution. It seems to me, therefore, that our courts have also to guard against reluctance or unwillingness to develop common law when circumstances of a case justify such development. This is of course a constitutional mandate.

[32] Notwithstanding the above observations the position set out in *Reddy v Siemens Telecommunications (Pty) Ltd, supra* still holds. I have to make a value judgment which involves the weighing up of the interests involved. As stated above the applicant's interests to her trade secrets and confidential information is protectable' to which the respondent has, however, denied to have access, but as far as the skill, knowledge and abilities while the respondent obtained which in the employ of the applicant those are attributes of the respondent which do not constitute a proprietary interest vesting in the applicant but accrue to the respondent as part of his general stock of skill and knowledge which he may not be prevented from exploiting. As such applicant has no proprietary interest that might legitimately be protected by enforcing the restraint of trade clause against the applicant. The restraint therefore, in all the circumstances of this matter, inimical to public policy and unenforceable. The respondent has discharged the onus to prove a balance of probabilities that in all the circumstances of this case it will be unreasonable to enforce the restraint.

[33] As far as the costs are concerned I find no reason justifying a departure from the general rule that costs follow the event.

[34] For these reasons therefore this application is dismissed with costs.

_____

D.Z.DUKADA

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff	:	Adv Schultz Instructed by Smith Tabatha Inc.
For the respondent	:	Adv D.H De la Harpe Instructed by Russell Inc.