IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO. 2654/2010

DATE HEARD: 28/10/10

DATE DELIVERED: 22/11/10

In the matter between

IZAK SCHALK VAN DER MERWE	**FIRST APPLICANT**
DANIEL JOHANNES DE VILLIERS	**SECOND APPLICANT**
LOUIS FRANCOIS GROBLER	**THIRD APPLICANT**
SOUTH CAPE IRRIGATION (EASTERN CAPE) CC	**FOURTH APPLICANT**

and

WILLEM HENDRIK JANSEN VAN RENSBURG	**RESPONDENT**

JUDGMENT

ROBERSON J

[1] This is an application for an interdict, brought on an urgent basis:

1.1 to enforce a restraint of trade agreement against the respondent; and

1.2 to prevent the use or disclosure by the respondent of confidential information pertaining to the fourth respondent (the CC).

[2] The first, second, and third applicants, and the respondent, are all members of the CC, which was registered on 3 September 2004. The business of the CC is the sale, planning, and installation of irrigation systems. During October 2004 the four members of the CC entered into a co-operation agreement, paragraph 23 of which (the restraint clause) read as follows:

> "Die Lede kom hiermee onherroeplik ooreen en verbind hulself om by hul uittrede uit die BK nie vir vyf (5) jaar na hul uittrede regstreeks of onregstreeks 'n soortgelyke besigheid binne die Landdroshof distrikte van die areas soos geidentifiseer op Aanhangsel "A" hetsy gesamentlik of individueel of as 'n vennoot, bestuurder of assistant of enige ander persoon of maatskappy handel dryf of daarby betrokke sal wees nie."

Annexure A was a map showing highlighted magisterial districts in the Eastern and Western Cape.

[3] The applicants seek to enforce the restraint clause following the respondent's resignation as an employee of the CC and subsequent employment with a company, Andrag Agrico (Agrico), which also sells irrigation systems (and other agricultural products) and is a competitor of the CC. The claim for an interdict to prevent use or disclosure of confidential information is based on the delict of unlawful competition. Notice of the application was given to Agrico, by way of service of the application by the sheriff at Agrico's principal place of

business in this Court's jurisdiction. There has been no response by Agrico to such notice.

[4] It is necessary to set out some background leading up to the formation of the CC. The first and second applicants are also members of Suid Kaapse Besproeings CC (SKB) which conducts the same business as the CC, and initially operated from George in the Southern Cape. SKB had and still has the exclusive right to distribute irrigation products of Valley Irrigation Systems (Valley) for the Southern Cape area. Valley is acknowledged in the irrigation business as the leader in centre pivot irrigation. Following SKB's success in the Southern Cape, during 2000 or 2001 the first applicant decided to expand SKB's business to the Eastern Cape. Travelling backward and forwards between George and the Eastern Cape proved to be impractical and it was decided to open a branch of SKB in Cradock.

[5] The first applicant had met the respondent in 2001 and knew him to be a very successful salesman of Valley irrigation products in the North West Province. The respondent was offered and accepted the position of sales representative and manager of SKB in the North Eastern Cape area, based in Cradock. He commenced employment with SKB on 2 April 2003. His employment contract with SKB provided that if the Cradock branch was profitable, he would receive a 20% membership of a close corporation to be formed after a period of twelve months. The Cradock branch proved to be

profitable (there was some dispute about the extent of the profitability) and the CC was in due course formed. The CC was run from Cradock and the exclusive Valley distribution rights were extended to the CC. At the time of the formation of the CC, the third applicant had already started doing business in the southern part of the Eastern Cape and his region formed part of the total business of the CC.

[6] From 2004 the respondent managed the Cradock branch of the CC. During October 2009 he received offers of employment, as a salesman, from Agrico. The respondent turned down these offers, but on 31 July 2010 he addressed a letter to SKB for the attention of the first, second and third applicants, telling them that he had received an offer from Agrico which he could not refuse, and notifying them that he would leave the service of the CC at the end of August or September 2010. He left the CC on 10 September 2010 and commenced employment with Agrico on 13 September 2010.

The law

Restraint of trade agreements

[7] In *Reddy v Siemens Telecommunications (Pty) Ltd*[1] Malan AJA (as he then was) said:

1 2007 (2) SA 486 (SCA)

> *"Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[2], described as a landmark decision, introduced a significant change to the approach of the courts to agreements in restraint of trade by declining to follow earlier decisions based on English precedent that an agreement in restraint of trade is *prima facie* invalid and unenforceable. In English law, a party seeking to enforce such agreement has to show that the restraint is reasonable as between the parties while the burden of proving that it is contrary to public policy is incumbent on the party alleging it. *Magna Alloys* reversed this approach and held that agreements in restraint of trade were valid and enforceable unless they are unreasonable and thus contrary to public policy, which necessarily as a consequence of their common-law validity has the effect that a party who challenges the enforceability of the agreement bears the burden of alleging and proving that it is unreasonable."[3] (Authorities omitted.)

[8] In *Reddy v Siemens* there was a constitutional challenge to the question of *onus*. It was submitted on behalf of the appellant that an *onus* on the person seeking to avoid the restraint that the restraint was unreasonable, was in conflict with the right, in terms of s 22 of the Constitution, to choose his trade, occupation or profession freely. Malan AJA dealt with this submission as follows:

> "In the present case we are not called upon to decide that issue. Where the *onus* lies in a particular case is a consequence of the substantive law on the issue. I have pointed out that the substantive law as laid down in *Magna Alloys* is that a restraint is enforceable unless it is shown to be unreasonable, which necessarily casts an *onus* on the person who seeks to escape it. But if the rule were to be reversed – which would necessarily cast an *onus* on the person seeking to enforce it to allege and prove that the restraint is reasonable the result in the present case would be the same. For in the present case the facts concerning the reasonableness or otherwise of the restraint have been fully explored in the evidence, and to the extent that any of those facts are in dispute that must be resolved in favour of Reddy (these being motion proceedings for final relief). If the facts disclosed in the affidavits, assessed in the manner that I have described, disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the *onus* accordingly plays no role."[4] (Authorities omitted.)

---

2 1984 (4) SA 874 (A)
3 At paragraph [10]
4At paragraph [14]

[9] With regard to a value judgment, Malan AJA said:

> "A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values."[5] (Authorities omitted.)

With regard to the application of these two considerations, Malan AJA said:

> "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."[6] (Authorities omitted.)

Unlawful competition

[10] In *Schutz v Butt*[7], Nicholas AJA (as he then was) said the following:

> "As a general rule, every person is entitled freely to carry on his trade or business in competition with his rivals. But the competition must remain within lawful bounds. If it is carried on unlawfully, in the sense that it involves a wrongful interference with another's rights as a trader, that constitutes an *injuria* for which the Aquilian action lies if it has directly resulted in loss.
>
> In order to succeed in an action based on unfair competition, based on unlawful competition, the plaintiff must establish all the requisites of Aquilian liability, including proof that the defendant has committed a wrongful act."[8]

Where the alleged unlawful competition involves use or disclosure of confidential information, the party seeking an interdict to protect such information must allege

5 At paragraph [15]
6 At paragraph [16]
7 1986 (3) SA 667 (AD)
8 At 678F-H

and prove the following:

1. That it has an interest in the confidential information;
2. That the information is confidential;
3. The relationship must exist between the parties which imposes the duty on the respondent to preserve the confidence of information imparted to him, for example the relationship of employer and employee, or the fact that the respondent is a trade rival who has obtained confidential information in an improper manner;
4. The respondent must have knowledge of the confidentiality of the information and of its value. The knowledge can be express or implied;
5. Improper use must have been made of that information, whether as a springboard or otherwise.[9]

Final relief

[11] The applicants seek a final interdict, alternatively an interim interdict. These being motion proceedings, the applicants will be entitled to final relief if the respondent's averments, together with those averments of the applicants which the respondent admits, justify such relief, subject to the qualification that where a denial by the respondent raises no real, genuine or *bona fide* dispute of fact, the applicant's factual averment will be accepted as correct. Where allegations or denials are so far fetched or untenable the court may reject them on the papers.[10]

9 *Van Castricum v Theunissen and another* 1993 (2) SA 726 (TPD) at 730 D-G
10 *Plascon-Evans Paints Ltd v Van riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634H – 635C

The facts

[12] According to the applicants' founding affidavit, deposed to by the first applicant, the respondent was appointed by SKB to grow its business in the Eastern Cape. In accordance with his employment contract, when the prospects of profitability in the area looked promising, the CC was formed and the respondent acquired a stake in the assets of the business, which included goodwill. SKB, through the first applicant, had opened up the market for Valley products in the Eastern Cape, and at the time the respondent was employed by SKB, it had a gross annual income of approximately R1,5 million. The goodwill of the CC (taken over from SKB) was therefore established by the first applicant's efforts and not that of the respondent, although the respondent had contributed to the customer base in the area while employed by SKB. After the formation of the CC the respondent achieved great success in the area, generating a gross income of millions of rands a year. The respondent was responsible for approximately 60% of the annual turnover of the CC and the third applicant was responsible for approximately 40%. The respondent played a pivotal role in decision making in respect of the Cradock branch and, in addition to selling Valley products, he was responsible for planning irrigation systems for particular customers and the preparation of quotations. These duties brought him into close contact with customers of the CC and resulted in the formation of strong relationships.

[13] The first applicant explained that in the irrigation trade, it is not uncommon for a farmer to start on a small scale and later to expand. Records of the CC show that a large portion of business over the years came from services rendered to existing clients on a recurring basis, many of which clients were initially clients of SKB. It also happened that a farmer would enquire about the suitability of a pivot system for his particular needs. An inspection of the land would be done, a system designed and a quotation prepared, but the farmer would then not have the financial means to pay for the system. However it often happened that the same farmer would at a later stage be in a financial position to install the system. The information already collected would then be used for a further quotation without the necessity for a further inspection.

[14] The identity of the existing clients was given to the respondent when he was first employed by SKB. One of these clients was a farmer, Mr. Michael Vermaak, who, prior to the respondent being employed by SKB, had through SKB installed a number of irrigation systems, and, after the formation of the CC, had installed at least fifteen centre pivots. On 9 September 2010 the respondent, while still in the employ of the CC, had given Vermaak a quotation for the sale, transport and installation of a Valley irrigation system. On 13 September 2010, the day the respondent started to work for Agrico, he gave Vermaak a substantially lower quotation on behalf of Agrico. The applicants alleged that Vermaak had told the second applicant that the respondent had telephoned him to tell him he was now working for Agrico and could supply the same system at a substantially cheaper

price.

[15] During his employment with the CC, the respondent had completed a survey of certain land belonging to a Mr. Wenzel Lombard, for the purpose of installing a Valley system. After the respondent started working for Agrico, Lombard approached him for further information in connection with the proposed installation and the respondent used his laptop computer to print out the plan of the proposed layout of the system. The respondent had copied this plan from the laptop supplied to him by the CC, which he had since returned to the CC, onto his present laptop.

[16] With regard to confidential information, the applicants referred to the respondent's knowledge relating specifically to Valley products, as well as the following items (I quote directly from the founding affidavit):

> "All the business policies, trade secrets such as profit margins and pricing structures (i.e. mark up), action plans, marketing strategies, outside resources, measured plans, designs, quotations and accompanying works documents, installation methods, technical knowledge gained by extensive experience of the product as well as of the trade and the market in general; intimate and particular knowledge of all of Fourth Applicant's business contacts (mostly farmers) such as their farming operations, personal information, development plans, requirements and the like; full knowledge of its administration and financing, its equipment and business proficiencies."

The CC is also obliged to send monthly work in progress reports to Valley Irrigation Systems. These reports contain possible sales that might materialise during the following three months.

[17] The applicants alleged that the respondent had all this information on his laptop, and knew that this information was not public knowledge, was of economic value to the CC and would be useful to the CC's competitors.

[18] During 2009 to 2010 the CC showed a decline in profits and the applicants attributed this decline to the respondent's decision to concentrate on turnover rather than profit, because he earned a 1% commission on turnover.

[19] Many of the averments of the applicants were admitted by the respondent. The respondent specifically did not dispute that he played a pivotal role in the CC which brought him into close contact with customers and that he had formed strong relationships with these customers. He also did not dispute that the identity of existing clients was given to him when he was first employed by SKB. He denied that the CC had any goodwill when he became a member because it had just been registered, but in my view this denial is disingenuous when seen against the background to the formation of the CC, which he did not dispute. Clearly the reputation and customer goodwill built up by SKB prior to the formation of the CC had been taken over by the CC. Although the respondent had contributed to this goodwill, by building up a customer base, he did so in his capacity as an employee and the goodwill adhered to the CC and not to him. The respondent also said that there is no customer loyalty in the irrigation business and that price is the most important factor. Again this is in my view a disingenuous attempt to deny the existence of goodwill. Price will indeed be a

factor and clients do move to competitors, but the evidence of the CC's clients coming back on a recurring basis, or following up on an earlier quotation, which was not in dispute, demonstrates the existence of customer goodwill. The respondent said that potential clients for the purchase of irrigation systems are easily identified, because they are farmers whose properties are registered for irrigation and their identity is accessible. This argument however only relates to future clients, who are not the applicants' concern in this application, and ignores the existing clients of the CC.

[20] Further with regard to goodwill, the respondent said that he will not be marketing Valley systems and therefore the CC will still retain its reputation as the sole distributor of Valley systems in the area. It may well be that the goodwill in the sense of reputation of the CC relates to Valley products, but this assertion ignores the fact that the CC has existing and recurring customers, and that there are other types of irrigation systems supplied by competitors of the CC.

[21] With specific regard to the Vermaak incident, the respondent denied that he had telephoned Vermaak and said that Vermaak had telephoned him on 13 September 2010 and asked for a quotation from Agrico. He said that Vermaak had given him the specifications when he prepared the quotation on 9 September 2010, and he had used those same specifications when he prepared the quotation on 13 September 2010. I am unable on the papers to resolve this dispute of fact. There was no affidavit from Vermaak, and the respondent's

account of what took place between him and Vermaak is not so untenable as to be rejected .

[22] With regard to the Lombard incident, the respondent admitted that he had given a quotation to Lombard for the supply of a Valley irrigation system, while still in the employ of the CC. He copied the survey he had prepared onto his laptop because he anticipated that Lombard would need assistance regarding the proposed layout of the system. He provided the survey to Lombard in order to facilitate and finalise the transaction concluded between the CC and Lombard, and Agrico gained no advantage from the transaction, which remained with the CC. There is no dispute that Lombard is still a client of the CC, and in view of the fact that the particular transaction remained with the CC, the respondent's account of the Lombard incident cannot be rejected as untenable.

[23] The respondent's answer to the applicants' averments of his knowledge of confidential information was to deny that there was any confidential information. Information regarding Valley products was available on Valley's website and in any event no other competitor could sell Valley products because SKB and the CC had the exclusive distribution rights. I agree that no competitor could derive an advantage from information relating to Valley products. In regard to business policies, trade secrets etc., referred to in paragraph [16] above, the respondent said that he did not know what was meant by some of the items mentioned, for example "outside resources", and said that other items were not trade secrets. In

my view some of the items mentioned are described in such vague and general terms that it cannot be determined if they qualify as confidential information in which the CC has an interest. The items which I think do qualify as confidential information, are the CC's business contacts, and measured plans, designs and quotations. It is self evident that these items have an economic value to the CC, and the respondent, as an employee of the CC had a duty to preserve the confidentiality of the information and must have known that it was confidential. The respondent again said that the identity of irrigation farmers is well known to everyone and I have dealt with that answer already. With regard to measured plans, he said such plans are achieved by attending on the particular property and that there is no secret in the preparation of such a plan. I disagree with this view. The measured plans would be the result of the application of the time and expertise of whoever prepared them. They therefore have economic value to the CC. The same goes for designs. The respondent said that a design relates to a tailor made irrigation system to suit certain environments. Each system is designed around a standard format with some minor adjustment to accommodate the particular environment, and there is no trade secret in the design. Again, in my view, time and expertise must go into the particular design in order to adapt it to the particular environment and again such design must have an economic value to the CC.

[24] With regard to the monthly reports to Valley, the respondent said he is not in possession of such reports and that no advantage could be obtained from such

reports, because most farmers who contemplate purchasing an irrigation system approach a number of suppliers for quotations. Again this assertion overlooks the fact that potential clients mentioned in such reports will already have approached the CC and their identity constitutes confidential information of value to the CC. Although he said he was not in possession of the reports, the respondent agreed that such reports were periodically submitted and he did not claim not to know the contents of the reports.

[25] The respondent said that the only information he kept on his laptop while employed by the CC, was quotations for potential customers and survey plans of areas to be irrigated. This laptop was returned to the CC. The only information he transferred to his new laptop related to the survey of land which he had conducted in respect of unfinished contracts secured for the CC, and those contracts have now been finalised on behalf of the CC. The applicants did not reply specifically to these averments, and in the light of the Lombard incident, the respondent's evidence about what was transferred to his new laptop cannot be rejected as untenable.

[26] With regard to the decline in profits of the CC, the respondent denied that this decline was attributable to a desire on his part to concentrate on turnover. He attributed the decline to the fact, which he had recently discovered, that the first and second applicants, in the form of SKB, were trading in competition with the CC and marketing Valley products in the Southern Cape for the benefit of

SKB and not for the CC. According to the respondent it was the duty of the first and second applicants to advance the business of the CC in the South Western Cape magisterial districts contained in Annexure A to the co-operation agreement. However the first and second applicants sold Valley products in the South Western Cape for the benefit of SKB and therefore traded in opposition to the CC, and in so doing, breached the co-operation agreement and their fiduciary duties towards the CC. The co-operation agreement provided that each member of the CC would contribute to the business of the CC on a full time basis and would seek to advance the interests of the CC at all times. As a result of the conduct of the first and second applicants the respondent decided to terminate his relationship with the CC.

[27] The applicants' response to the allegation that SKB traded in competition with the CC was that the CC was intended to operate only in the Eastern Cape and that therefore trading by SKB in the Southern Cape was not competition. It was explained that the area for which SKB permitted the CC to sell Valley products is not the whole area in respect of which SKB has the exclusive right to sell Valley products. The inclusion of the various magisterial districts contained in Annexure A to the co-operation agreement related only to the area to which the restraint applied, and all these districts comprised the whole area for which SKB had the exclusive Valley rights. That whole area was covered by the restraint clause in order to protect the first and second applicants' interests in the Southern Cape. All the members of the CC knew that the CC had the right to do

business only in the Eastern Cape region.

[28] In my view it was clear from the background to the formation of the CC and the areas of operation of the respondent and the third applicant, which were not in dispute, that the CC was intended to operate only in the Eastern Cape. The applicants confirmed this position in the replying affidavit. The allegation that the first and second applicants were, through SKB, trading in competition with the CC was therefore baseless and created no real dispute of fact. In any event, in his letter of resignation, the respondent made no accusation of competition by SKB, and in his attorney's letter of 16 August 2010 addressed to SKB, the reason given for his decision to join Agrico was that the CC was no longer viable, that he had never received a profit share, and that he could not survive financially. In his answering affidavit the respondent said that he had considered "appropriate proceedings" to address the prejudicial conduct of the first and second applicants but decided not to proceed because to do so would have been costly and protracted, and, whatever the result, no future relationship between him and the first and second applicants would have been possible. In my view, if he considered the first and second applicants' conduct to be so prejudicial to the CC, such alleged conduct would have been included in at least his attorney's letter, particularly because at the time of the writing of the letter the applicants had told the respondent that they expected him to abide by the restraint clause. In these circumstances I am of the view that the respondent's allegation that SKB traded in competition with the CC was so untenable as to be rejected on the

papers.

[29] In applying the *Plascon Evans* rule referred to above, I summarise the factual situation as follows:

1. The respondent bound himself to the restraint of trade agreement.
2. He left the employ of the CC and commenced employment with a competitor, Agrico.
3. At the time he commenced employment with Agrico, the CC was possessed of customer goodwill and had a customer base known to the respondent.
4. The respondent ran the Cradock branch and played a central role there, which involved decision making, sales, planning of systems and preparation of quotations. Such duties brought him into close contact with customers with whom he had a strong relationship.
5. The respondent had knowledge of confidential existing designs and plans and quotations which were the product of the labour of the CC, and which might be used in the future for existing customers.
6. The respondent was aware of monthly reports to Valley containing details of possible future sales.
7. Two existing customers of the CC, Vermaak and Lombard, made contact with the respondent after his departure from the CC, which contact related to work already done on behalf of the CC.

8. SKB did not trade in competition with the CC.

Urgency

[30] It was submitted on behalf of the respondent that the urgency was self created. The applicants knew on 31 July 2010 that the respondent was to be employed by a competitor but only launched the application on 1 October 2010. The applicants however explained why they waited until 1 October 2010. After they received the respondent's letter of resignation they hoped to reach agreement with the respondent and traveled to Cradock on 26 August 2010 to try to resolve matters. Correspondence between the parties and their respective attorneys was annexed to the affidavits which evidenced a debate about the enforcement of the restraint clause. For example as early as 5 August 2010 the first, second and third applicants wrote to the respondent telling him that they expected him to abide by the restraint clause. In response the respondent's attorneys wrote to SKB saying that their advice to the respondent was that the clause was not enforceable. The applicants' attorneys responded by saying that the applicants would enforce the restraint clause. In the replying affidavit the first applicant said that he and the second respondent decided not to rush into legal proceedings and hoped that the respondent would appreciate the implications of his intended employment with Agrico. However when they learned of the contact with Vermaak on 13 September 2010 they realised that the only way to protect the applicants' interests was to launch the application. In my view the conduct of the applicants was reasonable in the circumstances, in that they did not

immediately rush to court when they received the letter of resignation. The urgency was not self-created, but rather spurred on by the events of 13 September 2010. It must be remembered that the respondent only commenced employment with Agrico on 13 September 2010.

In addition the disputes have been fully dealt with in the papers and the respondent has not claimed any prejudice as a result of the shortened time limits.

The issue of urgency must therefore be decided in favour of the applicants.

Protectable interest

[31] The respondent maintained that the restraint clause merely sought to prevent competition. If that was the case, the restraint clause would not be enforceable.[11] However customer goodwill, which I have found on the facts to exist, is a protectable interest. It made no difference that the respondent had contributed to the creation of this goodwill. He did so on behalf of the CC. In *Branco*, van Rensburg J said the following:

> "As I see the position, when an employee has access to the customers of a business and is in a position to build up a particular relationship with customers, with the result that when he leaves his employer's service he could easily influence customers to follow him and trade with him at the expense of his erstwhile employer, there is no reason why, in principle, a restraint should not be enforced to protect the employer's trade connections."[12]

11 *Branco and another t/a Mr. Cool v Gale* 1996 (1) SA 163 (ECD) at 176A-C
12 At 177C-D

(See also *Paragon Business Forms (Pty) Ltd v du Preez*)[13]

[32] The applicants therefore established a protectable interest and the respondent adduced no evidence to demonstrate that it was unreasonable to restrain activities which threatened such an interest. The enforcement of the restraint clause would affect his current employment with Agrico but he willingly agreed to the restraint clause. In addition, it would appear from previous offers by Agrico, that he was head-hunted because of his expertise. If the period and area of restraint were to be restricted, which I intend to do, the restriction on the respondent's employment opportunities would not be significant. The first applicant stated (or rather speculated) in the founding affidavit that the services of the respondent will be in high demand and he will be able to find a suitable position anywhere in the country other than the Eastern Cape region. The respondent's answer was that he was unable to comment on his prospects of obtaining similar employment elsewhere in the country and that if the application was successful he would be prevented from earning a living, and he was not in a position to relocate to another part of the country. He had no agreement with Agrico that he would be deployed elsewhere if the application was successful. He however did not explain why he would be prevented from earning a living, when his expertise was not in dispute, nor did he explain why he could not relocate.

Enforcement of restraint clause inequitable

13 1994 (1) SA 434 (SECLD) at 445 G-J.)

[33] It was submitted on behalf of the respondent that enforcement of the restraint clause by the first and second applicants was inequitable in view of their alleged breach of the co-operation agreement and their fiduciary duty towards the CC. I have already found that there was no such breach, in that SKB did not trade in competition with the CC. In any event, there were still the interests of the third applicant and the CC to consider in relation to the respondent's employment with a competitor. The submission on behalf of the respondent concerning these interests, was that there must have been a conspiracy between all the applicants to gang up against the respondent. This submission only has to be stated to be rejected. It was the respondent who resigned and commenced employment with a competitor. There was therefore no unreasonable or inequitable enforcement of the restraint.

Interpretation of clause 23

[34] It was submitted on behalf of the respondent that the phrase "om by hul uittrede uit die BK" contemplated the termination of membership of a member. The respondent was still a member, therefore the restraint clause did not take effect. Reference was made to the dictionary meaning of "uittree" which according to HAT 5th edition means "'n amp of bediening neerlê; aftree; jou ontslag neem; jou limdaatskap opsê." In my view, this meaning is wide enough, in the context of the restraint clause, to include resignation as an employee. The narrower interpretation submitted by the respondent would completely defeat the purpose of the restraint clause. Whether or not the member resigned as a

member or an employee, the restraint clause related to involvement in any capacity with a similar business, in order to protect the interests of the CC and its members. This ground of opposition to the application must also fail.

Conclusion

[35] In the result, I am of the view that the applicants have established the requirements for a final interdict to enforce the restraint clause. The applicants have a clear right in that the restraint clause was agreed upon, the applicants have a protectable interest, the breach by the respondent is an injury committed, and there is no other remedy to protect that interest.[14] I however intend to restrict the scope of the restraint, which I am entitled to do,[15] and which Counsel for the applicants invited me to do. The clause provides for a restraint for a period of five years, but the applicants conceded that this was too long and suggested three years. Counsel for the respondent suggested a period of one year. In my view a period of one year with effect from 13 September 2010 adequately protects the applicants. The area of the restraint clause is in my view too wide. The inclusion of magisterial districts in the Western Cape protects SKB and not the CC. A restriction of the area to the Eastern Cape would be appropriate.

Unlawful competition

[36] On the facts I found to be established, I do not think it can be said that the respondent improperly dealt with confidential information. Not only was it found

14 *Reddy v Siemens* at paragraph [22]
15 *Branco* supra at 175D-E and 179D-E and the authorities referred to

that Vermaak and Lombard contacted him, rather than the converse, but he concluded the Lombard contract for the benefit of the CC. Further, his attorneys said in their letter to the applicants' attorneys, when the restraint clause was being debated, that the respondent was concluding contracts in progress on behalf of the CC. All the indications were that the respondent was not improperly or wrongfully using confidential information to the detriment of the CC.

Even if I am wrong in this conclusion, an enforcement of the restraint clause will apply to such confidential information, because in my view it forms part of customer goodwill. It is work done on behalf of existing clients and might be followed up by such clients. The same applies to clients who are included in the monthly work in progress reports to Valley.

Costs

[37] The applicants have been partially successful in that I have found the restraint clause to be enforceable. They did not succeed in establishing all the elements of unlawful competition but the two claims were to some extent intertwined and I regard the applicants as substantially successful.

Order

[38] The following order is made:

38.1 The respondent is interdicted from conducting the business of

planning, selling and installing irrigation systems or from being involved, directly or indirectly, with such business, in the area of the magisterial districts of the province of the Eastern Cape, identified in Annexure A to the co-operation agreement entered into between the members of the fourth applicant, for a period of one year commencing 13 September 2010.

38.2 The respondent is to pay the costs of the application.

_____
J.M. ROBERSON
JUDGE OF THE HIGH COUR

Appearances:

Applicants: Adv L.J. Joubert, instructed by Neville Borman and Botha, Grahamstown.

Respondent: Adv. S. Cole, instructed by McCallum Attorneys, Grahamstown