IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number **760/2021**

In the matters between:

CORREIA SPARES CC t/a OMEGA MOTOR SPARES Applicant

and

JOHANNES NICOLAAS CROUCAMP Respondent

CORAM: DAFFUE J

HEARD ON: 29 APRIL 2021

DELIVERED ON: 3 MAY 2021

This judgment was handed down electronically by circulation to the parties' representatives by email as agreed with them. The time and date for hand down is deemed to be 13h00 on 3 MAY 2021.

I INTRODUCTION

[1] *Verba contra stipulatorem interpretanda* or in English, words should be interpreted against the stipulator, is an important principle to be kept in mind when interpreting contracts. The well-

known contra *proferentem* rule eminates from this saying. *In casu* the employer who either drafted the employment agreement, or instructed someone to do so, may well regret the fact that the restraint of trade clause contained therein is vague and ambiguous, if not nonsensical.

II THE PARTIES

[2] The applicant is Correia Spares CC t/a Omega Motor Spares in Welkom. Adv MC Louw appeared for the applicant on instructions of Kruger Venter Attorneys, the heads of argument having been drafted by Adv CJ Hendriks.

[3] The respondent is Mr Johannes Nicolaas Croucamp, an adult male and former employee of the applicant. He was represented by Adv J Els on instructions of Phatshoane Inc.

III THE RELIEF CLAIMED

[4] The applicant seeks an order in terms whereof the respondent is interdicted and restrained, for a period of one year after his employment relationship with the applicant has ended, to conduct business in whatsoever capacity in competition with the applicant "in the area known as the "Motor Industry" and in the jurisdictional area of Welkom." It also seeks an interdict preventing the respondent "from communicating with and/or soliciting the applicant's customers and suppliers, enticing employees of the applicant and retaining, using or disclosing any confidential information of the applicant." Finally an order is sought in

terms whereof the respondent is directed to return all confidential information to the applicant.

IV THE MATERIAL FACTS

[5] The following facts will be considered in adjudicating the application and in so far as some are not common cause I shall indicate why such facts are accepted, bearing in mind the *Plascon Evans* principle:

1. The applicant's business was founded by its deponent in 1994 and must be regarded as a well-known and established business in the city of Welkom.
2. On 26 June 2009 the parties entered into an employment agreement, drafted by or prepared on behalf of the applicant. This agreement contains a clause 28 under the heading: "Beperking op handelsvryheid." It was designed to be a covenant in restraint of trade.
3. The respondent started his career at the applicant as an assistant manager, but was promoted to manager approximately four years later.
4. Prior to his appointment he was employed by Lindsay Saker in Welkom. The applicant head-hunted him. He obtained his knowledge of gearboxes and engines before he started with the applicant. The applicant did not transfer any skills to him.
5. The respondent left the applicant's employ on 27 October 2020 and started the business known as Multi Engine and Gearbox at the beginning of December 2020.

6. The applicant's business is conducted "in the Welkom area and surrounds." Its two key areas of trade are the sourcing and supply of new and used engines and gearboxes to car dealerships (an aspect put in context by the respondent) and the public and the sourcing and supplying of second hand and new general automotive spares and other parts.[1] The respondent was only involved with the first key area. The applicant is therefore a dealer in these products like numerous other dealers in the Goldfields as well as the remainder of the country as respondent has proven in relying on extracts from the internet.
7. Although applicant delivers a specialist service, no confidential information such as business strategy and customer lists and the like exist. If that was the case, the applicant failed to show that the respondent is unlawfully making use of such information.
8. The applicant caused a letter to be written to its employees on 2 June 2020[2] that had the intention to unilaterally change their employment conditions, inter alia by cancelling their "weekends off," taking away overtime payments and insisting that no payments in lieu of leave would be paid. This letter and the attitude of applicant's deponent thereafter made further employment unbearable.[3]
9. The applicant's turnover dropped by 60% to 70% during the period from December 2020 to the beginning of February 2021.

[1] Record para 6 p 11
[2] OA1 on p 138
[3] Record para 10 on p 112

10. Except for the respondent, at least six other people left the applicant's employ over the last few months. It is the respondent's case that any decline in the applicant's turnover may be attributed to the applicant's inability to provide customers with professional and efficient service.[4]
11. The respondent has shown that numerous businesses in Welkom and surrounding area provide similar services as the applicant.[5]
12. Some of the respondent's business activities overlap with applicant's business, but he provides a service centre and overhaul of engines which is his core business and main source of income. The applicant is not conducting this type of business.[6]
13. The applicant replaced the respondent by recruiting a Mr Johan Barnard from 1 December 2020. There is no indication that this person is not capable of filling the respondent's shoes and/or that time is needed for him to build up customer relationships. All suppliers and customers have been informed that the applicant intended to act in terms of the restraint of trade applicable to the respondent.[7]

V THE CASE LAW IN RESTRAINT OF TRADE DISPUTES

[6] The authorities in restraint of trade disputes are well-known and it would suffice to briefly mention a few judgments. We learned from

[4] Record para 20 pp 126 & 127
[5] Record para 12 at pp 117 & 118 and p 160
[6] Record para 11 on p 114; the applicant avers that the mechanic who is now employed by the respondent was previously in its employ, but it is not averred that it is in the business of a service centre or the overhauling of engines
[7] Record para 21 pp 18 & 19

the Romans: *pacta servanda sunt*, *i.e.* contracts must be complied with. This remains an important principle, but many years before the enactment of both the *interim* and final Constitutions, the Appeal Court (as it was then called) held in its landmark decision of nearly 40 years ago in *Magna Alloys and Research (Pty) Ltd v Ellis*[8] that agreements in restraint of trade are valid and enforceable, unless they are unreasonable and thus contrary to public policy. The court held that the party challenging the enforceability of the agreement bears the *onus* to allege and prove that it is unreasonable.[9]

[7] Restraint of trade agreements are not special contracts separate from any other type of contract. Having said this, restraint of trade agreements give effect to a wide range of circumstances "spanning the spectrum from the hugely successful businessperson who sells the business that he or she has built up for massive amounts of money and is required to sign a restraint of trade agreement in order that the purchaser may protect its investment, to relatively humble employees who may be required to sign such an agreement as a matter of rote and possibly *in terrorem* to deter them from seeking a more advantageous position …" as Wallis AJ (as he then was) stated in *Den Braven SA (Pty) Ltd v Pillay and another.*[10] Later on in the same paragraph the learned judge stated that where a business seeks to protect itself against the use by its former employee of confidential information, trade secrets and/or customer connections, there is no reason for the courts to view this with disfavour, unless the bounds of public policy are overstepped in which case the court will withhold its assistance.

[8] 1984 (4) SA 874 (A)
[9] *Ibid* at 893 C - G and 897 H – 898 D
[10] 2008 (6) SA 229 (D & CLD) at par 35

[8] A court adjudicating a dispute relating to restraint of trade should follow the approach adopted in *Basson v Chilwan and Others*[11] where four questions were identified that should be asked to consider the reasonableness of a restraint of trade:

(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 the restraint to be maintained or rejected?

[9] Although the public interest requires parties to comply with their contractual undertakings, it is also in the public interest that all persons shall be granted an opportunity to remain economically productive to enable them to earn a living and to support their families. This was again reiterated in *Reddy v Siemens Telecommunications (Pty) Ltd.*[12] The court continued in *Reddy*[13] as follows:

> "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."

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[11] 1993 (3) SA 742 (A) at 767 G-H. See also in general Bradfield, Christie's Law of Contract in South Africa 7th ed, p 427 and further

[12] 2007 (2) SA 486 (SCA) at par 15

[13] *Ibid* par 16

[10] Many years after *Magna Alloys* the Constitutional Court confirmed in *Barkhuizen v Napier*[14] that *pacta servanda sunt,* but courts are allowed to decline to enforce contracts, or terms thereof, that are in conflict with constitutional values, even where the parties consented thereto.

[11] Section 22 of the Constitution stipulates that every citizen has the right, subject to regulation by law, to choose their trade, occupation or profession freely. A balancing act must be performed in considering this constitutional right enshrined in the Bill of Rights against the common law principle of *pacta servanda sunt* which in any event may not be unreasonable and thus against public policy as confirmed in *Magna Alloys supra*. It is interesting to note that Currie and De Waal[15] are of the view that in the light of "the effect of the clear preference for freedom of trade in the 1996 Constitution" the *onus* in these matters must be reconsidered. I shall accept for purposes hereof that the respondent bears the *onus* to show that the restraint of trade is unreasonable and contrary to public policy. In the evaluation of the evidence I shall consider the alleged unlawful competition against the backdrop of the applicant crying foul and its interest *vis-a-vis* public policy and the constitutional right of the respondent to engage the free market system to earn a living.

[14] 2007 (5) SA 323 (CC) at par 30
[15] *The Bill of Rights Handbook* 5th ed at p 497; see also *Canoa KwaZulu-Natal t/a Canon Office Machines v Booth* 2004 (1) BCLR 39 (N)

[12] The Constitutional Court accepted in *Phumelela Gaming and Leisure Ltd v Grundlingh* and others[16] the logical assumption that any form of competition poses a threat to a rival business. Only unlawful competition becomes actionable. The court continued to confirm the principle of weighing the different interests against each other already encapsulated in *Basson v Chilwan supra,* a pre-constitutional judgment. In *Phumela Gaming* the court reiterated that "the *boni mores* or reasonableness criteria" are fundamental to a determination of whether competition is unlawful.[17]

[13] It is an accepted principle that, in the main and excluding other factors relating to unlawful competition, an ex-employee utilising his/her own experience, skill, knowledge and/or expertise cannot be restrained to go into competition with the ex-employer.[18]

[14] In *Masstores (Pty) Ltd v Pick n Pay Retailers*[19] the Constitutional Court also had its say on matters of restraint of trade, although the dispute that the court had to adjudicate dealt with an exclusive contractual right to trade as a supermarket in a shopping complex granted to Pick n Pay by the lessor in a lease agreement. The court quoted with approval a *dictum* in *Automotive Tooling Systems v Wilkens* referred to *supra* that it is generally accepted that a restraint will be considered unreasonable, contrary to the public interest and unenforceable "if it does not protect some legally recognisable interest of the employer, but merely seeks to exclude or eliminate competition."

[16] 2007 (6) SA 350 (CC) at paras 32 -35
[17] Ibid at para 32
[18] *Automative Tooling Systems (Pty) Ltd v Wilkens and others* 2007 (2) SA 271 (SCA) at 279
[19] 2017 (1) SA 613 (CC) at para 35

[15] Just last year Froneman J in a minority judgment of the Constitutional Court confirmed the aforesaid principle in *Beadica 231 CC and others v Trustees, Oregon Trust and others*[20] in the following words*:*

> "In our law it is now established that covenants in restraint of trade will not be enforced where enforcement would be contrary to public policy, especially in cases where there is no legitimate business interest in the restraint."

In the majority judgment Theron J confirmed that *Barkhuizen v Napier* quoted *supra* remained the leading authority in our law on the role of equity in contract as part of public policy considerations.[21] She discussed aspects such as the role of the Constitution, fairness, reasonableness and *ubuntu* and eventually concluded that the applicants failed to explain adequately why the enforcement of the strict terms of a renewal clause in a contract would be contrary to public policy.[22]

VI EVALUATION OF THE EVIDENCE AND COUNSEL'S SUBMISSIONS

[16] Prayers 2 and 3 of the notice of motion may be dealt with at once. There is no acceptable allegation that the respondent took any confidential material with him or that he is using any information belonging to the applicant that can be defined as confidential. Mr Louw readily conceded this. There is also no acceptable evidence that the respondent enticed the applicant's customers, suppliers or

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[20] 2020 (5) SA 247 at para 138
[21] Ibid paras 38 & 58
[22] *Ibid* paras 71 & further and para 99

employees to cut their ties with it and do business with him only. These two prayers do not require any further consideration.

[17] The first issue to be considered and in my view the death knell for the applicant's case is the vague and nonsensical restraint of trade as it appears in clause 28 of the employment agreement. It does not indicate the applicable geographical area. Instead it refers to the area known as "Motor Nywerheid" or in English, motor industry. Obviously, the applicant was made aware of the predicament and therefore its deponent tried to minimise the damage by stating that the respondent should be prohibited from conducting business in the " the area known as the "Motor Industry" and in the jurisdictional area of Welkom"[23] whatever that means. In support of the relief claimed the applicant's deponent avers that it "does business mostly within the Welkom area with local dealers, but on occasion would do business outside the boundaries of Welkom."[24] I have a serious difficulty with the applicant's attempt to read something into clause 28 that is not contained therein. The clause is open-ended and no geographical area is defined. The Welkom area may include the city centre of Welkom only, or it may refer to all the suburbs and even towns such as Thabong, Riebeeckstad and Bronville. These towns fall to the best of my knowledge within the magisterial district – not jurisdictional area - of Welkom, but is this what the parties intended? If one wants to be technical, the Welkom area may even include surrounding towns such as Virginia, Hennenman and Odendaalsrus. What about the district of Welkom?

[23] Prayer 1 of the notice of motion
[24] Record para 16 p 17

[18] It was no surprise that Mr Louw had difficulty to explain what he understood by the words "jurisdictional area of Welkom." He practised for several years as attorney in Welkom and I am personally aware of the fact that he has acted on many occasions for the Matjhabeng local municipality. At first he suggested that the jurisdictional area referred to means the area within the Welkom municipal area. When I pointed out that there is not a Welkom municipality anymore, but that Welkom forms part of the Matjhabeng local municipality, he submitted that the court could trim the area to that of this local municipality. When I pointed out to him that such area includes Welkom and surrounding towns such as Virginia, Hennenman and Odendaalsrus, he immediately retracted his submission. Finally, he suggested that the court should trim the wide restraint to the geographical area consisting of the Welkom magisterial district.

[19] This court cannot make a contract for the parties. It is impossible to interpret the employment agreement and clause 28 thereof in particular in order to ascertain the common intention of the parties, even if the background and surrounding circumstances are considered. The restraint of trade clause is vague, ambiguous and does not make any sense. The court may apply the *contra proferentem* rule as a last resort when all methods of ascertaining the common intention of the parties have failed.[25] I am not prepared to read into the contract a term that the applicant failed to put in writing. The applicant insisted on the agreement and either drafted the document or instructed someone to draft it. In the event that the agreement - particularly clause 28 - is incurably

[25] Bradfield, Christie's Law of Contract in South Africa 7th ed at p 262

ambiguous or lacking certainty, the *contra proferentum* rule should be applied in favour of the respondent. This lack of certainty ties in with the issue considered in the next paragraph. The application should be dismissed without the necessity of considering any of the aspects relating to the respondent's alleged breach of contract.

[20] Another aspect related to the failure to indicate the geographical area is the reference to the "area of the Motor Industry." We do not need a genius to tell us that "motor industry" encapsulates the total motor industry, *ie* manufacturing of all kinds of motor vehicles and automotive parts, the sale thereof by manufacturers to the industry and further sales to end users, as well as the distribution of these vehicles and parts throughout the country. It is common knowledge that there is a Bargaining Council in place for the motor industry as well as an Ombudsman. This industry is huge and deals with every facet relating to automotives.[26] Mr Louw, a labour law expert, readily conceded the wide ambit of the motor industry. The question with this in mind is what did the parties, and the applicant in particular, have in mind with clause 28. The intention could never be to prevent the respondent from conducting business in any sphere of the motor industry whatsoever. I agree with the respondent that the restraint is too wide and therefore unreasonable and against public policy. The point made herein strengthens the conclusion reached in the previous paragraph. In all fairness to the applicant and on the supposition that I am wrong, I shall deal with the further matters raised by the parties.

[26] Respondent alluded to this in para 19.2 p 125, stating that the restraint is unreasonable as the clause refers to "the very wide motor industry"

[21] I shall shortly deal with the facts *in casu.* It is apposite to reflect firstly what transpired in two of the judgments mentioned *supra*. Mr Reddy, the appellant in *Reddy v Siemens*[27] quoted above was a systems engineer in the carrier services high-level support network platform department of Siemens that rendered "intelligent network" and value added services to its customers. He had knowledge of confidential technologies that could be utilised when he started employment with a competitor of Siemens, to wit Ericsson. Reddy gained experience and was trained both in South Africa and abroad in relation to his ex-employer's products and networks and the use of its software, which gave Siemens' intelligence network platform service a unique identity and competitive edge. The process of customising software was confidential and a trade secret of Siemens. Clearly, Reddy was a skilled employee in possession of knowledge of Siemens' "processes, methodologies and systems architecture." In the case of Reddy, the Supreme Court of Appeal held that he would be employed with Ericsson in a similar position to the one he occupied at Siemens, that his loyalty would be to his new employer and the opportunity to disclose confidential information at his disposal, whether deliberately or not, would exist. Therefore, the restraint was intended to relieve Siemens from the risk of disclosure and the court had no difficulty to find that the restraint was neither "unreasonable nor contrary to public policy."[28] The differences between the experience and expertise of Reddy and that of respondent are enormous. I do not believe it is necessary to repeat the material facts set out *supra*.

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[27] *Loc cit* para 9
[28] Ibid par 20

[22] In the *Den Braven* case, Mr Pillay, the ex-employee, was regarded as an excellent sales representative who in the past financial year before his resignation was responsible for close to 50% of Den Braven's sales of its products in KwaZulu-Natal. Pillay conceded that he had knowledge of Den Braven's client base and that he had built-up a close relationship with customers over a period of 8 years. The court had little difficulty in that factual scenario to hold that the purchasing decisions of customers are not only influenced by price as opposed to the relationship between the salesperson and customers. Furthermore, the trade connections established through a specific salesperson may well be the decisive factor in the minds of customers.[29] No doubt, Pillay could be described as an excellent salesman that would most definitely have a detrimental effect on Den Braven's future sales whose commercial interests were deserving of protection.[30] Again, the respondent's attributes cannot be compared at all to that of Mr Pillay, even in so far as the applicant tried to show a decline in its turnover. Fact of the matter is that in excess of six people left the applicant's employ recently. Several other factors could have contributed to a decline in sales, such as the festive season and the rather poor economic conditions country-wide.

[23] In *Reddy* the duration of the restraint of trade was one year which the court held was reasonable. In Pillay the duration of the restraint was decreased from two years as contained in the

[29] *Loc cit* par 17
[30] Ibid par 19

restraint of trade agreement to eight months and Wallis AJ stated the following in support of the decrease:[31]

"In my view the period of the restraint should not be any longer than is necessary to enable the Applicant to place a new salesperson in the field, enable them to become acquainted with the products and the customers and to make it plain to the latter that they are now the person with whom to deal on behalf of the Applicant. Having regard to the nature of the products, the type of customer to whom they are sold and the number of customers who will need to be contacted I think that a period of 8 months is sufficient for those purposes." (emphasis added)

[24] I could not find a proper explanation for insisting on a restraint period of one year. Mr Louw submitted that the onus was on the respondent to convince the court that the duration was excessive and to suggest a shorter period. I do not agree. The respondent did not have to rely on alternative arguments. His case is clear: the restraint is unreasonable; the applicant does not have a protectable interest; its business model is exactly like that of numerous other similar businesses in Welkom and across South Africa and finally, the respondent is lawfully competing with the applicant in so far as some of their activities overlap. According to the respondent the only logical explanation for the legal steps taken is the applicant goal to prevent lawful competition and in doing so, to penalise the respondent for leaving the applicant's service. I tend to agree with this statement.

[25] I accept that the respondent was one of the applicant's managers and he was in a fiduciary position *vis-a-vis* the applicant, but

[31] Ibid par 55

cognisance is also taken of the fact that the respondent was in control of only one component of the applicant's business, to wit the sourcing and selling of engines and gearboxes. It is not the applicant's case that the respondent was so intimately connected to suppliers that through him the applicant received preferential treatment or discounts that were not offered to other customers. Although respondent may have had the telephone numbers of some customers stored in his cellphone's address book, applicant failed to present any acceptable evidence that such close customer connections exist between the respondent and these customers that they will follow him as of cause to his new business. In fact, based on the *Plascon Evans* principle I must accept that by far the majority of the applicant's customers are so-called "walk-ins" who perhaps once in a lifetime buy items such as motor engines and gearboxes. The respondent's version in this regard, as is the case with many other allegations in the answering affidavit, was denied by the applicant without any attempt to explain the denial. I am not prepared to find that the applicant has an interest which is deserving of protection.

[26] *In casu* the applicant has already replaced the respondent in December 2020.[32] I have to accept that Mr Barnard, the new employee, has all the necessary skills, experience and expertise to fill the gap left by the respondent, otherwise the applicant would have informed the court that Mr Barnard was inexperienced and could not cope as the respondent did. It is not the applicant's case that more time is required to ensure that Mr Barnard establish good and close connections with all suppliers and customers.

[32] Record para 21 p 19

Applicant immediately informed all its customers and suppliers of its intention to rely on the restraint of trade to prevent respondent from competing with it. Mr Barnard deposed to a confirmatory affidavit in support of the applicant's case. Applicant's deponent started the business in 1994 and he personally is still involved although the respondent made the point that he did not have "a hands on" approach anymore.[33]

[27] Applicant did not issue its application immediately, but waited until the middle of February 2021. In the process a period in excess of three months lapsed. It is interesting to note that the application was issued only after the resignation of respondent's wife from the applicant's employ. Mr Louw submitted that nothing sinister could be read into the delay as the applicant wanted to establish whether its business was negatively affected as a result of the respondent's alleged unlawful competition. Once the financial information was obtained the applicant decided to act which it did immediately.

[28] Applicant is an established business and there is no legitimate reason why the court must interdict the respondent from competing lawfully with it. No acceptable evidence was tendered by the applicant to show that it is or was in possession of confidential information, trade secrets and/or supplier and customary lists to which the respondent had access and which could be used to compete unlawfully. Even if the applicant has a protectable interest, it has not been shown that the respondent's conduct prejudiced the applicant's protectable interests.

[33] Record para 6.1 p 108 which is denied by applicant in para 8 p 173

[29] I cannot ignore the reason why the respondent decided to terminate his services. Four other employees, excluding the respondent, his wife and Mr Riaan Klopper, left the applicant's employ in the past few months.[34] The respondent's reasons are clear: the applicant's deponent made continued employment impossible, he became increasingly difficult, was never satisfied with the conduct of any of the applicant's employees and even attempted to change their employment conditions by taking away privileges.[35]

[30] I accept that the applicant's deponent made life unbearable for the respondent and other employees. The respondent's resignation was a direct consequence of the conduct towards him. This is a facet of public policy to be taken into consideration. More importantly, if a balancing act is undertaken, or put differently, if the interest of the applicant's established business is weighed up against the constitutional right of the respondent to be economically active and to care for his family, I am satisfied that the scales are tipped in favour of the respondent. The applicant's reliance on the employment agreement – even if I interpret clause 28 as suggested by it – is unjust and unreasonable. It merely wants to frustrate the respondent's right to earn a living by following his constitutionally entrenched right to trade. The application cannot succeed.

VII CONCLUSION

[34] Record para 20.3 p 126
[35] Record para 10 p 112 and annexure OA1 on p 138

[31] In conclusion I confirm that clause 28 of the employment agreement is so vague and meaningless that it cannot assist the applicant to obtain any relief as claimed. Even if I am wrong in this regard, the respondent has shown that the alleged covenant in restraint of trade is unreasonable and against the public interest. Also, if the restraint is considered alongside the respondent's constitutional right enshrined in s 22, I am satisfied that the applicant has not made out a case for the relief claimed. There is no reason why costs should not follow the event.

VIII ORDER

[32] The following order is issued:

The application is dismissed with costs.

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J P DAFFUE, J

On behalf of Applicant	:	Adv MC Louw (the heads having been drafted by Adv CJ Hendriks)
Instructed by	:	Kruger Venter Attorneys Bloemfontein
On behalf of the Respondent	:	Adv J Els
Instructed by	:	Phatshoane Henney Inc Bloemfontein