IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE DATE: 10/1/2008
CASE NO: 52996/07

In the matter between:

MGK BEDRYFSMAATSKAPPY (EDMS) BPK APPLICANT

AND

FRANS JOHANNES DE BRYUN RESPONDENT

JUDGMENT

MAVUNDLA, J.,

[1] This is an urgent application to enforce a restraint clause that is contained in an employment agreement. On the 12 December 2007, after hearing the submissions, I reserved judgment until the 14 December 2007. However, due to the heavy roll in the urgent Court, I had to further reserve my judgment. I now proceed to deliver my judgment.

BACKGROUND

[2] PRODSURE is a division of the applicant. Its main business is the purchasing of agricultural products and in particular the procurement of

wheat from commercial farmers. Accordingly PRODSURE trades in grain acquisition. The clients of the applicant are essentially:

2.1 full time farmers in the bushveld;
2.2 part time farmers in bushveld;
2.3 farmers in other districts, but also in Brits district.

[3] According to the applicant, through time he has built a good relationship of loyalty with the farmers who sell to him their wheat harvest. It further states that the loyalty is not only based on the fact that it has been conducting business with the farmers over a long period, but also on the fact that the price at which the applicant purchases the grain from the farmers is competitive in an exceptionally competitive agricultural sector, as well as the applicant's purchase structure, its knowledge and advice it gives in regard to available options for the handling of wheat is competitive in the market and has the result that it is attractive and beneficial to the farmers; the applicant's personnel that is involved in the applicant's advice providing section (PRODSURE) has direct contact with the farmers. The personal relationship between the farmer and a particular employee of the applicant, is an important factor to a farmer in making a choice with regard to the selling to the applicant his agricultural product, especially wheat.

[4] The applicant further avers that there is a fierce competition among competitors in the agricultural sector with regard to the procurement of wheat. The applicant's confidential contract options, business integrity and business methods, as well as the nature of the relationship between the farmer and the involved worker of the applicant is usually a decisive factor in order to obtain the business of the farmer.

[5] The applicant further avers in its papers that it ensures that its employees are familiar with the market tendencies in regard to the purchase and selling of agricultural products, in particular, wheat, so that exceptional competitive business options are made available to the farmers so that the sale of wheat is done at specific times and specific price for the advantage of the farmer and the applicant. He states that he has developed specific strategies for the handling of special agricultural products especially wheat

to make same available to the farmers. This enables the applicant to purchase agricultural products from the farmers at an exceptional competitive price and then sell same at a competitive price. The applicant has specific grading methods to determine the credit worthiness of the farmers and has a long association with the farmers and as a result, he has compiled a profile of credit worthiness of every farmer, a profile of the financial ability of every farmer, in order to determine specific quantity of and periods when to purchase certain agricultural products, especially wheat. This enables him to determine the circumstances of entering into business contracts and the business terms thereof with the farmers, and their needs. He says that it follows that he would be having confidential information in regard to individual farmers.

[6] The reason for confidentiality according to the applicant is that he places regularly his business strategies and business methods to procure the business of farmers so much that he cannot afford to have these disclosed to his business competitors, since this would place the latter to unfairly and unlawfully compete with the applicant, and they would have an unfair advantage over the applicant. Further he says that its employees get intimate knowledge of the applicant's purchase methods and business strategies which the applicant employs to purchase from the farmers at a competitive prices the agricultural products and in particular wheat. Its employees gain confidential information over the individual farmers and their needs such that they would be in a position to make use of this information to the contracts that have to be entered into with such farmers.

[7] According to the applicant, its employees do not build the relationship between himself and the farmer so that the latter can be the client of the employee. It might be so that the employee might have that personal relationship with the farmer, but it is in essence the client of the applicant. It has resulted in an avoidable situation that the client farmer of the applicant and the potential client of the applicant would prefer to deal with a specific employee of applicant. The individual employee of the applicant builds a reputation for himself in the agricultural market so much that the client farmers and potential client farmers of the applicant would approach that specific individual employee of the applicant to conduct business with the employee.

[8] According to the applicant, the respondent was not involved nor knowledgeable in the agricultural industry before his employ with the applicant. In this regard the applicant has attached the *curriculum vitiae* of the respondent as annexure B. At the commencement of his employment with the applicant as the wheat procurement manager as from 1 September 2005, the respondent's duties entailed inter alia that the respondent would market the applicant at Bushveld region, he would procure wheat from the commercial farmers in that region. The respondent also operated for a while in the Brits region. The applicant further says that since the appointment of the respondent, it had to regularly train the respondent on how to be an effective grain-procurement-manager in the bushveld region, and towards this end, the applicant had to expose the respondent in its business methods and strategies and how to procure purchase agreements from the individual farmers. As a result the respondent in executing his duties, in full time employment by the applicant, used the business methods and business strategies of the applicant; gained intimate knowledge and experience in the wheat industry and the procurement of wheat; built a strong personal relationship with the farmer-clients of the

applicant; built a strong personal reputation for himself amongst the clients of the applicant. All this he achieved through the intensive training of the applicant and the use of the methods and strategies and the profiles of the individual farmers compiled by the applicant.

[9] The applicant contends in its papers that it has a protectable interest in:

9.1. the applicant's drawing power of potential and existing clients;

9.2 the applicant's business secrets, which include client list, information regarding business strategies and business methods, individual contract options for the handling of wheat, price structures, the price of wheat and expert knowledge with regard to the market position in the wheat industry;

9.3 the applicant's existing client base;

9.4 the respondent has built a personal relationship with the clients of the applicant with regard to the handling of wheat;

9.5 the respondent is in a position to recruit the clients of the applicant through the relationship he has with the farmers, as well as with his reputation which he gained in the industry to procure wheat for himself and not for the applicant, and this would result in a financial loss for the applicant.

[10] The applicant further states that to date of the launch of the application, it has managed to find out that at least 1 (one) farmer, G.S. Jansen van Rensburg, delivered to the respondent 50 (fifty) tons

of wheat in the previous 7 (seven) days. The applicant expects that most of the applicant's clients and potential clients would want to continue to do business with the respondent. The respondent has intimate knowledge of the risk profiles of the individual farmers in the bushveld and this information places the respondent in a position to recruit these clients and potential clients away from the applicant. According to the applicant the respondent can also give the same option advice as the applicant but his personal relationship with the farmers would be more decisive in enabling the respondent in recruiting the clients of the applicant and the potential clients.

[11] The applicant contends that the restraint period contained in the agreement is reasonable. In the alternative it contends that having regard the fact that the respondent has been employed by the applicant since 1 September 2005, a restraint for a period of 2 years is reasonable.

[12] The applicant states that the matter is urgent because the respondent has since 7 November 2007 been daily trying to recruit the clients of the applicant in the bushveld region. The respondent can daily be involved in the procurement of a business interest in the wheat industry. At this particular moment it is critical because the farmers are involved in harvesting and that farmers are entering into contracts with regard to the sale of the wheat they would have stored over some period. The respondent can daily make use of the confidential information he obtained whilst he was in the employ of the applicant to recruit the clients of the applicant and the potential clients of the applicant. In the event the respondent interferes with the client base of the applicant, the applicant would suffer irreparable and

incomputable financial damages, so does it contends.

[13] The applicant has attached as annexure 10 to the papers a copy of the agreement in which the relevant restrain clause is contained in clause 10. This clause provides as follows:

"10. TRADE RESTRAINT

The employee undertake for a period of 3 years from the termination of this contract not for any reason without the written consent of the employer, to conduct or attempt to conduct business or engage or to have an interest directly or indirectly in business of the same nature as that of the Employer, within any district of the Magistrate within PRODSURE'S AREA where he has been working for the past 3 years, with the understanding that this limitation will not be applicable where the Employee is declared redundant."[1]

[14] The respondent has filed his notice of intention to oppose on 16 November 2007and his answering affidavit on 27 November 2007, which was the day on which the application was to be heard. By agreement the matter was postponed to the 11 December 2007 and the costs were reserved. The notice of motion had demanded of the respondent to file an intention to defend on or before the

16 November 2007 and his answering affidavit on or before the

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[1] The Afrikaans text reads as follows:

"Die Werknemer onderneem om vir 'n tydperk van 3 jaar vanaf datum van beëindiging van hierdie ooreenkoms nie vir enige rede sonder die skriftelike vooraftoesteming van die Werkgewer,besigheid te werf of te probeer werf van bestaande kliënte van die Werkgewer nie of betrokke te wees of 'n belang te hë direk of indirek in enige besigheid van dieselfde aard as die van die Werkgewer in enige van die Landdroshof distrikte binne PRODSURE se gebied waar hy vir die afgelope 3 jaar werksaam was nie, met dien verstande dat, indien die Werknemer oortollig verklaar word, sal hierdie beperking nie van toepassing wees nie."

19 November 2007. He stated that he was served with the notice of motion at approximately 14h00 on 15 November 2007at Brits hospital where he had been admitted for severe chest infection. He could only provide his attorney of record with a copy of the notice of motion on the 18 November 2007.

[15] The respondent further pointed out that whereas the applicant first consulted with its attorneys on the 1 November 2007, it was only after 14 days that the applicant managed to launch this application and chose to afford the respondent with limited period to enter an appearance to oppose (16 November 2007) and file answering affidavit within 3 days thereafter (19 November 2007). Having regard to the explanation as set out herein above and the limited period that was accorded to the respondent, I am of the view that there has been no inordinate delay in the filing of the answering affidavit. I am of the view that the costs occasioned by the postponement on the 27 November 2007 should be cost in the cause.

[16] The respondent in its answering affidavit states that he was born on 8 May 1978 and is 29 years old. He states that he has lived his entire adult life in the area known as 'Bosveld" (Bushveld) region. He says that in his previous employment at Magaliesburg Kooperatiew Taback Vereniging (MKTV) from 1998 to 2001 where he was employed as a sales clerk or sales assistant, he assisted MKTV's clients in the retail outlet with sales and other general advice concerning farming equipment and related products. During this period, so he says, he became well known amongst the farmers in the region of Brits/Bosveld. He resigned this post in 2001 to join Groeisorg Verspreiders until he joined the applicant on1 September 2005. He says that whilst still with Groeisorg he was marketing and selling insecticides to farmers. During this period of his employment, he would give advice to farmers with regard to what was most effective insecticide and pesticide for crops. He built a strong relationship with the farmers. During this period he successfully attended a JSE SAFEX course.

[17] He avers that the applicant has failed to disclose a cause of action for the final relief he seeks. He states that the relevant covenant clause only entitles the applicant to enforce the restraint clause within specified areas and only in the event of the respondent having worked in such area for three years or more. Further he states that the restraint clause is incompetent. The

applicant is a large company with a number of different divisions, which include a financial service division (which provides financial assistance to clients and farmers); a retail outlet; a division involved in the marketing and sale of pesticides and insecticides; a business similar to that of a co-operative and various business arms and interests of which he is not aware. The relief sought by the applicant effectively precludes him from doing business with any client of the applicant or having an interest, whether direct or indirect, in any business which is the same as that of the applicant. The extent of the applicant's business is undefined and accordingly an order sought by the applicant is incompetent. He contends that for instance the order would preclude him from being employed by ABSA as a bank teller in the Bushveld region since ABSA also offers financial services.

[18] The respondent further avers that the applicant does not have a protectable proprietary interest, nor is there any confidential information of which the respondent possesses, neither are there any customer connections which are deserving of protection. He further contends that the purpose of a restraint clause is to provide a "sterilisation period" and that the very fact that the applicant seeks as an alternative a shorter restrain period is a concession that the period of three (3) years sought is unreasonable. He contends that the restraint goes much further than is reasonable. The respondent further avers that the applicant has not discharged the *onus* which rest upon it to show that it has confidential information possessed by the respondent and that there is any customer connection deserving of any protection.

[19] The respondent further states that although he was employed as the Wheat-procurement –manager, he did not have any employee working under him whom he had to supervise. He further states that the price at which any entity such as the applicant, purchases maize, soybeans, sunflower or wheat (grain) is predetermined and fluctuates from day to day. This price referred to as South African Exchange Price (SAFEX) is calculated by subtracting "transport differential" with the latter influenced by the proximity of the relevant area to Randfontein which is the main maize depot, e.g. transport differential for Brits to Randfontein would be R100. 00 and from Thabazimbi to Randfontein would be R140, 00.The respondent further states that he was not privy to nor was he aware of the criteria used by the applicant in determining the extent of a particular maize order which it would place on a particular farmer. He says that he would visit a particular farmer and inform such a farmer of the applicant's price for the particular day, which would be the SAFEX price less a Rand value per ton. In the event of the farmer wishing to conclude an agreement with the applicant for the delivery of a specific tonnage of maize at that price, he would immediately telephone the applicant's head office and would confirm that the particular farmer wishes to sell a particular tonnage of maize as a particular price. This contract would be confirmed by the head office. In certain instances the applicant would not be willing to purchase more than a certain minimum amounts from specified farmers.

[20] The respondent says that he resigned from the applicant because there is little scope for promotion. He wants to engage in what he refers to as "paper maize industry" which in essence involves trade in maize futures. Towards this end he caused the registration of a company called Limpopo Graan (Pty) Limited (Limpopo Graan), of which he is the sole director. This company has concluded an oral agreement with Bosveld Graan (Pty) Limited, in terms of which the latter company finances purchase and sale transactions of ,maize, soybeans, wheat and sunflower for an agreed percentage of profit. Limpopo Graan conducts business in partnership or in a joint venture with Leon Van Rensburg, whose expertise lies in the field of marketing. He further says that the price at which Limpopo Graan purchases maize are determined independently, depending on how price at which Van Rensburg can secure a buyer and depending on how Van Rensburg interprets

the market indicators. He says that there is no way that the Limpopo Graan can compete with the applicant in so far as a farmer who wishes to sell maize with moisture content of higher than 13% and in so far as a farmer wishes to have his maize graded at a grading station closer to his farm. The applicant has various grading stations located in proximity with various farms. The competition which may exist between the applicant and the respondent is limited to grain or maize with a certain moisture content and also limited to farmers who wish to have their maize grade locally. The only determining factor to a successful sale is accordingly the price. A farmer selling maize will never, as a matter of logic, sell it at a lower price simply because he has some form of personal relationship with the respondent.

[21] He further states that farmers see the grain-procurement-manager as a conduit which simply conveys to them the price at which the applicant will purchase maize. When the applicant replaces a grain-procurement-manager, the farmers simply see such a new employee as a conduit of the applicant. He says that there is no customer connections deserving of protection, neither is there any confidential information belonging to the applicant which the respondent is privy to.

[22] The respondent states that he played no role in the determining of the prices at which the applicant purchased his grain. He says that on certain days the applicant's prices were more competitive than those of his competitors. However, in some days farmers would sell their grain to other competitors who would on that particular day be offering better prices. He further states that the applicant offers financial services to farmers by way of ordinary loans and productions loans. He was not privy to nor did he have any access to any of this information. He says further that his only function was to approach farmers at a pre-determined price. There was no confidential information divulged to him. He further denies that the terms offered by the applicant to the farmers were unique nor were these confidential. He denies that the personal knowledge of a farmer by the procurement manager plays any significant role in the decision making by the farmer in concluding business with the applicant. He further denies that should he become a competitor of the applicant, farmers will all of a sudden start selling their grain to the competitor as opposed to the applicant. He further denies that he had been tasked with the marketing by the applicant. He says that he had been tasked with the purchase of grain from farmers at a

predetermined price. He says that although he worked predominantly at Bosveld region, he did short periods of work at Brits/Beestekraal/ Atlanta area due to the resignation of certain of other grain-purchaser-managers. He further denies that he had to receive specific training to execute his task. He further denies that there are any facts alleged to establish the alleged confidentiality or uniqueness of the methods and strategies alleged by the applicant. The respondent denies that the applicant is entitled to the relief it seeks.

LEGAL POSITION IN RESPECT OF RESTAINT COVENANT

[23] In the matter of Coin Security (EDMS) BPK V Kruger en Ander [2] Spoelstra J pointed out that the applicable principles in matters of this nature are set out in Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) as follows:

1. It is in the public interest that commercial contracts that have been entered into freely and in all seriousness be enforceable. It is also in the public interest that everyone should be free to seek fulfilment in the business or professional world. An unreasonable restriction of a person's freedom of trade is also contrary to public policy and accordingly unenforceable.
2. The *onus* to show that public policy would be prejudiced, lies with the party who alleges that he is not bound by the contract. The question whether a limitation is against public

[2] 1993 (3) SA 564 at 569

policy is a factual one;

3. The public policy is determined on the prevailing circumstances at the time when enforcement of restriction is sought.

4. The court is not restricted on a finding that the restraint is enforceable or not enforceable. In appropriate circumstances the Court may, in accordance with the requirements of a public policy, declare the agreement partially enforceable or unenforceable."[3]

[24] In respect of *onus,* this entails that the person seeking enforcement of the restraint clause "need do no more than to invoke the provisions of the contract and prove the breach"; the person resisting "enforcement is required to prove on a balance of probability that in all circumstances of the case it would be unreasonable to enforce the restraint."[4]

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[3] My own translation.

[4] Aranda Textile Mills (Pty) Ltd v Hurn and Another [2000] 4 ALL SA 183 (E) at 189.

[25] In the matter of Aranda Textile Mills (Pty) Ltd v Hurn and another[5] Kroon J repeated the four questions that have to be asked in matters of restraint covenant as stated in *Basson v Chilwan and others 1993 (3) SA 742 (A) at 762B-D,* as follows:

"(1) Is there an interest of the one party which, after termination of the contractual relationship, is deserving of protection?

2) Is that interest being prejudiced by the other party?

3) If so, does that interest weigh up, qualitatively and quantitatively, against the interest of the other party in not being economically inactive and unproductive?

4) Is there some other facet of public interest, unrelated to the relationship between the parties, which requires that the restraint be upheld or struck down, as the case may be?

To the extent that the interest in (4) overshadows that in (1) the restraint would be unreasonable, and accordingly unenforceable. A value judgment is involved, which may vary from case to case. See, generally , in regard to the above: *Magna Alloys and Research*

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[5] supra

(SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at 893H-894D; Sunshine Records (Pty) Ltd v Frohling and others 1990 (3) SA 742 (A) at 762B-D; 767B-I; Basson v Chilwan and others 1993 (3) SA 742 (A) at 762B-D, 767B-I; Sibex Engineering Services (Pty) Ltd) v Van Wyk and another 1991 (2) SA (T) at 486H."

[26] Kroon J further stated that[6]:

'A man's 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 men 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 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, he is know-how or skills. Such know-how and skills *in the public domain* becomes

[6] Supra at 183 (E) in para [33]

attributes of the workman himself, do not belong in a week to the employer and the use there of cannot be subjected to restrictions 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.'

[27] In the matter of Automative Tooling Systems (Pty)Ltd v Wilkens and Others[7] the Court said:

"[8] At issue in this case, therefore, is whether the appellant does have a proprietary interest worthy of protection. An agreement in restraint of trade is enforceable unless it is unreasonable.[8] It is generally accepted that a restraint will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some legally recognisable interest of the employer, but merely seeks to

[7] 2007 (2) SA 271 at 277 G-278B

[8] : "Ft note 5 Magna Alloys and Research (Pty) Ltd v Ellis 1984 (4) SA 874 (SCA) at 898A-B

exclude or eliminate competition.[9] As Nienaber AJA stated in Basson v Chilwan and Others: [10]

'Wat die partye self betref, is 'n verbod onredelik as dit een party verhinder om hom, na beëindiging van hul kontraktuele verhouding, vryelik in die handels- en beroepswêreld te laat geld, sonder dat 'n beskermingswaardige belang van die ander party na behore daardeur gedien word. So iets is op sigself strydig met die openbare beleid.'

[28] Cachalia AJA in the said matter of Automative Tooling Systems (Pty)Ltd v Wilkens and Others (supra)[11] further points out that the mere fact that a former employee is in competition with his previous employer does not entitle the former employer to any relief if all what the former employee would be doing is applying his skills and knowledge acquired while in the employ of the former employer. It is

[9] "Ft note 6:See generally John Saner Agreements in Restraint of Trade in South African Law (Aug 2005) at 7-5.

[10] "Ft note 71993 (3) SA 742 (A) at 767E-F"

[11] at 279 paras [9] and [10]

only if the restriction on their activity serves to protect a proprietary interest relied upon by the former employer that the former employee would be in breach of his contract. He further points out that:

> "[10] In practice, the diving 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[12] or confidential information[13] or other interest which he may not disclose if bound by a restraint, is notoriously difficult to define[14]."

[29] The applicant states that it provided the respondent with training, which allegation is denied by the respondent who says that there was no any form of training. The respondent says that he was merely tasked with visiting farmers in an attempt to purchases grain at predetermined price.

[30] I also bear in mind what was said in the matter of Plascon-Evans-Paints v Van Riebeeck Paints[15] and the authorities therein cited that, inter alia, '…where there is a dispute of fact a final interdict should

[12] (Ft note 12: See, for example, Northern Office Micro Computers (Pty) Ltd and Others v Rosenstein 1981 (4) SA 123 (C) at 136B - E."

[13] "Ft note 13: See, for example, Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and Another 1967 (1) SA 686 (W) at 689.

[14] " Ft note 14: See John Saner Agreements in Restraint of Trade in South African Law Issue 7 (Aug 2005) at 7 – 1"

[15] 1984 (3) SA 623 (AD) at 634E-635A.

only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order… Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.' I take note of the fact that the respondent, prior to joining the applicant, has been dealing with farmers and that he had built a good reputation for himself with farmers then. The probabilities are that the reason why the applicant had employed the respondent is this very fact that the respondent was well known and well received by the farmers. The respondent did not need any formal further training to access farmers, once he was in the employ of the applicant. I also bear in mind that the respondent in general denies that it has tried to ply away the customers of the applicant, and that he intends to trade in the same field of business as the applicant. The respondent says that he intends to trade in "paper maize industry" which in "essence involves trade in maize future (the right to sell maize in the future at a predetermined price using SAFEX price which is in the public domain. The applicant admits that SAFEX is in public domain.

[31] With regard to clause 10, which I have already stated herein above, this clause, as I understand it, seeks to primarily preclude the respondent from conducting business for a period of three years after the termination of the contract. But the clause then defines or specifies the areas in which the respondent is to be so restrained. Those areas are those areas which:

(a) fall within the magisterial districts in which PRODSURE conducts its business,

(b) where the respondent has been working for a period of three years.

[32] The respondent contends that he has not worked for the applicant for a period of three years and that the restraint clause would only be enforceable if he had worked for a period of three years for the applicant. I am of the view that this contention is with merit. The restraint seeks to restrict a right to trade which is protected by the Constitution.[16] The respondent who bears the *onus* to show that he is not bound by this covenant, needs only to discharge the *onus* on a

[16] S22 of the Constitution of the Republic of South Africa, Act no 108 of 1996.

balance of probability[17]. The applicant, being the employer, has crafted the terms of the restraint clause. An interpretation that would be (a) onerous to the employee, who is the weaker party in such negotiations, and (b) favourable to the applicant who is the employer and in a stronger position and also crafted the restraint clause, is in my view incorrect and unfair having regard to the fact that the applicant seeks to impugn the right protected in the Constitution. I am of the view that it would be unreasonable to interpret the entire clause to suit the applicant, who was in fact the author of such clause. If the applicant wanted to have the clause drafted in such a way that it would operate immediately upon termination of the contract, irrespective of the duration of employment, it could have done so. I am of the view that the clause as it stands, and having regard to the fact that the respondent had only worked for less than three years, it is therefore unenforceable.

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[17] In the Coin Security (EDMS) BPK v Kruger en Ander (supra) at 569I-J Spoelstra J said:

"Die erkening deur die applicant dat die beperkende bepaling, wat die gebied aanbetref, onredelik is, is voeldeoende om die bewyslas wat op die eerste respondent rus, te kwyt. Dit is op die feite van die saak 'n gewetendlose en onderdrukkende bepalling wat, soos geformuleer is, 'n onredelike ontneming van die applicant se reg om an die handelsverkeer deel te neem en daarom teen die openbare beleid en onafdwengbaar is."

[33] Assuming that I am wrong in this regard, which is not conceded, I need then to look at the matter in the light of the authorities I have referred to herein above.

[34] The respondent has stated that the very fact that the applicant seeks in the alternative that the period of restraint be made lesser than three years, is therefore indicative of the fact that the applicant concedes the unreasonableness of the restraint clause. I agree with this submission. In my view the restraint has no proportionality at all to the period the respondent has worked for the applicant and is therefore unreasonable and unenforceable. As Spoelstra J concluded in the matter of Coin Security (EDMS) BPK v Kruger en Ander[18], the respondent has discharged the *onus* that rest on him, to show that the restraint is unreasonable and accordingly unenforceable.

[35] In the matter of Townsend Production (Pty) Ltd v Leech and Others[19] the Court held that even if the employer has trained the employee that does not afford the employer a proprietary interest in the employee, his knowledge and skill. The respondent in any event

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[18] (vide footnote 2 and 17 supra)

[19] 2001 (4) SA 33 at 51 B-C.

denies that he was trained by the applicant at all. He says that by virtue of the nature of his employment and duties which he had to fulfil, no training was necessary. There is therefore a dispute of fact in this regard. However, having regard to the fact that the respondent has stated that he had been dealing with farmers in his previous employment, albeit as marketing and selling insecticides to farmers and giving them advice on the most effective insecticide pesticide for crops. He says that he had built a good relationship with the farmers during his previous employment. In my view, his previous employment would have equipped him with the necessary skills of interacting with the farmers, and he therefore did not need any further training in that regard. These averments have not been disputed by the applicant. I therefore accept the version of the respondent that he was not trained by the applicant. But even if the applicant had trained the respondent, which I do not accept, that does not give the applicant a proprietary interest worth protecting; vide para [26] supra.

[36] Although the respondent has had previous dealings with the farmers, through his previous employment as well with the applicant, he says

that this does not mean that he has the farmers in his pocket. He says that he would not be in a position to compete with the applicant who has various grading stations within the proximity of some of the farmers. He denies that the farmers are influenced by the mere personal knowledge of the grain-procurement-manager, more than they are about the reasonable price, which fluctuates from day to day. I am satisfied that the respondent has acquitted himself of the *onus* to show that he does not have any significant influence on the farmers he previously dealt with.[20].

[37] The respondent has denied that he has any intimate knowledge of the confidential information of the applicant. The respondent has in great detail explained how the purchase price of maize would be calculated at SAFEX less a certain Rand value and that he would only be informed what the purchase price of the applicant on daily basis would be. He denied that he was privy to any analysis of the market indicators and the price at which the applicant would sell maize at. Further the respondent has demonstrated, in my view, that SAFEX is

[20] Rawlins and another v Caravantruck (Pty) Ltd 1993 (1) SA 537 (AD) at 542H-I.

a matter of public domain. As stated in Automotive Tooling Systems (Pty) Ltd v Wilkens and Others[21] "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[22] or confidential information[23] or other interest which he may not disclose if bound by a restraint, is notoriously difficult to define.[24] I am therefore of the view that having regard to the facts and the denial as stated by the defendant, it cannot be said that the applicant has in any way well defined protectable interest which warrants that this Court should come to its rescue and afford it the relief it seeks.

[38] Although the question of urgency was argued, I have deliberately refrained from deciding this matter on that leg, but rather on the merits, since the latter cause is dispositive of the matter.

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[21] () at 279 para [10]

[22] " Foot note 12: See for example, Northern Office Micro Computers (Pt) Ltd and Others v Rosenstein 1981 (4) SA 123 (C) at 136B-E"

[23] "Foot note 13: See for example, Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and Another 1967 (1) SA 686 (W) at 689

[24] "Footnote 14: See John Saner *Agreements in Restraint of Trade in South Africa Law* Issue 7 (Aug 2005) at 7-14(2)."

[39] With regard to costs it is trite that the costs follow the event. I do not think that the respondent need to be mulcted with the costs occasioned by the postponement of the 27 November 2007. He has furnished a good reason why he was only in a position to have his answering affidavit filed on the 27 November 2007 and not on 19 November 2007. The applicant had to file its replying affidavit. That would explain why the applicant agreed to the matter having to be postponed to the 11 December 2007. Due to the heavy roll on the 11 December 2007, this matter could not be heard on that date and had to be stood down to the 12 December 2007. I am of the view that the costs of the postponement of the matter on the 27 November 2007 as well as of the 11 December 2007 should form part of the costs in this matter and follow the event. I am further of the view that this is not a matter requiring that I should grant punitive costs, and therefore the costs shall be computed on opposed party and party scale.

[40] In the premises the application is dismissed with costs.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE: 12 DECEMBER 2007
DATE OF JUDGMENT: 10 JANUARY 2008
APPLICANT`S ATT: MR. JMS NEL

APPLICANT`S ADV: MR. PG CILLIERS

RESPONDENT'S ATT: MR. GT VAN DER MERWE
RESPONDENT'S ADV: MR. A SOUTH