IN THE HIGH COURT OF SOUTH AFRICA

REPORTABLE

DURBAN AND COAST LOCAL DIVISION CASE NO: 7351/06

In the matter between:

DICKINSON HOLDINGS GROUP (PTY) LIMITED First Applicant

DICKINSON HOLDINGS (TRADING) (PTY) LIMITED Second Applicant

DICKINSON REFRACTORY SERVICES (NATAL) (PTY) LIMITED Third Applicant

and

DU PLESSIS, EDMUND GEORGE LOUIS First Respondent

RHI REFRACTORIES AFRICA (PTY) LIMITED Second Respondent

JUDGMENT

Ngubane AJ

This is an application by the applicants for an order against the respondents in the following terms:

"1.2 Interdicting first respondent for a period of three years from 8 July 2006 from –

1.2.1 divulging to any person whatsoever any of the confidential information of the Dickinson Group of whatsoever nature to any person whatsoever;

1.2.2 being interested or engaged in or concerned with or employed by any company, close corporation, firm, entity, undertaking or concern which carries on business in South Africa, Mozambique, Zimbabwe and Zambia ("the territory") which renders services in competition with the applicants inclusive of the companies listed in annexure "X" hereto ("the Dickinson Group");

1.2.3 using any of the Dickinson Group's confidential information for his own or anyone else's benefit;

1.2.4 whether as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise and whether for reward or not, directly or indirectly –

1.2.4.1 carry on; or

1.2.4.2 be interested or engaged in or

concerned with or employed by any company, close corporation, firm, entity, undertaking or concern which carries on,

In the territory any business which sells prescribed goods or competing goods or renders prescribed services or competing services or in the course of which prescribed goods or competing goods are sold or prescribed services or competing services are rendered, similar to those/that of the Dickinson Group;

1.2.5 neither personally nor through any company, close corporation, firm, entity, undertaking or concern in or by which he is directly or indirectly interested or employed –

1.2.5.1 persuading, inducing, encouraging or procuring any employee of the Dickinson Group, or any person who was an employee of the Dickinson Group during the twelve months preceding 7 July 2006 to become employed by or interested in any manner whatever in any field of activity similar to that of the Dickinson Group to terminate their employment with the Dickinson Group;

1.2.5.2 enticing or soliciting or canvassing any of the customers of the Dickinson Group away from them, whether for first respondent's own benefit or otherwise;

1.2.5.3 enticing or soliciting or canvassing any agency or representative of any of the principals for whom the Dickinson Group were acting as agent or representative away from the Dickinson Group;

1.2.5.4 maintaining, retaining and/or transferring

any data of the Dickinson Group on to or in any medium which is not kept on the business premises of the Dickinson Group without the prior written authorization of the board of any of the Dickinson Group;

1.2.5.5 interfering in any way with any relationship between the Dickinson Group and any of its suppliers and/or clients;

1.2.5.6 selling or supplying or attempting to sell or supply to any customer who was a regular client of the Dickinson Group during first respondent's term of employment, any product or service which is the same as or similar to or otherwise compete with any product or service which was being sold or supplied by the Dickinson Group during first respondent's employment.

1.2.6 whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise in any part of the territory and whether for reward or not –

1.2.6.1 soliciting orders from prescribed customers for the prescribed goods or any competing goods and/or the prescribed services or any competing services;

1.2.6.2 canvassing business in respect of the prescribed goods or any competing goods and/or the prescribed services or competing services from prescribed customers;

1.2.6.3 selling or otherwise supplying any prescribed goods or competing goods to any prescribed customer;

1.2.6.4 rendering any prescribed services or competing services to any prescribed customer;

1.2.6.5 purchasing any prescribed goods from any prescribed supplier or accept the rendering of any prescribed services from it;

1.2.6.6 soliciting appointment as a distributor, licensee, agent or representative of any prescribed supplier in respect of prescribed goods and/or prescribed services;

including on behalf of or for the benefit of a prescribed supplier and prescribed goods and services.

1.3 interdicting second respondent from –

1.3.1 employing first respondent in any capacity whatsoever for three years from 8 Jul7 2006; and

1.3.2 utilising the confidential information of the Dickinson Group for any purpose whatsoever.

1.4 In the alternative to prayers 1.2 and 1.3 above, the applicants claim interim interdict in terms of prayers 1.2 and 1.3 above pending the final determination of an application for a final interdict, alternatively an action to be instituted for the relief in prayers 1.2 and 1.3 above within two weeks of date of this order.

1.5 Ordering the first and second respondents jointly and severally to pay the costs of this application, the one paying the other to be absolved.

1.6 For further and/or alternative relief."

There are three applicants in this matter, namely, Dickinson Holdings Group (Pty) Limited, the first applicant, Dickinson

Holdings (Trading) (Pty) Limited, the second applicant and Dickinson Refractor Services (Natal) (Pty) Limited, the third applicant.

The above three applicants are part of the family of companies which is commonly known as “The Dickinson Group” consisting of the following entities:

“Dickinson Holdings (Group) (Pty) Ltd

1. The Dickinson Holdings (Trading) (Pty) Ltd

1.1 J R Dickinson & Sons (Pty) Ltd
1.2 Dickinson Construction (Pty) Ltd
1.3 Refgun (Pty) Ltd
1.4 Refractory Fibre & Anchor Systems (Pty) Ltd
1.5 Dickinson Refractory Services (Natal) (Pty) Ltd
1.6 Dickinson Demolitions (Pty) Ltd
1.7 Dickinson Refractories (Pty) Ltd

2. Dickinson Holdings (Property) (Pty) Ltd

2.1 Northgrow Property Investments (Pty) Ltd
2.2 Erf 804 Vereeniging (Pty) Ltd
2.3 Erf 807 Vereeniging (Pty) Ltd
2.4 Erf 8948 Richards Bay (Pty) Ltd
2.5 Erf 872 Smuts Avenue (Pty) Ltd
2.6 Roynev Property Investments (Pty) Ltd”

For the purpose of easy reference the three applicants shall be collectively referred to as “the applicant” and the Dickinson Group shall be called “the Group”.

The first respondent also brought a counter application for the following order:

"2.1 that the first respondent's intended employment with the second respondent on the terms and conditions contained in the letter of employment dated 31 May 2006, attached as annexure "MW2" to the second respondent's answering affidavit will not constitute a breach of the restraint undertakings contained in annexure Dickinson on pages 86 to 93 of the founding affidavit alternatively in clause 10 of the service agreement attached as annexure JM3 to the founding affidavit at pages 70 to 76;

2.2 alternatively to 2.1 (and in the event that the first respondent's intended employment does constitute a breach of either of the aforesaid restraint undertakings), that the restraint undertakings are unreasonable and therefore unenforceable."

The application arises out of the contract of employment ("the contract") between the first applicant and the first respondent concluded at Vereeniging on 10 January 2001.

The contract contains a clause in restraint of trade which reads as follows:

"10 ***RESTRAINT OF TRADE***

10.1 In this clause, unless clearly inconsistent with the context, words and phrases defined in 1 shall bear the meanings assigned to them in that clause and the following words and phrases shall bear the meanings assigned to them in this sub-clause –

10.1.1 "the business" – the business engaged in by the group from time to time during the executive's term of employment in terms of this agreement;

10.1.2 "competitive activity" – any activity which is the same as or similar to the business and is conducted in competition with the business;

10.1.3 "confidential information" – confidential information of the group, including, but not without being limited to –

10.1.3.1 any information in respect of trade secrets, know-how, expertise, intellectual property, processes, systems, business methods, marketing methods, promotional plans, financial models, inventions, long term plans and any other information of the group in whatever form it may be;

10.1.3.2 all internal control systems of the group;

10.1.3.3 information relating to the identity of clients, suppliers and licensors of the group, the pricing methods of the group, the trade connections, the manufacturing procedures and their financial and marketing operations;

10.1.3.4 the contractual and financial arrangements between the group and others with whom it has business arrangements of whatsoever nature; and

10.1.3.5 all other matters which relate to the group;

10.1.4 "entity" – includes any association, business, close corporation, company, concern, enterprise, firm, partnership, person, trust, undertaking, voluntary association or similar entity;

10.1.5 "the restraint period" – the duration of this agreement and a period of 1 (one) year after the termination date;

10.1.6 "the territory" – collectively each magisterial district in the Republic of South Africa, Mozambique, Zimbabwe and Zambia, and encompasses a reference to each individually as the context may require;

10.2 The executive acknowledges that –

10.2.1 during his employment with the company he will have access to the confidential information of the group;

10.2.2 he will have access to names of customers with whom the group does business whether embodied in written form or otherwise and generally will have the opportunity of learning and acquiring the trade secrets, business connections and other confidential information pertaining to the group's business;

10.2.3 if any of the confidential information were to be given to or used by any competitor or potential competitor of the group, the group would be severely prejudiced and could suffer substantial damage and loss;

*10.2.4 because he will have access to the confidential information during the period of his employment with the group, the only effective and reasonably (*sic*) manner in which the group's rights in respect of its business secrets and customer connection can be protected is the restrain imposed upon the executive in terms of this clause 10.*

10.3 For the reason stated in 10.2 the executive hereby undertakes that –

10.3.1 for as long as he is employed by the company and/or any group company and for a period of 3 (three) years after the termination date, he will not divulge any of the confidential information to any person whatsoever except insofar as may be necessary for the proper performance of his duties to the company in terms of this agreement; and

10.3.2 he will not use any of the confidential

information for his own or any one else's benefit,

Unless and until, and then only to the extent that the confidential information becomes public knowledge through no fault of his.

10.4 Without derogating from the executive's obligations in terms of this agreement, the executive hereby agrees and undertakes that he will not, for 36 (thirty-six) months from the termination date, whether as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise and whether for reward or not, directly or indirectly –

10.4.1 carry on; or

10.4.2 be interested or engaged in or concerned with or employed by any company, close corporation, firm, entity, undertaking or concern which carries on,

in the territory any business which sells prescribed goods or competing goods or renders prescribed services or competing services or in the course of which prescribed goods or competing goods are sold or prescribed services or competing services are rendered.

10.5 The executive hereby agrees and undertakes that neither he nor any company, close corporation, firm, entity, undertaking or concern in or by which he is directly or indirectly interest or employed will within 36 (thirty-six) months after the termination date and whether for reward or not, directly or indirectly –

10.5.1 persuade, induce, encourage or procure any employee of the company, or any person who was an employee of the group during the 12 (twelve) months preceding the date upon which the executive ceases to be employed by the company or any group company, to become employed by or interested in any manner whatever in any field of activity referred to in 10.4.1, or terminate their employment with the company or any group company;

10.5.2 entice or solicit or canvass any of the customers of the company and/or any group company away from them, whether for his own benefit or otherwise;

10.5.3 entice or solicit or canvass any agency or representative of any of the principals for whom the company or any group company was acting as agent or representative away form the company or any group company;

10.5.4 maintain, retain and/or transfer any data of the company or a group company on to or in any medium which is not kept on the business premises of the company or a group company without the prior written authorisation of the board;

10.5.5 interfere in any way with any relationship between the company or a group company and any of its suppliers and/or clients; and

10.5.6 sell or supply or attempt to sell or supply to any customer who was a regular client of the company or a group company during the executive's term of employment any product or service which is the same as or similar to or otherwise competes with any product or service which was being sold or supplied by the company or a group company during the executive's term of employment.

10.6 Without limited the other obligations imposed on the executive in terms of this clause 10, the executive hereby undertakes that neither he nor any company, firm, entity, undertaking or concern in or by which he is directly or indirectly interested, engaged, concerned or employed will for a period of 36 (thirty-six) months after the termination date directly or indirectly, whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise in any part of the territory and whether for reward or not –

10.6.1 solicit order form prescribed customers for the

prescribe goods or any competing goods and/or the prescribed services or any competing services;

10.6.2 canvas business in respect of the prescribed goods or any competing goods and/or the prescribed services or competing services from prescribed customers;

10.6.3 sell or otherwise supply any prescribed goods or competing goods to any prescribed customer;

10.6.4 render any prescribed services or competing services to any prescribed customer;

10.6.5 purchase any prescribed goods from any prescribed supplier or accept the rendering of any prescribed services from it;

10.6.6 solicit appointment as a distributor, licensee, agent or representative of any prescribed supplier in respect of prescribed goods and/or prescribed services,

Including on behalf of or for the benefit of a prescribed supplier.

10.7 The executive hereby acknowledges and agrees that –

10.7.1 the restraints imposed upon him in terms of this clause (interpreted in their widest sense as contemplated in 10.8) are reasonable as to subject matter, period and territory;

10.7.2 the provisions contained in this clause 10 shall be construed as imposing separate, severable and independent restraints in respect of –

10.7.2.1 each of the years falling within the restraint period;

10.7.2.2. each state, province, division or council area, municipal area, magisterial area, town and locality falling within the territory;

10.7.2.3 each activity falling within the ambit of a

competitive activity;

10.7.2.4 each capacity in relation to the competitive activity which the executive is prohibited from undertaking in terms of this clause;

10.7.2.5 the categories of persons falling within the definition of prescribed customers;

10.7.2.6 the categories of goods falling within the definition of prescribed goods and competing goods;

10.7.2.7 the categories of services falling within the definition of prescribed services and competing services; and

10.7.2.8 the categories of persons falling within the definition of prescribed supplier,

And are acknowledged to be reasonably required for the protection of the group and are generally fair and reasonable.

10.8 The restraints set out in this clause 10 shall be given the widest possible interpretation and the invalidity or unenforceability of any one or combination of restraints referred to above (including the restraints interpreted in their widest cumulative senses aforesaid) shall not affect the validity and enforceability of the other restraints referred to in this clause 10 or any combination of such restraints.

10.9 The provisions of this clause 10 shall survive the expiration or earlier termination of this agreement including any cancellation.

10.10 Should as a result of the executive's services and/or directorship of the company or any group company, it be required by any client and/or principal of the company or group company, in relation to such services, that a distinct and separate set of restraint covenants be furnished in order to protect any proprietary information and/or intellectual property and/or intellectual property rights of such client and/or principal (including the secrecy and confidentiality

thereof), the executive shall, as a material term of his employment and/or directorship if applicable, be obliged to sign such further undertakings and covenants as may reasonably be required by the client and/or principal in such circumstances."

During argument is was agreed that "one year" appearing in 10.1.5 should read "three years".

Annexure C to the contract sets out the appointment of the first respondent as Assistant Contracts Manager of the first applicant with a list of duties including but not limited to:

"Sales and marketing of Dickinson Holdings (Trading) (Pty) Ltd's products and services;

Estimating, tendering and negotiation of contracts;

Preparation of all contractual documentation and correspondence;

Ordering of materials and services for the contracts;

Management of project programme and resources;

Visiting the project sites as required or being involved as site manager;

Ensuring that all works are executed to the required safety and quality standards;

Submission of progress claims and ensuring expeditious receipt of claims from clients;

Preparation and submission of weekly reports to the directors, concerning the status of operations of the company;

Human resources/industrial relations management;

General company administration."

On 27 August 2003 the first respondent signed a further restraint contract marked Annexure "D" which contains similar clauses to the restraint of trade clause contained in the agreement of 10 January 2001 ("the first restraint").

The first respondent alleges, however, that the restraint of trade clause dated 27 August 2003 ("the second restraint") was not a supplement of the service agreement containing the first restraint but it was part of a completely new service agreement. [1] This new service agreement substituted the agreement of 2001 and he was, therefore, not bound by the agreement of 2001 anymore.

The restraint clauses in both agreements signed by the first respondent are similar except that the second one relates to the aluminium industry.

1 The latter agreement, according to the first respondent, was similar to the one his colleague, a Mr A Wolhuter ("the Wolhuter contract") had concluded.

The first respondent explains that it became necessary to enter into a second contract of employment because he was being transferred from Vereeniging in the Gauteng Province to Richard's Bay in Kwa-Zulu Natal. On the other hand, the applicant avers that the second restraint was not part of a new employment contract as there was no such new employment contract but only a restraint clause. Because the first respondent was moving to Richard's Bay to deal with the aluminium industry, it was necessary to revamp the initial restraint to cover the aluminium industry which had not been catered for in the first restraint.

The relevance of the Wolhuter contract is that the first respondent is unable to produce the alleged second contract of employment as his car was broken into in July 2006 and his important documents, including the second contract, were stolen.

It is appropriate at this stage to deal with the business or area of activity of the Group, the first and second applicants,

as set out in the papers.

The Group is an independent refractory specialist which supplies turnkey services to the prometallurgical industries of Africa and International markets. It was established in 1910. It has offices located throughout Southern Africa, Europe and the United Arab Emirates. Counsel for the applicant informed the Court that the applicant is a multinational company dealing in a multimillion Rand Industry.

On the other hand, the first respondent was appointed as Assistant Contracts Manager during 2001 with a total remuneration package of R195 760.77 per annum. The first respondent's list of duties has been referred to extensively above.

RHI Refractories, according to the applicant, is the applicant's competitor. The information gleaned by the applicant from the RHI Refractories website reveals, in a

nutshell, the following:

1. RHI Refractories is the globally leading refractories supplier;
2. It deals with production, sale and lining of high-grade ceramic products which are indispensable for industrial high-temperature processes exceeding 1200° ;
3. It derives its annual €1.1 billion turnover as follows:
   - 3.1 Western Europe 42%
   - 3.2 Asia Pacific 14%
   - 3.3 North America 13%
   - 3.4 Central and South America 11%
   - 3.5 Africa, Near and Middle East 10%
   - 3.6 Eastern Europe 10%
4. It supplies 10 000 customers in more than 180 countries.

The second respondent avers that RHI Refractories is an international company that commenced business in 1834 and established permanent business in South Africa in 1967. The second respondent is a subsidiary of this international company. The second respondent does not operate in the aluminium industry at all. Its primary business is the

manufacture and sale of refractory materials. The second respondent competed with the applicant up to March 2004 when it sold it projects division to Refraline. [2] The respondent, however, can still, upon insistence of a client, accept work in competition with the applicant and pass that work on to the applicant's competitors.

On 30 May 2006 the first respondent resigned from the applicant and the applicant accepted his resignation. The second respondent subsequently offered to the first respondent, and the first respondent accepted, employment with the second respondent, which employment would commence on 12 August 2006. It is this episode that set the current application in motion.

Some of the issues raised for a decision can be dealt with individually but others flow into each other so much that they need to be addressed simultaneously. It may well be that a decision on any one of them may be so decisive on

2 It is common cause that Refraline is the applicant's competitor.

the application as to render it unnecessary to consider the rest of the issues raised.

There is a dispute as to whether the first employment agreement still exists in the light of the first respondent's assent to the second restraint. The second respondent urged the Court to accept that, although it was not able to produce the alleged second contract, the Court should accept not only that such a contract existed but also that it was similar to the Wolhuter contract to the best of his (the first respondent's) recollection.

The difficulty with this submission is two-fold:

A. In argument and in the first respondent's papers, it was maintained on behalf of the first respondent that his memory was not such that it could recall the details which were discussed at the strategic meeting of the applicant in December 2005. It is debatable whether one can really rely on the first respondent's recollection of

what it signed in 2003 in the face of the positive sworn evidence that there was no such second agreement.

B. The first respondent suggests that when the applicant put up its founding papers it was so brazen that it alleged that the first agreement was the only agreement between the parties whilst knowing that a second agreement existed and that the first respondent had a copy thereof. The first respondent did not produce evidence or at least allege that at the time the applicant put up its founding affidavit it knew that the first respondent had lost its copy of the contract. In my view it is highly improbable that the applicant would risk being discredited on such an obvious matter taking into account that the first respondent could easily have produced a copy of the "lost" contract.

In the result, the first respondent has not done enough to

upset the applicant's case in this regard. I, therefore, find that, on the papers as they stand, the agreement of 2001 as supplemented by the second restraint prevails as the agreement that regulated the relationship between the applicant and the first respondent until 30 May 2006.

The dispute between the parties raises, broadly speaking, the following issues to be decided:

1. Whether the first respondent signed only one employment agreement containing the first restraint and supplemented by the first restraint, or a second agreement was signed in 2003 which was substituted for the first agreement of 2001. This aspect has been dealt with above;

2. Whether the restraint of trade between the applicant and the first respondent is reasonable and enforceable;

3. Whether there is a protectable interest possessed by the applicant and, if there is, whether that interest resides with the applicant or with the other members of the Group who have not been cited as parties. Flowing from that,

in case there is a protectable interest but such interest is not that of the applicant but is that of a member of the Group who has not been cited, whether the applicant has the *locus standi* to bring this application.

Section 22 of the Constitution [3] provides:

"Every citizen has the right to choose their trade, occupation or profession freely. The practice of trade, occupation or profession may be regulated by law."

Section 36(1) [4] provides:

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

(a) the nature of the right;
(b) the importance and the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

The Bill of Rights is in Chapter 2 of the Constitution. Both sections 22 and 36 form part of this Chapter.

3 The Constitution of the Republic of South Africa, Act 108 of 1996
4 Of the Constituion *supra*

Section 2 [5] provides:

"This constitution is the supreme law of the Republic; law or conduct inconsistent which is involved with it is invalid, and the obligation imposed by it must be fulfilled." [6]

Contracts in restraint of trade are recognized as valid in law.

[7]

In the **Roffey** case [8] **Didcott J** stated at page 505E:

".... South African law prefers the sanctity of contracts. That principle is firmly entrenched in our system, where it shows its head in so many places. Freedom of trade does not vibrate nearly as strong through our jurisprudence..... Commerce needs freedom to bargain and loyalty to contracts already concluded as much as freedom of trade and the public has no larger interest in the maintenance of the latter than in the preservation of the former. But its mercantile justification is not all there is to be said for the sanctity of contracts. The principle has a moral dimension too, which gives it a durability and universality beyond the norms of the marketplace. This consists of its simple requirement that people should keep their promises."

The **Roffey** case and the cases that followed thereafter recognise the sanctity of the contract. Such recognition does not exist *in vacuo* but is always subject to whether the

5 Of the Constitution *supra*

6 Emphasis provided.

7 See generally **Magna Alloys and Research (Pty) Ltd v Ellis** 1984(4) SA 874(A); **Roffey v Catterall, Edwards and Goudré (Pty) Ltd** 1977(4) SA 494(N); **Basson v Chilwan and Others** 1993(3) SA 742 AD.

8 *Supra* 505 E-G.

contract is reasonable and not contrary to public policy. The Constitution raises the bar by not only leaving the issue of the freedom to choose the trade to common law but by actually entrenching such in the supreme law of the land. Not only the law but also the conduct that is inconsistent with the constitution in an open and democratic society is invalid. In my mind the approach to assessing the validity or otherwise of the restraint of trade is not only restricted to whether it is reasonable and in consonant with public policy but whether such reasonableness and consonance with public policy is the one expected of a free, open and democratic society envisaged in the Constitution. Irrespective of the fact that the parties freely contracted to certain terms, if the product thereof is inconsistent with the supreme law of the country the sanctity of the contract should give way to the dictates of the Constitution. In fact, if the contract offends the aims and objectives of the Constitution, one wonders whether that casts such turpitude on the covenant that it would still be appropriate of speaking of sanctity at all.

To determine whether the terms of the contract are reasonable or not is a factual enquiry and should be conducted in accordance with the facts of each case. [9]

In the **Sunshine Records** case [10] **Grosskopf JA** stated:

> *"In determining whether a restriction on the freedom to trade or to practise a profession is enforceable, a court shall have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations a court will obviously have regard to the circumstances of the case before it. In general, however, it will be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade."*

In **Basson v Chilwan and Others** [11] the Court dealt with the approach to be adopted when one conducts a factual inquiry to determine the reasonableness and therefore enforceability of the restraint clause and said the following at G-H:

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9 **Sibex Engineering Services (Pty) Ltd v Van Wyk and Another** 1991(2) SA 482 at 486G; **Sunshine Records (Pty) Ltd v Frohling and Others** 1990(4) SA 782 AD at 794.

10 *Supra* at 794 B-D

11 *Supra*.

"Vier vrae moet in dié verband gestel word:

a) Is daar 'n belang van die een party wat na afloop van die oorenkoms beskerming verdien?

b) Word so 'n belang deur die ander party in gedrang gebring?

c) Indien wel, weeg sodanige belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy economies nie onaktief en onproduktief moet wees nie?

d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te make het nie maar wat verg dat die beperking gehandhaaf moet word, al dan nie? (Laasgenoemde vraag kom nie hier ter sprake nie.)"

The judgment in **Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another**[12] added that a further consideration is whether the restraint goes further than is necessary to protect the interest.

In my view a further consideration, and the one that is over-arching, is whether the restraint clause is compatible with the Constitution in an open and democratic society.

I am aware of the conflicting approaches in this Division as to who bears the *onus* of proof that the restraint clause is reasonable and enforceable. [13] The facts which have been

12 1999(1) SA 472 W at 484 E

13 See **Canon KwaZulu Natal (Pty) Ltd t/a Canon Office Automation v Booth and Another** 2005(3) SA 205 N and *contra* **Rectron (Pty) Ltd v Govender and Another** (2006) 2 All South African Law Reports 301 (D) at 304d – 305h.

placed before me by both parties render it unnecessary for me to enter into a debate of who bears the *onus* since this matter can be resolved without the need to pinpoint on whom the *onus* lies.

I now turn to the facts of the case and the submissions made.

Mr Whitcutt, on behalf of the respondents, submitted that the second respondent is not in competition with the applicant. This is so, the argument went, because the second respondent had sold the projects that formed an area of conflict with the applicant in 2004.

I am not convinced by this submission. The second respondent, in its own words, admits that it can still accept work that is in competition with that of the applicant and pass it on to specialists which include the applicant and its competitors. In addition, the second respondent is a subsidiary company of one of the group companies forming

RHI Refractories which is the applicant's competitor. The fact that the second respondent is part of the family of RHI Refractories raises a strong probability that, if a chance presented itself for the second respondent to share information with its family members in areas where there is competition between the applicant and a member of the RHI Refractories, the second respondent would be likely to share such information.

I agree with **Mr Venter** for the applicant that the second respondent is in competition with the applicant or, at the very least, with the Group. I must admit that, on the papers, it has not been proven that the competition between the applicant and the second respondent is as heightened as pre-2004. Peripheral as it may seem to be, in my mind, the competition still exists and the applicant correctly regards the second respondent as a competitor.

The protestation by the second respondent that the first respondent will be performing duties which are not in the

field of the applicant's area of conflict does not hold water in the light of the fact that the second respondent is still the applicant's competitor. The first respondent also avers that it has undertaken not to disclose information of the applicant to the second respondent. The second respondent also confirms that he does not need such information. I am not convinced that such say-so need be accepted. I am aware that in the **Rectron** case [14], in an almost similar scenario, the following was said:

> *"Govender can only disclose the information to Axiz if it is a willing recipient thereof. Axiz will only receive the information if it could be useful for the purpose of unlawfully competing with Rectron. Dishonest conduct of this nature is not to be lightly presumed."* [15]

Despite what is said in the **Rectron** case, I conclude that the fact that I find that the first respondent is still the competitor of the applicant, the respondent is a member of the Group of companies which compete with the applicant and nothing besides the respondent's say-so can police the communications between the respondents, cumulatively do justify the conclusion that the first respondent is likely to

14 *Supra* at 323j – 324a.
15 Emphasis provided.

communicate the confidential information, if it is established that there is such information, to the second respondent.

I now turn to the issue which I think is central to this application: -

> Are the terms of the restraint of trade reasonable and enforceable? Are they contrary to public policy and are they compatible with the Constitution of the Republic of South Africa?

In my view, a clause that restrains the individual's trade should be clearly structured and should be such that its content protects what does exist as a protectable interest that needs protection for trade to be conducted freely. A restraint clause which is excessively protective, all encompassing, couched in terms that are too far-reaching and have seamless bounds offends against public policy and is not consistent with the Constitution. It falls to be declared unenforceable.

The applicant, when it tries to make a case for confidential information which is sought to be protected, prefixes its case in general terms as set out in the definition of confidential information in the service agreement, and goes on to set out specifically what it regards as confidential information as follows:

"31.

31.1.1 SABS/ISO 9002 accreditation.
31.1.2 Continually improve their quality management systems.

31.1.3 NOSA 5 star safety accreditation.
31.1.4 Better systems.
31.1.5 Safety, training and quality manager.
31.1.6 Better, more progressive training system.
31.1.7 Specialist know-how of bidding and managing refractory service contracts.
31.1.8 Supply at more competitive prices.
31.1.9 Knowledge of major projects (nationally and internationally).
31.1.10 Holding companies have business in Africa and the Middle East.
31.1.11 Agreements for the refractory design, project management and supervision requirements on major projects.
31.1.12 International projects, where their "cheaper" South African personnel can be employed.
31.1.13 Reputation.
31.1.14 Competitive price strategy.
31.1.15 Manufacture their own refractory materials.
31.1.16 Supply sliding gate concepts and maintenance.
31.1.17 Experts and knowledge.
31.1.18 Aggressive in acquisitions and market expansion.
31.1.19 Flexible management structures.
31.1.20 Large conglomerate backing.
31.1.21 More contracts awarded because of

relationship with conglomerate.
31.1.22 Can run at a loss because of backing.
31.1.23 Smaller contractors have a price advantage.
31.1.24 Smaller companies have lower overheads.
31.1.25 Larger range of equipment and more stock.
31.1.26 Household name.
31.1.27 Fabrication workshops with a permanent workforce.
31.1.28 More reps on the road.
31.1.29 Clients and their specific needs."

The applicant further avers:

> *"This information is not generally known to the public and trade competitors. Insofar as this court may decide that parts are so known, which is denied, the manner in which the Dickinson Group applies and utilizes the information, and the manner in which it has developed the application of the information, is not so known to the public or trade competitors."*

The applicant, however, does not proceed to demonstrate the manner of utilization or application of such information that it claims is unique to itself. That portion of the allegation remains a bare allegation and is of no assistance to the Court.

Significantly the applicant in its strategic planning of December 2005 presented a document entitled "Strategic

Thinking". [16] At page 18, under the section "Supporting Data", the applicant sets out the names of its 39 competitors. On page 19 under the heading "What strengths do they posses, as a group, that you do not possess?"

The answer to the above question repeats chapter and verse what the applicant puts up as confidential information in paragraph 31 of its founding affidavit as quoted above. This can hardly, therefore, be confidential information and therefore protectable interest. The attempt by the applicant to strengthen the allegation of the so-called confidential information at paragraph 23.3 of its replying affidavit is not convincing firstly because it raises the new matter in the replying affidavit thus depriving the first respondent the opportunity of responding to it and, secondly, because the so-called confidential information in the founding affidavit has been so discredited that it remains

16 This document is part of the four documents which were ordered by this Court, in a separate Ruling but in the same matter at a separate hearing, to be released to the respondents. The applicant had initially tendered its availability to Court and later to the applicant's legal representatives. The matter was argued and I made a Ruling that both respondents should have access to it.

extremely doubtful whether what is raised in the replying affidavit is genuine confidential information.

The next leg of the confidential information on which the applicant relies is the strategic planning of the Group that occurred during October to December 2005. It occurred in three phases and the applicant alleges that the first respondent attended all the sessions. The first respondent avers that it missed one of those sessions. Nothing much turns on this. The applicant's fear is that the information gained at the workshop would be used by the first respondent.

It is clear from the general nature of his response, in the answering affidavit, that the first respondent does not have a detailed independent recollection of what happened at the workshop. Indeed, the first respondent, in its answering affidavit, states that it left all the material it had obtained at the workshop at the applicant's place of business when it resigned. Nothing in the replying affidavit gainsays this.

It follows, therefore, assuming that what was discussed at the workshop was confidential, no risk exists that the first respondent would recall it, in a sufficiently coherent fashion, so as to pose a threat of passing it on to competitors. In any event, when the first respondent was given the opportunity of access to the documents as a result of my Ruling, he extensively demonstrated in a supplementary affidavit that the documents discussed at the strategic meeting contained information which either belonged to the consultants and therefore could not be confidential information of the applicant, or information compiled by the applicant but which was commonly known in the marketplace. Significantly, the applicant did not put up an affidavit to counter this and I have to accept the respondent's version. [17]

Even if I am wrong in what I have said above, in my view the applicant has further problems caused by the fact that the

17 I must admit that when I compiled my Ruling in this matter some of the information appeared confidential and I ruled accordingly. But having had the benefit of the first respondent's supplementary affidavit, which is uncontroverted, I am persuaded that there is no confidentiality in the documents. They, however remain private documents and my Ruling as to how they should be accessed remains in deference to the applicant's privacy.

restraint clause is couched in the widest of terms.

The first respondent protests that if the restraint of trade clause were to be upheld it would deprive it of its livelihood as this would effectively keep it out of employment. Since completing its studies in 1997, the first respondent states that "*.... working with refractories is my field of expertise. This is all that I am qualified to do.*" [18]

As against this, the first respondent faces the challenge that it signed the covenant acknowledging that the terms of such covenant were reasonable and essential for it and the applicant to conduct mutually beneficial trade.

This dichotomy enjoins the Court to enquire whether, despite the signing of the agreement, such agreement is consistent with the Constitution, is reasonable and is not contrary to public policy.

18 Paragraph 13.5 of the answering affidavit.

One of the factors which the Court must consider is the bargaining power of the parties. Despite the fact that the parties signed the agreement freely and voluntarily, I think it would be shortsighted not to acknowledge that this is an agreement between a global conglomerate on the one hand and a fairly junior member of middle management on the other. It is clear that the first respondent's level of expertise in the refractory business was such that it would not have put it on par with, or in a stronger bargaining position than, the first applicant. It is only fair to observe that the agreement is tilted heavily in favour of the applicant. To me this is an indication of the immense bargaining power the applicant had as against that of the first respondent.

Of great concern is the wide-ranging style in which the restraint clause is couched. The first respondent is prevented from being employed not only by the applicant's competitors but also by its clients throughout the Republic of South Africa and the neighbouring SADEC countries. When it was pointed out to **Mr Venter** that this seemed to be a

serious erosion of the first respondent's right to earn a living, he informed the Court that the applicant had no objection to having the first respondent employed by the first respondent's clients. The applicant had also made a similar offer in its replying affidavit.

The clauses that are particularly worrisome are 10.4, 10.5 and 10.6 of the employment agreement. Besides the fact that they form a serious barrier to the first respondent's ability to practice its profession, they contain vague and all-encompassing phrases without defining them. The examples are "prescribed goods", "prescribed suppliers" and "prescribed services". These are not defined anywhere in the contract. These phrases are not confined to clause 10.4, 10.5 and 10.6 but are found in other substantial parts of the restraint clause.

The problem with the offer by the applicant that the first respondent can be employed by its customers is that it comes too late, even later than the founding affidavit.

Rather than being a genuine offer, it is an offensive on the back foot launched with the sole aim of trying to rescue an indefensible situation. Worse still, if it is meant to persuade the Court to panel beat the restraint clause into a shape acceptable in law, it is not properly brought before the Court.

In the **Retron** case [19] the following was said:

> *"'..... The issues of partial enforcement of a restraint provision which is too wide must be "pertinently raised". ..... **Alum-Phos** 633 c-d **Southwood J** also said that 'the court is not obliged in all cases to whittle down an unreasonable contract in restraint of trade until it eventually becomes reasonable.' "*

Quoting **Botha J** in **National Chemsearch (SA) (Pty) Ltd v Borrowman and another** 1979(3) SA 1092(T) 117 A-B, the Court went on and said:

> *"I imagine that when an unreasonable restraint is so formulated that it would require major plastic surgery in the form of a drastic re-casting of its provisions to make it reasonable, the Court will decline to perform the operation."*

Some of the clauses in the restraint can lead to absurd results: for example in the definition "confidential information" in 10.1.3, it is defined to mean but <u>not limited</u>

19 *Supra* at 328 a - b.

to.... "any other information of the Group in whatever form it may be." [20]

This would make confidential, for example, the whereabouts of the offices of the applicant, what trade it is involved in, what position the first respondent occupied in the company, etc.

In my opinion, it would be improper and perhaps unworkable to try to streamline the restraint clause so that it is acceptable in law.

The restraint clause is so wide that it is contrary to public policy and it offends against the Constitution. It unfairly erodes the first respondent's right to choose its profession and is not consistent with section 22 of the Constitution. It is, therefore, unenforceable against the first respondent and consequently cannot affect the second respondent.

20 Emphasis provided.

I do not think it is necessary to deal with reasonableness as to the time in the light of the decision I have arrived at. It is also unnecessary to deal with the rest of the issues raised in the case alluded to earlier in my judgment.

I now turn to the question of costs. The respondents have asked for attorney and client costs basically based on two reasons:

> Firstly, the applicant, when it was dealing with the question of the alleged lost contract called the first applicant a liar. Secondly, the second respondent feels that it should not have been drawn into the fray of this application: the real issue was simply between the applicant and the first respondent. The second respondent could just have been cited as an interested party, in which event the second respondent would have abided the decision of the Court.

I do not believe that these submissions are enough to persuade me to award costs on a punitive scale.

The conclusion by the applicant that what the first respondent said, with regard to the loss of the agreement, was a lie was not said with malicious intent. It might have been said in a huff – and litigants do that every day in court. Perhaps the only criticism that can be leveled against the applicant is that its conclusion could have been wrong and no more.

As to the second applicant's contention, in my opinion the applicant had a legal choice to cite the second respondent either as a participant or as an interested party. The choice, in my view, was exercised in no frivolous or malicious manner. The applicant genuinely believed that it had a valid restraint clause and that both the first and second respondents were interfering with the applicant's rights that are contained in that clause.

I therefore make the following order:

1. The application is dismissed.

2. The counter application succeeds and the following declarator is issued:

   The restraint of trade clause between the applicant and the first respondent is unreasonable, contrary to public policy, is inconsistent with section 22 of the Constitution of the Republic of South Africa, Act 108 of 1996, and is, therefore, unenforceable.

3. The applicants shall pay the costs jointly and severally the one paying the other to be absolved.

FOR THE APPLICANTS: Mr P J Venter

INSTRUCTED BY: Nkaiseng Chenia Baba Pienaar & Swart Inc

c/o Garlicke & Bousfield Inc

FOR THE RESPONDENTS: Mr C Whitcutt

INSTRUCTED BY: Edward Nathan & Friedland Inc

c/o Sonnenburg, Hoffman Galombik

DATE OF HEARING: 25 August 2006

DATE OF JUDGMENT: 12 September 2006