

**IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION**

REPORTABLE

Case No : 9661\2007

In the matter between:

ARROW ALTECH DISTRIBUTION (PTY) LTD

APPLICANT

and

BYRNE; SHELDON

FIRST RESPONDENT

MUNGROO; BRADLEY

SECOND RESPONDENT

SEALTRON SA CC

THIRD RESPONDENT

EXCESS INVENTORY ONLINE CC

FOURTH RESPONDENT

J U D G M E N T

NICHOLSON J

Introduction and background

1. The applicant brought an application for a final interdict, alternatively an interim interdict, to restrain first and second respondents from breaching certain restraint clauses in their

employment contracts. The relief includes an interdict preventing them being employed by third and fourth respondents, from disclosing trade secrets and confidential information to them. The relief also seeks to restrain third and fourth respondents from competing with applicant.

2. One point should be cleared up at the outset. Although relief may be sought, as it is here in the alternative, in the form of an interim interdict, if in substance the relief is for an interdict to endure for the entire unexpired period of the restraint, it should be treated as substantially an application for final relief. See *BHT Water Treatment (Pty) Ltd v Leslie and another* 1993 1 SA 47 (W) at 55 A-E. This was the submission of Mr Marais SC who appeared for the respondents. Mr Sutherland SC, who appeared for the applicant, together with Mr Peter, did not contend otherwise and in fact conceded as much.
3. Many of the facts relevant to the issue whether the applicant's trade secrets and connections required protection are in dispute. It is, however, unnecessary to attempt to resolve the disputes. The rule (stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5) to the broad effect that an application for final relief is generally decided on a respondent's

version applies even where the onus of proof is on such respondent (*Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259D-E and 262B).

Legal approach to restraints

4. In *Reddy v Siemens* 2007 2 SA 486 (SCA) 493 et seq Malan AJA set out the present position of the law including the application of the Constitution. This case and the cases quoted by the Court may be summarized in the following manner. Part of what is set out is a verbatim quote from the various cases and part is a summary thereof.
 - (a) Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work.
 - (b) Insofar as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case.

- (c) Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought.
- (d) Where the onus lies in a particular case is a consequence of the substantive law on the issue.
- (e) What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.
- (f) A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint.
 - i. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*.
 - ii. The second is that all persons should in the interests of

society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom to contract is an integral part of the fundamental right referred to in s 22.

- (g) In applying these two principal considerations, the particular interests must be examined. 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. Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest.
- (h) Five questions that should be asked when considering the reasonableness of a restraint:
 - i. Does the one party have an interest that deserves

protection after termination of the agreement?

ii.If so, is that interest threatened by the other party?

iii.In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

iv.Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.

v.whether the restraint goes further than necessary to protect the interest?

5. The applicant is a broadline distributor of electronic components and wireless modules in South Africa, sourcing its components from specialist suppliers around the world. The components are used in the manufacturing of electronic circuits and printed boards which are in turn used in products that are used in the automotive, consumer, metering, security fleet management and vehicle

tracking, military and telecommunications industries.

6. The applicant is in the business of distribution and imports stock which it places in warehouses pending orders from customers. It seems clear that the applicant imports the component parts which are then used by customers in units designed by the said customers.
7. The applicant alleges and it is not disputed that its key customers in KwaZulu-Natal include UEC Technologies, Control Instruments Group, Merlin Gearing SA t/a Conlog, Utility Systems (US Metering) and Digicor Electronics.
8. The first and second respondents were employed by the applicant as field application engineer (from 2 April 2001) and field sales engineer (from 2 May 2001) respectively. The third and fourth respondents are close corporations which the applicant alleges are competitors of the applicant. It is also clear from the papers that third and fourth respondents are closely connected and share offices, telephone numbers and secretarial staff.
9. The first and second respondents are members of the third respondent and the second respondent is the sole member of the

fourth respondent.

The covenants in restraint of trade

10. The written agreements which the first and second respondents signed are annexed to the papers. They each signed covenants in restraint in trade which read as follows:

“14. Confidentiality

14.1 It is recorded that the employee, by virtue of his association with the employer and by virtue of his association with other Group members, will become possessed of and will have access to the employer's and/or the Group's trade secrets and confidential information including, but without limiting the generality of the foregoing, all or some of the following matters which are hereinafter collectively referred to as 'the Group's trade secrets';

14.2 manufacturing and/or operating know-how, processes and techniques;

14..2.1 designs, patents, exclusivity arrangements and technical information;

14.2.2 knowledge of and influence over the employer's and/or the Group's suppliers, customers, principals and business associates;

14.2.3 the contractual arrangements between the employer and/or the Group and its suppliers, principals, customers and business associates including arrangements between the employer and/or the Group and sundry principals in terms of which the employer and/or the Group holds distribution rights in respect of the products and/or services of the said principals;

14.2.4 financial details of the employer's and/or the Group's relationship with

its suppliers, principals, customers and business associates;

14.2.5 the names of the employer's and/or the Group's present and prospective suppliers, principals, customers and their requirements;

14.2.6 details of the employer's and/or the Group's financial structure and operating results;

14.2.7 details of the remuneration paid by the employer and/or the Group to its various employees and their duties;

14.2.8 other matters which relate to the business of the employer and/or the Group and in respect of which information is not readily available in the ordinary course of business to a competitor of the employer and/or the Group.

14.3 The employee agrees and undertakes that in order to protect the proprietary interests of the employer and/or the Group in the Group's trade secrets :

14.3.1 he will not during his employment by the employer and/or the Group or at any time thereafter, either directly or indirectly use or divulge or disclose to anyone (except as required by the terms and nature of his employment hereunder) any of the Group's trade secrets;

14.3.2 any written instructions, drawings, notes, memoranda or records relating to the Group's trade secrets which are made by the employee or which come into his possession during the period of his employment by the employer and/or the Group, and all copies thereof, shall be deemed to be the property of the employer and shall be surrendered to the employer and/or the Group on demand and in any event on termination of the employee's employment by the employer, and the employee will not retain any copies thereof or extracts therefrom.

15. Restraints

15.1 In this 15 :

15.1.1 'entity' means any company, close corporation, partnership, trust, association for gain, sole proprietorship or any other vehicle, whether a legal person or not, by which business can be carried on;

15.1.2 'involvement' means a direct or indirect interest in an entity, whether as

shareholder, director, partner, owner, principal, agent, representative, financier or consultant of or to the entity or whether by way of part-time or full time employment by that entity or whether in any other capacity whatsoever, but excluding the holding of more than 5% of the issued share capital of any company listed on any stock exchange;

15.1.3 'the restraint period' means the period constituted by the time during which the employee is employed by the employer and the twelve month period following immediately upon the termination of that employment for any reason whatsoever;

15.1.4 'employer's business' means (subject to 15.3.3) any business carried on by the employer at any time during a period of twenty-four months prior to the date of first demand by the employer to enforce the rights contained in this 15 or, in the case of enforcement against an ex-employee, prior to the termination date;

15.1.5 'Group's business' means any and all of the businesses carried on by the Group during a period of twenty-four months prior to the date of first demand by the employer to enforce the rights contained in this 15, or in the case of enforcement against an ex-employee, prior to the termination date;

15.1.6 'prescribed area' means the province of the Republic of South Africa (including each magisterial district therein) in which the employee's principal place of employment is situated, together with such other provinces and/or magisterial districts in which the employee regularly and in accordance with his job requirements performed his services from time to time;

15.1.6.1 at the date of first demand by the employer to enforce the rights contained in this 15; or

15.1.6.2 in the case of enforcement against an ex-employee, as at the termination date;

15.1.7 'termination date' means the date upon which the employee's employment by the employer ceases or is terminated for any reason whatsoever;

15.1.8 'induce' includes encourage, incite, persuade and entice.

15.2 Having regard to the facts recorded in 14.1 the employee agrees and undertakes that in order to protect the proprietary interests of the employer and/or the Group in the employer's and the Group's trade secrets the employee shall not, either directly or indirectly, throughout the period of his

employment by the employer and/or the Group and for twenty-four months after the termination date :

15.2.1 induce or procure any employee of the employer and/or the Group to have an involvement in any entity which carries on or has an involvement in the same business as the employer's business or a business similar to the employer's business;

15.2.2 furnish any information or advice acquired by him as a result of his employment as the employer to anyone else which results in, or in the ordinary course of events is calculated to result in any employee of the employer terminating his employment by the employer and having an involvement in any entity;

15.2.3 induce any entity which was, prior to the termination date, a principal or prospective principal of the employer and/or the Group or accustomed to dealing with the employer and/or the Group to discontinue any such relationship or limit or reduce its scope or extent

PART B

15.3.1 Having regard to the facts recorded in 14.1 the employee acknowledges and agrees that the employer's and/or the Group's proprietary interests in the employer's trade secrets and/or the Group's trade secrets will be prejudiced if he takes up employment or otherwise becomes associated with or interested in any concern that competes with the employer's.

15.3.2 The employee accordingly agrees and undertakes to protect, in the manner set out in 15.3.3, the proprietary interest of the employer and/or the Group in the employer's trade secrets and/or the Group's trade secrets.

15.3.3 The employee therefore shall not, throughout the period of his employment by the employer and for a period of twelve months after the termination date, either directly or indirectly within the prescribed area, have an involvement in any entity which carries on the same business as the employer's business or a business similar to the employer's business. For the purposes of this 15.3.3 the phrase 'the employer's business' shall mean only those businesses of the employer in which the employee has actually worked or which have formed part of the purview of any board of directors or executive

committee on which the employee has actually served.

15.4 In the event that the employee leaves the employer and thereafter works for any other employer within the Group then, without limitation of any other provision of this agreement, it is expressly acknowledged that the provisions of this 15 shall apply both in respect of that new employer and its business and in respect of the first employer and its business. For the avoidance of doubt, it is recorded that the restraint period in respect of the first employer will end upon the expiry of a twelve month period reckoned from the termination of the employee's employment with the first employer notwithstanding that the employee shall have remained in the employ of the Group after that first termination date

15.5 The employee acknowledges that the restraints imposed on him in terms of this clause 15 are reasonable as to subject, matter, area, duration and are reasonably required by the employer to protect and maintain the goodwill and proprietary interests of the employer and the Group and may be enforced against him by the employer and/or all or any of the other companies in the Group.

15.6 The provisions of this clause 15 are severable, *inter alia*, as to each of the undertakings set out therein; each magisterial district contained in the prescribed area; each of the businesses falling within the definition of the Group's business; and each category of person referred to in 15.2.

15.7 To the extent that the provisions of this agreement constitute a *stipulation alteri* in respect of any Group member, the benefits thereof shall be capable of acceptance by any such Group member in writing at any time."

11. The first respondent left the employment of the applicant at the end of July 2007 and the second respondent left three months earlier at the end of April 2007.

The relief sought

12. After an exchange of correspondence alleging and denying breach

of the restraints in question the applicant has approached this Court for the following relief which may be divided into three broad categories :

- (a) Interdicting the first and second respondents from being employed by, associated with or being involved in, the business of the third respondent, the fourth respondent and any other business which carries on business similar to that of the applicant for a period of twelve months from 30 April and 30 July 2007;
- (b) Interdicting the first and second respondents from disclosing or divulging to the third respondent, the fourth respondent or any other party any of the applicant's trade secrets or confidential information;
- (c) Interdicting and restraining the third and fourth respondents from competing unlawfully with the applicant.

Does the one party have an interest that deserves protection after termination of the agreement?

Trade secrets and confidential information

13. The principal point of departure is whether the applicant has in respect of first and second respondents any proprietary or protectable interest worthy of protection. As is often the case the proprietary interest the applicant seeks to protect relates to its trade secrets and confidential information and secondly its customer connections.
14. I accept that confidential information is that which is not in the public domain or public knowledge See *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 at 415 and *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA p 173 T at 194.
15. I am of the view that information received by an employee (or anyone else bound by a fiduciary duty) about business opportunities available to an employer (or to anyone else to whom a fiduciary duty is owed), even if such information could be obtained from a source other than the employer or employee (or from the parties to the fiduciary relationship) is in certain circumstances protected: *Jones v East Rand Extension Gold Mining Co Ltd* 1903 TH 325. Among such business opportunities may be included those which arise through knowledge of the identity of the supplier of a

particular commodity wanted by a potential buyer, even if such knowledge may be available from other sources too.

16. In *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and Another* 1967 (1) SA 686 (W) Marais J said, at 691B:

‘What would constitute information of a confidential nature would depend on the circumstances of each case, and in this regard the potential or actual usefulness of the information to a rival would be an important consideration in determining whether it was confidential or not.’

17. In the English case of *Faccenda Chickens Ltd v Fowler and Others*;

Fowler v Faccenda Chickens Ltd [1985] 1 All ER 724 (Ch), quoted with approval in *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (WLD) at p429 et seq by Stegmann J it was held that, as between employer and employee, all information for which confidentiality is usually claimed can be classified into three categories. Much of it is set out in either a summary or verbatim quotes from the two judgments I have mentioned.

18. First there is information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to impart it during his service or afterwards to anyone he pleases, even his master's competitor.

19. Second, there is information which the servant must treat as confidential, either because he is expressly told it is confidential, or because from its character it obviously is so, but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract.

20. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master.

21. If an employer wants to protect information of this kind, he can do so by an express stipulation restraining the servant from competing with him (within reasonable limits of time and space) after the termination of his employment. In those circumstances it seems to me to be almost impossible, in justice to the servant, to restrain him when he leaves his master's employment from using - not disclosing - information which he could not help acquiring. It seems to me that to try to restrain him by injunction from using knowledge, which in that way has become his own, is to try to do something

which the Court really has no power to do, or rather it has no power to enforce the injunction if one could be granted.

22. First, after the employment terminates, the servant may, in the absence of special stipulation, canvass the customers of the late employer, and further he may send a circular to every customer. On the other hand, it has been held that while the servant is in the employment of the master he is not justified in making a list of the master's customers, and he can be restrained, from making such a list, or if he has made one, he will be ordered to give it up. But the defendant was not restrained from sending out circulars to customers whose names he could remember.

23. Another thing to be borne in mind is that although a servant is not entitled to make use of information which he has obtained in confidence in his master's service he is entitled to make use of the knowledge and skill which he acquired while in that service, including knowledge and skill directly obtained from the master in teaching him his business. It follows that the servant may, while in the employment of the master, be as agreeable, attentive and skilful as it is in his power to be to others with the ultimate view of obtaining the benefit of the customers' friendly feelings when he calls upon them if and when he sets up business for himself. That

is, of course, where there is no valid restrictive clause preventing him doing so.

24. Third, however, there are specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's.

25. Clause 14.1 of the employment contract relates to confidentiality and provides as follows:

14.1 'It is recorded that the employee, by virtue of his association with the employer and by virtue of his association with other Group members, will become possessed of and will have access to the employer's and/or the Group's trade secrets and confidential information including, but without limiting the generality of the foregoing, all or some of the following matters which are hereinafter collectively referred to as 'the Group's trade secrets'...'

26. The first and second respondents maintain that they signed their employment contracts, including the restraint provisions, when they commenced employment with applicant and were not aware of what confidential information or trade secrets would be acquired while employed for applicant.

27. I might add that in terms of paragraph 15.5 the employee acknowledges that the restraints imposed on him in terms of this clause 15 are reasonable as to subject, matter, area, duration and are reasonably required by the employer to protect and maintain the goodwill and proprietary interests of the employer and may be enforced against him by the employer.

28. An acknowledgment by an employee in a restraint of trade agreement that the restraint is fair reasonable and necessary is not decisive. *David Whul (Pty) Ltd v Badler* 1984 3 SA 427 (W) at 434. *Basson v Chilwan* 1993 3 SA 742 at 768 B-G, *Bonnet and another v Schofield* 1989 2 SA 156 (D) at 160 B-C.

29. One of the difficulties I have had with this matter is the very wide definition of the alleged trade secrets and confidential information. I have already alluded to the case law which results in the application being determined on the respondents' papers irrespective of the question of onus. What has occurred in this matter is that the respondents have answered each allegation - that some feature of the applicant's business is a trade secret or confidential information - in a schedule annexed to their affidavits. There is no substantial answer to each of these items. I will give examples which I believe are illustrative of what has been alleged and answered. I do so

because the court still has to determine whether the ‘allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers...’

See Plascon-Evans at 635 C-D.

30. The applicant deals with the various categories of trade secrets that are enumerated in the employment contract and alleges that they existed without any specific elaboration. It states that it has manufacturing and/or operating know-how, processes and techniques. The respondents dispute this and state that the applicant does not manufacture any products nor did they learn any manufacturing process.

31. Applicant alleges further that its trade secrets and confidential information included designs, patents, exclusivity arrangements and technical information. The respondents’ reply is that applicant’s business is no different to any other reseller and that it buys from the manufacturers and sells to the customer who manufactures products. They maintain that they did not learn any “operating know how”, except for product and selling “know how” in the industry.

32. I have given examples but there is an answer to each allegation

including those relating to knowledge of and influence over the employer's suppliers, customers, principals and business associates. I will deal with the aspect of the relationship between the first and second respondents and the customers in greater length later in this judgment.

33. The further alleged trade secrets include the contractual arrangements between the employer and its suppliers, principals, customers and business associates including arrangements between the employer and sundry principals in terms of which the employer holds distribution rights in respect of the products and/or services of the said principals; financial details of the employer's relationship with its suppliers, principals, customers and business associates; the names of the employer's present and prospective suppliers, principals, customers and their requirements; details of the employer's financial structure and operating results; details of the remuneration paid by the employer to its various employees and their duties; other matters which relate to the business of the employer and in respect of which information is not readily available in the ordinary course of business to a competitor of the employer.

34. The answers include that the applicant's processes are no different to any other reselling company. It buys (imports), costs the goods,

puts a markup and sells to the customer based on the customer's requirements. The respondents deny learning of any "processes". They allege that there are no special techniques in importing and distributing components as per the customer's requirements and that they did not learn of any "Techniques".

35. There is a denial that applicant designs any products in any way or that respondents were involved in any "Designs". There is a denial that applicant owns any patents or that they were privy to such. The knowledge of respondents to exclusivity arrangements, is limited to price protection which operates enough to protect the applicant, plus the supplier arrangements.

36. Insofar as the ownership of technical information the respondents aver that this comes from manufacturers who make this publicly available on their web sites.

37. The respondents deny having any influence over fellow employees as they were not employed in a position of management. Respondents more especially first and second respondents did have knowledge of applicant's suppliers which are publicly available but they held no influence over them as the Product Line Managers and management had relationships with the suppliers.

38. Respondents have amply illustrated to what extent the internet has impinged on confidential information. Examples are given of how companies such as the applicant, its suppliers and customers advertise their services and products on the internet in order to solicit business. We live in a changed world where the internet contains details of companies that hitherto were not available. The price of that publicity is a curtailment of their rights to claim confidential information.

39. This can be illustrated in the following manner. Companies can discover what other concerns might be interested as customers in their products and services by dint of searching the internet. All this appears from the respondents' papers.

40. For present purposes it is alleged by first and second respondents that they had knowledge of but no influence over the customers. The personal contact between first and second respondents was one of the points emphasised in the papers and in argument before me. I also do not believe too much emphasis can be placed on the strategy meeting and possession of the Strategy Manual. There was a delay in returning the manual but I am reluctant to place any great significance on that circumstance. It could have been

photostatted in a few hours and returned. The strategy meetings did not, in my judgment, result in first and second respondents coming into possession of confidential information.

Customer connections

41. In *Rawlins v Caravantruck (Pty) Ltd* 1993 1 SA 537 (A) 541–542

Nestadt JA dealt with the need of an employer to protect his trade connections. A summary or synopsis of his comments would amount to the following:

- (a) The need to protect trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business.
- (b) The customer contact doctrine depends on the notion that the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket.

- (c) The relationship must be such that the employee acquires such personal knowledge of and influence over the customers of his employer as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection. Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree.
- (d) Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left.

42. I accept also that as recognised in *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (WLD) at p429 et seq by

Stegmann J that customer lists drawn up by a trader, and kept confidential for the purposes of his own business, contain confidential information, the property of the trader: *Pelunksy & Co v Teron* 1913 WLD 34; *Robb v Green* [1895] 2 QB 315 (CA).

43. I am of the view that the legal protection afforded to this type of confidential information is limited to a certain extent. It seems clear that the law, whilst prohibiting an employee from taking his employer's customer list, or deliberately committing its contents to memory, nevertheless recognises that, on termination of an employee's employment, some knowledge of his former employer's customers will inevitably remain in the employee's memory. This leaves the employee free to use and disclose such recollected knowledge, in his own interests, or in the interests of anyone else, including a new employer who competes with the old one: *Freight Bureau (Pty) Ltd v Kruger and Another* 1979 (4) SA 337 (W) at 341E-F; *Roberts v Elwells Engineers Ltd* [1972] 2 All ER 890 (CA) at 894f-h.

44. As a field application engineer the first respondent had the following duties. He was required to identify customer requirements, offer designed in-solutions for appropriate products, interface with customers, engineers, designers and project leaders in the market

sectors, provide product presentations and technical assistance at seminars, exhibitions and customer visits.

45. I accept also that the first respondent had direct access to the applicant's customer information which included pricing and supply contacts. Even on the respondents' version, the second respondent visited customers on a fairly regular basis, obtained particulars of their requirements, provided customers with prices, recorded and processed orders and ensured that same were properly executed.

46. The respondents admit that the second respondent had social contact with customer representatives which included lunches, casual golf days and dinners. I will return to this matter later.

47. The applicant makes out the case that as a field application engineer, it was crucial for the first respondent to have direct dealings and contact with customers. As a result of the direct customer contact and in the course of his employment with the applicant, the applicant alleges that the first respondent built strong inter-personal relationships with the applicant's customers and in particular, the design and decision makers who had authority to decide whether a product would be used.

48. In his affidavit, the first respondent denies having built strong interpersonal relationships with the decision makers in the employ of the applicant's customers, but admits that he liaised at the applicant's premises or at the premises of customers, with different design engineers engaged by the customers for identifying the products required by the customers.

49. The second respondent admits that he played a role to assist in the identification of the variety available from the applicant and that because of his technical expertise, he could assist the engineers in identifying the different products.

50. Mr Sutherland submitted that the respondents are at pains to underplay their customer connection and contact. This is soundly rebutted in the replying affidavit – so he submitted - which points out that the first and second respondents regularly made payment requisitions for the reimbursement of personal expenditure outlaid in the furtherance of the applicant's business. It is of course improper to make out a case in reply. See *Ladychin Investments v SA National Roads Agency* 2001(3) SA 344 (N) at 359 E – J.

51. In addition to claims for contributions to cell phone expenditure,

these requisitions regularly included expenditure incurred in making gifts to and entertaining customers' employees and suppliers of the applicant. Gifts included DVDs, alcohol purchases, gift baskets, tickets for sports events including test matches in cricket or rugby and tickets to an A1 Grand Prix event.

52. What distresses the court the most is the brazen and shameless manner in which this is put before the court whose assistance is sought in enforcing a customer connection founded on such disreputable sources. The affidavit of Andries du Preez the general manager of sales in the Kwazulu-Natal and Cape branches spells out this practice.

53. He says the following about the gifts.

'28... [of the replying affidavit]... 'Both the first and second respondents regularly made payment requisitions for reimbursement of personal expenditure outlaid by the first and second respondents in furtherance of applicant's business. In addition to claims for contributions to cell phone expenditure, these requisitions regularly included expenditure incurred in making gifts to and entertaining customers' employees and suppliers of the applicant. These gifts included DVD's, alcohol purchases, gift baskets, tickets for sports event (including test matches in cricket and rugby) and tickets to an A1

grand prix event. Their jobs by definition required them to build close relationships with customers.'

54. The applicant has provided twelve examples of requisitions for expenditure and purchases which included A1 Grand Prix tickets, alcohol, birthday gifts, chocolates and cakes, dinners, drinks, entertainment at sporting events, including cricket and golf.

55. The applicant does not shy back from revealing its *modus operandi* in soliciting and wooing the customers in question. There is a detailed description as to how the applicant won a contract with Conlog, one of its largest customers. Du Preez says the following:

'38.3 Through his relationship established with the members of the staff of Conlog, as an employee of the applicant, the second respondent was able to approach a buyer at Conlog whom he had entertained together with other Conlog employees at the applicant's expense. Through this buyer, with the consent of his superiors, the second respondent was able to obtain a complete drawing and specification of the LCD unit... In addition to this, the second respondent obtained the target pricing at or below which the applicant had to supply such unit in order to secure Conlog's business...

43. Although the first respondent might have had 40 customers in his region, the applicant's entertainment was not aimed at all its customers but only its key customers.'

56. Mr Sutherland submitted that it was this customer connection that the applicant has a proprietary interest in protecting as part of its goodwill. It is perfectly permissible for the applicant, so he continued, through the use of a restraint covenant, to prevent the respondents from exploiting this relationship for a period, which is the present case is limited to twelve months.

57. The practices I have mentioned appalled me and seem *prima facie* to constitute a breach of the Corruption Act, 94 of 1992. Squires J in *S v Shaik and others* 2007(1) SACR 12 at 156 after dealing with the history of the legislation said the following:

"The reason for punishing corruption in the private sector is that it subverts the principle of lawful competition and free enterprise because the corruptor may be offering the bribe to obtain preferment over some competitor whose product or service is actually better than the offeror, but who cannot or will not resort to bribery."

58. He went on to say at page 239:

"I do not think I am overstating anything when I say that this phenomenon can truly be likened to a cancer, eating away remorselessly at the fabric of corporate probity and extending its baleful effect into all aspects of administrative functions, whether State official or private-sector manager. If it is not checked, it becomes

systemic and the after-effects of systemic corruption can quite readily extend to the corrosion of any confidence in the integrity of anyone who has a duty to discharge, especially a duty to discharge to the public, leading eventually, and unavoidably, to a disaffected populace.”

59. See also *S v Shaik and others* 2007(1) SACR 247 and 319 (SCA)

where bribery was called an ugly offence and insidious because it is difficult to detect and more difficult to eradicate.

60. Mr Sutherland was in some difficulty justifying the proprietary interest based on the ‘wining and dining’ of the customers. There were suggestions that it was a cut throat industry and that such practices were widespread. I appreciate that small tokens of gratitude or generosity might well fall under the *de minimis non curat lex* rule but the amounts involved were such as to take it outside the application of such a defence.

61. This sort of argument did not fall very far short of a submission that the proprietary interest enjoyed by applicant was knowledge of the customer’s predilection for a particular tittle or sporting event. That this inducement was used with the approval and probably on the direction of the applicant makes it even more serious. The requisitions for the ‘gifts’ as they are optimistically called, are countersigned by superiors of the first and second respondents who

are clearly authorising the 'gifts' or subsequently ratifying them.

62. If such measures are being resorted to by our captains of industry then the court must set its face most resolutely against that. The considerations of public policy that the court has to consider, as discussed earlier on in this judgment, militate against giving protection to such practices. I have stated that the practice of soliciting and maintaining customers goodwill with 'gifts' appears to constitute a criminal offence. This is not a criminal court and it is not seized with a criminal prosecution. To that extent it would be incorrect to stigmatise the conduct as criminal. The papers in this matter will be referred to the Director of Public Prosecutions for investigation.

63. Mr Marais SC, who appeared for the respondents, characterised the applicant as a distributor who could be compared to a large hardware store. He suggested that the first and second respondents did have specialised knowledge of the various components that applicant had access to and could and did advise customers more especially their design engineers how they could be incorporated in any application they desired.

64. It was submitted on behalf of applicant that as a result of training by

applicant the first and second respondents became seized with specialised knowledge in their own right of the customers needs that deserves protection.

65. The first and second respondents denied this and on the authorities mentioned their version must prevail. That they can preserve and utilise skill and training that is in the public domain is clear.

66. In *Aranda Textile Mills (Pty) Ltd v Hurn and another* 2000 4 All SA 183 (E) Kroon J held

‘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 workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the service of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-how or skills such know-how and skills in the public domain become attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision Such a restriction, impinging as it would on the workman’s ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy.’

67. I am not convinced that the first and second respondents acquired legitimate knowledge of specialised needs of the customers that

deserves protection. Looking at the requirements of the cases set out above I cannot find that a case is made out in this regard.

68. As I have indicated the respondents proceed to deal with each and every allegation of trade secrets and confidential information in similar manner. It is not necessary to catalogue them. None of their answers can be dismissed on paper for the reasons stipulated in Plascon Evans. There is no substantial answer to their comments either.

69. It follows that that it is not necessary to deal with paragraphs 14.2 dealing with using, divulging the trade secrets and confidential information. Clause 15 deals with the restraints and provides that having regard to the facts recorded in 14.1 relating to trade secrets and confidential information the employee agrees that the employer's trade secrets will be prejudiced if he takes up employment in any concern that competes with the employer's. The definition clause considerably widens the import of various words in the above.

70. It is therefore only in the context of the possession of trade secrets and confidential information that the involvement of first and second respondent with third and fourth respondent becomes relevant.

Competition with the applicant by respondents

71. The relief sought by the applicant with regard to unlawful competition is very wide. It seeks an order interdicting and restraining the third and fourth respondents from competing unlawfully with the applicant. No mention is made of area or duration. The culpability of third and fourth respondents depended on the first and second respondent. They were the alleged conduit of the trade secrets and information about customer connections. With their liability it is difficult to see how third and fourth respondents could be restrained from competing.

72. Various examples are given as to the competition including approaches to Conlog, Digicor and Swiftronics to buy excess stock. The case for this is either made out in reply or is adequately refuted by respondents. The applicant is a very substantial operation which also enjoys price protection barriers which make competition difficult.

73. As I understand the allegations, they amount to the first and second respondents telephoning the customers including the applicant to enquire if they had excess stock. The respondents would then

make use of any so purchased. I cannot understand how applicant would suffer from stock bought from it. Applicant could set an exorbitant price if it wished.

74. The purchase of the excess stock from other customers does not in my view involve unlawful competition. The existence of customers is easily established in this day and age on the computer. The selling of excess stock does not in my view result from confidential information or trade secrets. It also does not result from any specialised knowledge arising from a legitimate personal relationship with such customers.

75. I conclude therefore that there is no substantial interest that deserves protection after termination of the agreement. Even if it were established I am of the view that it is not seriously threatened by the other party. The width of the restraint and vagueness of its terms militates against the court coming to its assistance. I believe the applicant's interest if it exists at all does not weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive.

76. Looking further at the criteria established by the cases I believe there is an aspect of public policy having nothing to do with the

relationship between the parties that requires that the restraint be maintained or rejected. This aspect is the use of gifts and bribes by the applicant to woo or maintain customers. The first and second respondents are equally to blame in this regard but it is the applicant that seeks the assistance of the court. The maxim that a party must approach the court with clean hands has enured from time immemorial and seems apt in these circumstances.

77. Mr Sutherland submitted that the court should find the contract partially enforceable. The court is not limited to a finding in regard to the contract in restraint of trade as a whole, but may declare the contract partially enforceable or unenforceable. There is plenty of case law to that effect. What is clear however is that the party seeking partial enforcement must establish a proper basis for such enforcement.

78. In determining whether partial enforcement is justified, the court may take into consideration matters such as whether the restraint was unduly oppressive or designed to terrorise, and whether partial enforcement would not operate too harshly or unfairly towards the party bound by the restraint.

79. It must be borne in mind that this very wide contract is applicable to

every salaried employee from top to bottom of the applicant. The list of alleged trade secrets and confidential information and other matters is couched in the widest possible terms.

80. An unreasonable restraint will not be partially enforced if it would require major plastic surgery, in the form of a drastic re-casting of its provisions, to make it reasonable. I am not prepared to embark on such a venture. The court is therefore not obliged in all cases to whittle down an unreasonable restraint of trade until it eventually becomes reasonable.

81. It is also useful to consider the test of severability to be adopted in the case of subordinate legislation. The test has been laid down in various cases, including *Johannesburg City Council v. Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (AD) at page 822D – F, *S. v. Prefabricated Housing Corporation (Pty) Ltd and Another* 1974 (1) SA 535 (AD) at p. 539C - F.

82. Adopting that test for a restraint the considerations would have to be whether it is possible to separate the good from the bad in the restraint. Secondly if the good is not dependent on the bad, then that part of the restraint which is good must be given effect to, provided that what remains carries out the main object of the

restraint. No suggestions were made in argument as to how this exercise might be carried out.

83. I am not inclined to perform surgery to try and secure some relief for the applicant in these circumstances.

84. The application is dismissed with costs, such costs to include those previously reserved.

Counsel for the Applicant : R Sutherland SC with J Peter (instructed by Edward Nathan Sonnenburgs)

Counsel for the Respondent : J Marais SC (instructed by Haralambous Attorneys)

Date of hearing : 16 October 2007

Date of judgment : 15 November 2007