REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO. 2899/2008

In the matter between:

DEN BRAVEN S.A. (PTY) LIMITED **APPLICANT**

and

YOGANATHAN PILLAY **FIRST RESPONDENT**

GRACEHAVEN INDUSTRIES CC **SECOND RESPONDENT**

JUDGMENT
Delivered : 27 March 2008

WALLIS AJ

[1] Mr. Dean Pillay (the name by which the First Respondent is commonly known) is, in his own words, "an excellent sales representative", who in the past financial year was responsible for close on 50% of the Applicant's sales of its products in KwaZulu-Natal. However, even excellent sales representatives move on and on 31 January 2008 he tendered his resignation explaining that "I have to move on to better pastures". It was only after Mr. Michael Berg, the Applicant's national sales and marketing manager, had written to him on 1 February 2008 drawing his attention to the fact that he had signed a restraint of trade agreement that he

disclosed that he proposed taking up employment with the Second Respondent. This immediately prompted a letter from the Applicant's attorneys on which Mr. Pillay took legal advice and then indicated that he would nonetheless take the job with the Second Respondent. That decision provoked this litigation.

[2] The application came before me in the motion court on 3 March 2008 as a matter of urgency in which interim relief was sought. I granted that order subject to directions as to the filing of affidavits and the fixing of a return day that afforded the matter priority on the Roll. In the result the application was fully argued before me on 20 March 2008.

[3] Certain issues that have attracted some controversy in recent years in dealing with applications to enforce restraint of trade agreements need not be considered in this judgment. Thus, it was not in dispute that restraint of trade agreements are enforceable unless, and to the extent that, they are contrary to public policy because they impose an unreasonable restriction on the former employee's freedom to trade or to work.[1] It was also accepted that the onus of proving that the restraint is unreasonable and unenforceable rests upon the former employee.[2] In addition, whilst it appeared to be suggested in the affidavits that the restraint of trade undertaking was invalid because it had been induced by duress, this argument was not pursued by Mr. Choudree SC, who confined his submission to

---

1 *Magna Alloys and Research (SA)(Pty) Limited v Ellis* 1984 (4) SA 874 (A) at 891B-C

2 This had been laid down in *Magna Alloys, supra,* but some doubt had been cast upon it in the light of the advent of the Constitution. However, the Full Bench in *Rectron (Pty) Limited v Govender*. *Case No. AR269/2006 (NPD),* unreported, reiterated that tehis is the legal position and confirmed the decision in the court below in that case(reported at [2006] 2 All SA 301 (D)) that the earlier decision to the contrary in *Canon KwaZulu-Natal (Pty) Limited t/a Canon Office Automation v Booth and another* 2005 (3) SA 205 (N) is clearly wrong. I am bound by that decision for the reasons explained in *Ex parte Minister of Safety and Security and others : In re S v Walters and another* 2002 (4) SA 613 (CC) at para. [61] and it is therefore unnecessary for me to consider the cases where judges have either expressly or impliedly indicated that they do not think this view of the onus to be correct.

the proposition that there had been a disparity of bargaining strength as between the Applicant and Mr. Pillay at the time that he signed the restraint agreement and that this is a relevant factor in considering whether the agreement is unreasonable.[3] Nor was it in dispute that Mr. Pillay's employment by a competitor of the Applicant would contravene the terms of the restraint agreement. Lastly Mr. van Niekerk SC , who appeared for the Applicant, did not seek the confirmation of the rule *nisi* in its entirety. Instead he confined the Applicant's claim to an interdict restraining Mr. Pillay from taking up employment with the Second Respondent within KwaZulu-Natal and from soliciting the Applicant's customers and indicated that a more limited period than the stipulated two years would be appropriate.

[4] The effect of this was to narrow the issues substantially. Essentially only two issues remained. The first was a submission by Mr. Choudree SC that the restraint agreement, when viewed as a whole, is so far-reaching and extensive in the constraints that it imposes upon Mr. Pillay that its enforcement in any respect is contrary to public policy. As a corollary to that argument he also submitted that it is not possible to excise the good from the bad on an application of the principles of severability as the effect of that would be to make a new contract for the parties. In advancing these contentions he relied strongly upon a recent judgment by Davis J[4] which I will need to examine in some detail. The second arises in the context of the need in considering the reasonableness of a restraint to

---

3 *Reeves and another v Marfield Insurance Brokers CC and another* 1996 (3) SA 766 (SCA) at 776E-F.

4 *Advtech Resourcing (Pty) Limited v Kuhn and another* [2007] 4 All SA 1368 (C). I was told that the tenor of this had been endorsed by Nicholson J in *Arrow Altech Distribution (Pty) Ltd v Byrne and another* [2008] 1 All SA 356 (D) but a careful reading of that judgment does not support this contention.

address the following four questions:-

> "(a) Does the one party have an interest that deserves protection after termination of the agreement?
>
> b) If so, is that interest threatened by the other party?
>
> c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
>
> d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?"[5]

The issue in this regard is whether the Applicant has a protectable interest that is threatened by Mr. Pillay's proposed employment by the Second Respondent. It is convenient to deal with this issue at the outset.

[5] In contending that it had a protectable interest the Applicant relied on the risk of damage to its customer connection and on the risk of disclosure of confidential information. In the course of argument the former assumed the principal role as on the affidavits there was a substantial dispute of fact over whether Mr. Pillay was in possession of any confidential information beyond the fact that he admitted to having knowledge of the pricing of the Applicant's products and of the Applicant's price lists, which he conceded "may constitute its trade secrets". However, those matters are so closely linked to his ability to deal with the Plaintiff's customers, that the two arguments essentially merged into one

---

5 *Basson v Chilwan and others* 1993 (3) SA 742 (A) at 767G-H; *Reddy v Siemens Telecommunications (Pty) Limited* 2007 (2) SA 486 (SCA), para. [16] at 497.

concerning the existence of a trade or customer connection and Mr. Pillay's ability to interfere with it.

[6] The legal position where an employer seeks to enforce a restraint of trade agreement on the basis of a risk of harm to its trade connections and in particular its connections with its customers, has been authoritatively set out in the following terms:

> "The need of an employer to protect his 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... Heydon *The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that 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"
>
> In *Morris (Herbert) Limited v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that 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..."
>
> This statement has been applied in our courts... Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. 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..."[6]

In considering the facts of a particular case it must always be borne in mind that a protectable interest in the form of customer connections does not come into being simply because the former employee had contact with the employer's customers in the course of their work. The connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business.[7]

[7] The facts that are relevant to this aspect of the case are the following. Mr. Pillay has been employed by the Applicant as a sales representative since November 1999. Prior to joining them, according to the career history on his application form, he had worked as a warehouse manager with a furniture manufacturer, but was retrenched. He now describes this job as that of a sales representative, so I accept that he performed some kind of sales function. However, it is clear that he had no prior experience of selling products such as those of the Applicant, which are largely sealants, but include adhesives and various products related to the use of sealants and adhesives, such as solvents, primers and cleaners, as well as glazing accessories. In all the Applicant has approximately 241 products on the market. Whilst there are disputes about the extent of the training that Mr. Pillay received from the Applicant, it is plain that his knowledge of products of this type, the use to which they can be put and the businesses that have need of them,

---

6 *Rawlins and another v Caravantruck (Pty) Limited* 1993 (1) SA 537 (A) at 542E-H. See also *Paragon Business Forms (Pty) Limited v Du Preez* 1994 (1) SA 434 (SE) at 444A-C; *Branco and another t/a Mr. Cool v Gayle* 1996 (1) SA 163 (E) at 177C and *Napesca SA Products (Pty) Limited v Zaderer and others* 1999 (1) SA 886 (C) at 899B-900C.

7 *Walter McNaughtan (Pty) Limited v Schwartz and another* 2004 (3) SA 381 (C) at 390 C-D.

derives entirely from his employment by the Applicant.

[8] The customers for these products are diverse and not confined to retail outlets, although hardware stores are prominent among them. They include electrical contractors, garages and contractors who install glass products such as windows and showers. Various businesses in the fields of construction, shop-fitting and kitchen installation use the products. Among those whom the sales staff contact are architects, engineers and quantity surveyors, no doubt because they are in a position to direct business towards the Applicant. Whilst the existence and identity of potential clients is well known in what is a competitive market, whatever links Mr. Pillay has been able to forge with the Applicant's customers were forged in the course of his employment with the Applicant. The Applicant alleges that he has access to and knowledge of its customer base in KwaZulu-Natal, consisting of over three hundred customers, and this is admitted.

[9] According to the Applicant:-

> "The scope of employment of the First Respondent included on-site inspections with Applicant's customers, assisting in queries, ensuring that the Applicant's customers have sufficient stock of the products to on-sell as well as training of the Applicant's customers so as to ensure that the Applicant's customers have sufficient information pertaining to the [*sic*] its products. This is an additional "perk" offered to the Applicant's customers."

These allegations are admitted by Mr. Pillay. He adds that it was part of his duties to educate customers on the advantages of Applicant's products and on how to differentiate between different products.

[10] In regard to the nature of the relationship between Mr. Pillay and the Applicant's customers the Applicant made the following allegation:-

> "The First Respondent has also, through his employment with the Applicant, built up a close relationship with the customers of the Applicant as well as its suppliers. In the ordinary course of his employment and in an attempt to sell the various products of the Applicant, the First Respondent would have reason to communicate both telephonically and in person with the Applicant's customers and suppliers. All of the customer and supplier connections which are known to the First Respondent came to the First Respondent's knowledge solely due to his employment with the Applicant, which information was disclosed to him as a result of the position of trust which he earned over the years."

Mr. Pillay's response to this allegation is initially a bland denial. However, he goes on to say that "whilst I had built up a relationship with customers of the Applicant whom I dealt with, I deny ever having dealt with Applicant's suppliers." It appears therefore that he accepts the correctness of the allegations made by the Applicant insofar as they relate to customers, which is the pertinent issue. He goes on to deny that all of the customer connections were established due to his employment with the Applicant and says that in order to meet targets at the end of every month it was necessary for him to canvass new customers on his own. However, this is beside the point. His employment was as a sales representative. Part and parcel of his duties was to find customers for the Applicant's products. The fact that he did so and enjoyed some success does not enure to his advantage in seeking to resist the enforcement of the restraint undertaking. The customers that he procured by his efforts were the customers of the Applicant and the trade

connection established in consequence of his efforts is a trade connection between the Applicant and the customers, not one between himself and the customers. Indeed, the fact that he was able of his own volition to identify new customers, approach them and secure their custom for the Applicant is indicative of the existence of the type of trade connection that is protectable.

[11] The Court must avoid the subconscious temptation in cases such as these to think that the former employee is "just a salesman" and to treat the attempt to enforce the restraint as a case of the employer taking a sledge-hammer to crack a nut. Obviously each case depends on its own facts. A highly successful tele-marketer selling to the public at large on a "cold calling" basis will probably not establish a distinctive customer connection. However, in any business dependent for its profits on the sale of its products, the sales function is of fundamental importance and the salesperson's ability to damage the business of the employer may be very considerable or even fatal,[8] notwithstanding the fact that the salesperson may seem to stand fairly low in the staff hierarchy. This case provides a good illustration of this. The Applicant's branch in Durban, which services the province of KwaZulu-Natal, had only four employees. Two of these were sales representatives, namely Mr. Pillay and one other; one was an internal sales/administrative employee and one was both in charge of the warehouse and a driver for the purpose of making deliveries. In essence the only activity of the business in KwaZulu-Natal was sales and in that area its annual turnover in the last financial year was approximately R12 million to which Mr. Pillay contributed some R5 million. In this context, notwithstanding his ostensibly humble designation, he was a key employee. He had obviously played a significant role

---

8 As in *Stewart Wrightson (Pty) Limited v Thorpe* 1977 (2) SA 943 (A), where the departure of the employee effectively resulted in the collapse of the employer's business.

during the eight years of his employment in building up the business and establishing and maintaining its relationships with its customers. It is significant that if one looks at the minutes of the Durban sales meetings that are annexed to the replying affidavit that Mr. Pillay and his dealings with clients always formed the most substantial component of the meetings. It must also be borne in mind that what is referred to in the cases as a customer connection is often constituted by intangibles such as the relationship on personal issues between salesperson and purchaser; the reputation of the salesperson for dealing with complaints and problems and his or her all-round willingness to "go the extra mile" in order to secure a sale.

[12] The overall importance to the Applicant of its sales function is also demonstrated by the fact that it appears to have held national sales meetings at least once a year. Plainly the purpose of these was both to develop the skills of the sales team and to afford the opportunity to exchange information. Mr. Pillay made presentations to these meetings on behalf of the Durban branch. All of this serves to paint a picture of an employee with knowledge of the identity and requirements of the Applicant's customers in KwaZulu-Natal, who had helped to build up that customer base and in the process had regular and repeated contact with the customers so as to build a connection in the course of trade with them.

[13] Although challenged in the affidavits it was not seriously suggested in argument that the Applicant and the Second Respondent are not competitors in relation to the same products. Indeed such a challenge could hardly be raised in the light of the fact that there are repeated references in the minutes of sales meetings to the actions of the Second Respondent in the market; to the prices it was quoting for competing products and to business lost to the Second Respondent,

notwithstanding the endeavours of the Applicant's sales staff. In those circumstances there seem to be a number of factors that point towards the Applicant having a significant trade connection with its customers and that this trade connection is due to the relationship built between Mr. Pillay and those customers over the past eight years.

[14] What then does Mr. Pillay say in order to rebut the inference of the existence of such a relationship? The answer is, very little. He concedes that he has knowledge of the Applicant's client base and that he understands what their requirements are. He accepts that he built up a close relationship with the customers including some whom he sought out himself without being given any leads by the Applicant. He provides no information whatsoever that would tend to suggest that these relationships are of such a superficial and transitory nature that they could not be exploited in the course of his employment by the Second Respondent. Had the position been that the relationships that he has developed and the existence of which he acknowledges are not capable of being exploited by him in the course of employment by the Second Respondent, one would have expected him to provide details of why this is so. After all the precise nature of the relationships that he has developed are matters peculiarly within his knowledge. The Applicant's national sales manager, based in Johannesburg, or even a managerial employee based in Durban, can hardly speak in any detail to the nature of the relationships that Mr. Pillay has built up with customers all over the province of KwaZulu-Natal from Durban to Richards Bay in the north and Pietermaritzburg and Newcastle in the west.

[15] Mr. Pillay's simple response in his affidavit is to say that he is an excellent salesman. No doubt that is true and it is equally true that he is entitled to take his

qualities and skills as a salesman to another employer. However, to the extent that the Applicant has built up a trade connection with its customers in KwaZulu-Natal through the efforts of Mr. Pillay over the eight years of his employment it is entitled to protect itself against being deprived of that connection by Mr. Pillay's activities on behalf of a competitor. That is the very reason why it sought from him and obtained an agreement not to accept employment with a competitor for a period of two years after leaving its employ. In my view the evidence shows that the Applicant does indeed have such a trade connection with its customers in KwaZulu-Natal and that in substantial measure this is related to the relationship built between those customers and Mr. Pillay during the years of the latter's employ. That view is reinforced by Mr. Pillay's failure to give any details of his relationships with the various customers of the Applicant that would tend to show that these relationships are more fleeting and ephemeral than one would infer from the admitted facts. Nor has he sought to file affidavits from any of the major customers explaining that they would not be influenced by their relationship with him to move their custom from the Applicant to the Second Respondent.

[16] In oral argument Mr. Choudree sought to meet this inference by suggesting that the relationship between the Applicant and its customers is not one involving a particular connection with the Applicant through Mr. Pillay, but is a more tenuous relationship governed by price. As he put it:-

> "At the end of the day it comes down to rands and cents. In order to retain a customer you have to match the price."

He submitted that the minutes of the sales meetings reflected that "everybody knows your prices and customers" and that customers would not be influenced by

their connection with the salesman but would always adopt the hard-headed commercial approach of going after the lowest price.

[17] There are two difficulties with this submission. The first is that it is a product of counsel's ingenuity rather than being founded upon facts contained in the affidavits. Mr. Pillay specifically admits that he built up a relationship with customers of the Applicant and nowhere suggests that their purchasing decisions are influenced only by price as opposed to that relationship. He devoted far more of his affidavit to trying to suggest that the Second Respondent is not a competitor in relation to the Applicant, a proposition that cannot be supported on the evidence. The second difficulty is that this fails to take account of such factors as customer loyalty to a particular suppliers; customer inertia in continuing to purchase from an established supplier rather than going to the effort of always checking the market for the best possible price and the fact that where two different suppliers quote very similar prices for comparable products, the trade connection established through the sales person may well be the decisive factor. It is not in my view necessary for an applicant in this situation to winnow the wheat of trade connections and customer contact from the chaff of other factors that may influence purchasing decisions. It suffices for the Applicant to show that trade connections through customer contact exist and can be exploited by the former employee if employed by a competitor. The Applicant in this case has discharged that onus.

[18] Once that conclusion is reached and it is demonstrated that the prospective new employer is a competitor of the Applicant, trading in a range of similar products, the risk of harm to the Applicant if its former employee is able to take up employment with that competitor is apparent. The risk is increased where, as here, the employee in question is an excellent and highly successful sales person with a lengthy track record working in the particular market. I accept, as Mr. Pillay says, that he will be dealing with a broader range of products, if employed by the

Second Respondent, than he was when employed by the Applicant. However, it is not correct to suggest that these products are remote from those that he has sold in the past. They are described in a letter addressed by the Second Respondent as including:-

> "... stainless steel friction stays, window handles, sliding and folding door hardware, weatherpile gaskets, sealants, glass and shower hardware and window louvres."

Most of these seem related to the kind of products in which sealants, adhesives and the other items reflected in the Applicant's catalogue are used.

[19] It follows that I am satisfied that the Applicant has discharged the onus of showing that it has a commercial interest that is deserving of protection at the termination of the agreement and that such interest will be prejudiced by Mr. Pillay taking up employment with its competitive rival, the Second Respondent. No serious argument was addressed to me on the remaining two questions that fall to be considered in regard to the enforcement of a restraint namely, where the balance lies between protecting the Applicant's interest and the possible effect of affording such protection in leading to the employee becoming economically inactive and unproductive and whether there is any other facet of public policy that should influence the decision of the Court. No such factor, other than the period of any restraint, was identified either in the papers or in the course of argument and there is force in the contention by Mr. van Niekerk that Mr. Pillay can readily turn his skills as a salesman to selling products, even those related to the building and construction industry where the Applicant's products are primarily sold, provided he steers clear of selling the products of a competitor.

[20] In the light of those conclusions the Applicant is entitled to relief unless there is

merit in Mr. Choudree's point that the entire restraint undertaking is invalid and enforceable a point pursued in the light of the judgment of Davis J in *Advtech, supra*. It is necessary then to turn to a consideration of the restraint undertaking in the light of that judgment.

[21] The restraint undertaking is in a printed form and was obviously not prepared with Mr. Pillay's situation specifically in mind. Its terms are broad and general and it is plainly intended to be suitable for use for any employee of the Applicant at any level of its business, whether a sales person like Mr. Pillay or the managing director. This is confirmed by a consideration of Mr. Pillay's letter of appointment. That letter is itself in a standard form and indicates that his employment is based on certain terms and conditions including those recorded in a document entitled 'Den Braven Company Policies'. Under the heading 'Standard Terms and Conditions' it is said that his terms and conditions of employment are detailed not only in that document but also in a 'Restraint of Trade'. The use of standard form contracts in the context of employment relations is a common occurrence and particularly so where the employer is ultimately part of an international group of companies. This restraint undertaking bears all the hallmarks of such a contract. Returning to the restraint itself it has clearly been in use for a number of years inasmuch as in clause 1.1.13 thereof 'the territory' is defined as being:-

> "The area comprising Southern Africa including the independent states of Venda, Bophuthatswana, Ciskei, Transkei, Namibia, Botswana, Swaziland, Lesotho, Zambia, Malawi and Mozambique."

The advent of democracy in South Africa has not caused the Applicant to revise

this contract.

[22] The restraint undertaking deals with three matters namely the restraint itself, a prohibition upon the use or disclosure of confidential or secret information and the treatment of inventions and intellectual property arising from the employee's efforts whilst in the employ of the Applicant. It contains in clause 1 a definition section in which the expressions 'DEN BRAVEN', 'DEN BRAVEN customer' 'DEN BRAVEN employee', 'DEN BRAVEN product' and 'the protected business' are defined. These definitions are in broad terms. Thus 'DEN BRAVEN' is defined as including both the Applicant and all its present subsidiaries as well as any future subsidiaries acquired or coming into existence between the date of the restraint undertaking and the termination date. The restraint itself is said to be in favour of both the Applicant and its holding company, which is a company incorporated in the Netherlands, and its subsidiaries. It customers are defined as anyone who was a customer in respect of a DEN BRAVEN product during the pre-termination period. That could on the face of it extend not only to the initial purchaser from the Applicant but also to any person to whom the product was resold. Its employees are defined as anyone who was an employee, officer or agent of or consultant to the Applicant during the pre-termination period. That is also more extensive than the common understanding of an employee. The pre-termination period is a period of one year immediately preceding the termination date. The termination date is defined as the date on which the employee ceases for any reason whatsoever to be an employee of the Applicant and the restraint period is a period of two years immediately following the termination date. The protected business is the ordinary business of DEN BRAVEN carried on during the pre-termination period.

[23] The pertinent clauses of the agreement read as follows:-

> "2 ACKNOWLEDGEMENT
> The DEN BRAVEN employee acknowledges the following:-
> 2.1 During his employment with DEN BRAVEN
> 2.1.1 he has developed and maintained contact with DEN BRAVEN customers, DEN BRAVEN employees and Silicone suppliers, and was permitted to establish, on its behalf and for its benefit, the necessary rapport with DEN BRAVEN employees and Silicone suppliers;
> 2.1.2 by virtue of his position from time to time within DEN BRAVEN he also has had special access to DEN BRAVEN's financial and marketing policies, its lists of DEN BRAVEN customers and DEN BRAVEN suppliers, its special arrangements with DEN BRAVEN customers and DEN BRAVEN suppliers, and generally the confidential methods employed by members of DEN BRAVEN in carrying on their respective businesses;
> 2.1.3 by virtue of his continuing employment with DEN BRAVEN he may continue to maintain that close personal contact with DEN BRAVEN customers, DEN BRAVEN employees and DEN BRAVEN suppliers;
> 2.1.4 if he were to join or advise or assist or become interested in any of the competitors of DEN BRAVEN whether prior to or on the termination of his employment therewith for any reason or thereafter, or if he or such competitor were to employ any DEN BRAVEN employees, the connections with DEN BRAVEN customers, DEN BRAVEN employees and DEN BRAVEN suppliers, would, but for the undertakings given by him herein, inevitably become available to him or the competitor and enable him or it to compete unfairly with DEN BRAVEN and cause it great prejudice.
>
> 3 RESTRAINT
> For the reasons stated in 2., the DEN BRAVEN employee undertakes that during his employment and during the restraint period he will not, without the prior written consent of DEN BRAVEN directly or indirectly and whether for his own account or as a principal, partner, shareholder, director, member, employee, officer, representative, agent, adviser or consultant of, or holding any other capacity whatsoever in relation to any person, syndicate, partnership, joint venture, corporation or company, and whether for its or his direct or indirect benefit or otherwise, and whether for reward or otherwise and whether formally or otherwise -
> 3.1 be interested in or concerned with any business which,

in the territory, is competitive with or similar to the protected business;

3.2 draw away, deal with, canvass or entice or attempt to draw away, deal with, canvass or entice in respect of any business which, in territory, is competitive with, or similar to the protected business, any person who is a DEN BRAVEN customer or DEN BRAVEN supplier in respect of the protected business;

3.3 sell or attempt to sell or make available in the territory, to anyone who is a DEN BRAVEN customer, any product which is the same as or similar to or competes with any Silicone product;

3.4 solicit in the territory any order for any such same or similar product from any person who is a DEN BRAVEN customer, or potential customer, or place orders in the territory for any such similar product with any person who is a DEN BRAVEN suppliers;

3.5 draw away, canvass, solicit or entice, or employ, or appoint, or procure the employment or appointment of, or assist in the procurement or appointment of, or attempt to draw away, canvass, solicit, or entice, or appoint or procure the employment or appointment of, or assist in the procurement of, in the territory in respect of any business which, in the territory, is competitive with, or similar to the protected business, or otherwise, any person who, in the territory is a DEN BRAVEN employee;

3.6 encourage or entice, or incite, or persuade, or induce or attempt to encourage, or entice, or incite or persuade, or induce in the territory any person who is a DEN BRAVEN employee to terminate his employment with DEN BRAVEN.

4 <u>SEVERABILITY:</u>

The employee agrees that -

4.1 the undertaking given in terms of 3. shall be treated, as far as possible, as separate and divisible undertakings and shall be interpreted accordingly and, without detracting from the generality thereof, those undertakings shall be interpreted in that way insofar as they apply to the different activities, interests and capacities restrained and the different areas in which they are restrained:

4.2 each separate and divisible undertaking given by the employee in terms of 4.1 -

4.2.1 shall not affect any of the other separate and divisible undertakings if it is or becomes unenforceable for any reason;

4.2.2 is fair and reasonable as regards its extent, period and scope of operation;

4.2.3 is necessary to protect DEN BRAVEN’s legitimate interests in its customer and supplier connection;

4.2.4 may, if it goes too far to be enforceable, nonetheless be enforced to such lesser extent as

may be reasonable and shall therefore be interpreted accordingly."

[24] There can be no doubt that the terms of the restraint undertaking are extremely wide. I have already mentioned the possible scope of the definition of a DEN BRAVEN customer. Then there is the territory in which the restraint operates. Compliance therewith whilst still selling sealants and adhesives would require Mr. Pillay to seek employ in Angola, the DRC or Tanzania to mention the available possibilities that are closest to home. The restraint extends not only to DEN BRAVEN's customers and employees but also to its suppliers, with whom he has had no dealings. As pointed out by Mr. Choudree, in the absence of the usual provision that permits the person restrained to acquire up to 5% of the shareholding in a company listed on the JSE, Mr. Pillay is not even entitled to purchase 100 shares in a listed company that competes with the Applicant. The duration of the restraint - two years - was in a similar case said to be "rather a long time" and "close to the limit which would be reasonable in this type of case".[9] There can be no doubt that any attempt to enforce this restraint undertaking to the full extent would fail on the grounds that it was unreasonable to impose such a restraint on Mr. Pillay. That is not, however, the issue, as the Applicant does not seek such an order. The question is whether this excessive breadth means that the Applicant cannot restrain Mr. Pillay from breaching clause 3 of the agreement insofar as it precludes him from taking up employment with a company or corporation operating in KwaZulu-Natal, that was in direct competition with the business of the Applicant during the pre-termination period from 1 March 2007 to 29 February 2008 and continues to be one of its competitors..

[25] In arguing for an affirmative answer to this question Mr. Choudree relied heavily

---

9 *Rawlins and another v Caravantruck (Pty) Limited, supra,* at 544D-E.

on the judgment of Davis J in the *Advtech* case, *supra*. Before examining that case it may be helpful to revisit certain basic principles. Firstly, in regard to the history of our jurisprudence and the basic approach to restraint of trade agreements Malan AJA recently said[10]:-

> [10] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* described as a landmark decision, introduced a significant change to the approach of the courts to agreements in restraint of trade by declining to follow earlier decisions based on English precedent that an agreement in restraint of trade is *prima facie* invalid and unenforceable. In English law, a party seeking to enforce such agreement has to show that the restraint is reasonable as between the parties while the burden of proving that it is contrary to public policy is incumbent on the party alleging it. *Magna Alloys* reversed this approach and held that agreements in restraint of trade were valid and enforceable unless they are unreasonable and thus contrary to public policy, which necessarily as a consequence of their common-law validity has the effect that a party who challenges the enforceability of the agreement bears the burden of alleging and proving that it is unreasonable. The effect of the judgment is summarised in *J Louw and Co. (Pty) Ltd v Richter and others*[11]:
>
> "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. 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. Such circumstances are not limited to

---

10 In *Reddy v Siemens Telecommunications (Pty) Limited, supra*, para. [10] at 493-494.

11 1987 (2) SA 237 (N) at 243B-C

> 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.""

[26] A few years after the judgment in *Magna Alloys* E M Grosskopf JA explained its effect in the following terms:-

> "For present purposes the effect of this judgment may be summarised as follows... In determining whether a restriction on the freedom to trade or to practise a profession is enforceable, a court should 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 a unreasonable restriction on a person's freedom to trade."[12]

In other words the enforceability of restraint of trade agreements is dependent upon public policy. In weighing up what public policy demands:-

> "A court must make a value judgment with two possible policy considerations in mind determining the reasonableness of a restraint. The first is that the public interest requires that

---

12 *Sunshine Records (Pty) Limited v Frohling and others* 1990 (4) SA 782 (A) at 794B-D.

> parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt.* The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. 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. Section 22 of the Constitution guarantees "[e]very citizen ... the right to choose their trade, occupation or profession freely" reflecting the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as contemplated by the Constitution. It is also an incident of the right to property to the extent that s 25 protects the acquisition, use, enjoyment and exploitation of property, and of the fundamental rights in respect of freedom of association (s18), labour relations (s 23) and cultural, religious and linguistic communities (s 31)."[13]

[27] Now that our law has long since shrugged off the straitjacket of the English law in regard to restraint of trade agreements, there is no need any longer for courts to assert as a starting point in their consideration of such agreements that they are valid and enforceable. We do not feel the need to do this with contracts of sale or lease or agency or employment and there is similarly no need to do so with restraint of trade agreements. As with all contracts that leaves a single question to be considered namely whether the agreement in question is unenforceable as being contrary to public policy.

[28] Since the decision of the Supreme Court of Appeal in *Reddy v Siemens Telecommunications, supra*, we have had the benefit of an exposition by the

---

13 *Reddy v Siemens Telecommunications (Pty) Ltd, supra,* para. [15] at 496H-497B.

Constitutional Court in *Barkhuizen v Napier*[14] of the meaning of public policy in the context of contracts in its relationship to the Constitution. It is apposite in those circumstances to pause to consider what the Constitutional Court said in that regard. The following passages are taken from the majority judgment of Ngcobo J and are to be read against the background that the Applicant in that case sought to challenge a provision in a contract of insurance obliging him to bring a claim within ninety days of the occurrence of the insured event, failing which his claim would be barred. The constitutional argument was that this clause interfered with his right of access to courts in terms of s 34 of the Constitution. In dealing with the argument Ngcobo J said the following:-

> [23] The s 34 argument raises the fundamental question of the appropriateness or otherwise of testing a contractual provision directly against a provision in the Bill of Rights. This raises the question of horizontality, that is, the direct application of the Bill of Rights to private persons as contemplated in s 8(2) and (3) of the Constitution. This court has yet to consider this issue. But apart from this there are further difficulties. Clause 5.2.5 [of the insurance policy], if found to limit s34, is not a law of general application. It cannot, therefore, on its own be subjected to a limitation analysis under s 36(1). The limitation clause contemplates that only a law of general application will be subject to it. It is this difficulty that confronted the High Court in the first place.
>
> [24] To overcome this difficulty the High Court had to find a law of general application on which to hang clause 5.2.5. It found this peg in the form of the common law principle of contract that is expressed in the maxim *pacta sunt servanda*, agreements are binding. The

---

14 2007 (5) SA 323 (CC)

High Court reasoned that the framers of the Constitution intended the phrase "law of general application " in s 36 to have a wide meaning. It therefore held that the common law principle that agreements are binding is a law of general application. Having clothed clause 5.2.5 in the law of general application garb, the High Court then posed the question whether parties can by a term in a contract agree to limit the right of access to a court. Here the question, the High Court reasoned, was whether such a limitation is reasonable and justifiable under s 36(1). Having found that the limitation is not reasonable and justifiable under s 36(1), the High Court found that clause 5.2.5, not the common law principle that agreements are binding, fell foul of s 34.

[25] But this was not the end of the difficulties. There was s 172(1)(a) of the Constitution, which requires a court to declare "any law or conduct" that is inconsistent with the Constitution to be invalid. Clause 5.2.5 is manifestly not "conduct" within the meaning of s 172(1)(a). That left the question, whether it is a "law". The High Court found that the clause was a "regsvoorskrif" that is, a "law" within the meaning of s 172(1)(a). It is not clear from the judgment of the High Court why, if the clause is not a law of general application for the purposes of a limitations analysis, it is nevertheless a "law" within the meaning of s 172(1)(a).

[26] These difficulties that the High Court had to overcome, and the manner in which it dealt with them, in my judgment cast grave doubt on the appropriateness of testing the constitutionality of a contractual term directly against a provision in the Bill of Rights. The High Court accepted that the clause was not a law of general application. Hanging the clause on the common law principle of *pacta sunt servanda* does not meet the difficulty. For what is ultimately found by the High Court to be flawed is not a common law principle, but the clause itself. And this clause is ultimately

elevated to a "law" within the meaning of s 172(1)(a)."

[29] I have quoted these portions of the judgment of Ngcobo J *in extenso* because, in my respectful view they are pertinent to a problem that has reared its head on a number of occasions in regard to restraint of trade agreements. In at least three cases under the interim Constitution the Court was asked to consider the impact of s 26 of the interim Constitution on such agreements.[15] In several cases an argument was advanced that the common law principles should be altered because restraint of trade agreements constituted an infringement of the rights conferred upon the person bound thereby in terms of s 26(1) of the interim Constitution.[16] Whilst that argument was not upheld in those cases it was again raised in relation to the provisions of s 22 of the Constitution.[17] In one of these[18] it was held that:-

> "The restraint of trade clause in the contract constitutes a limitation on First Respondent's fundamental right to freedom of trade, occupation and profession. It is inconsistent with the Constitution to impose the onus to prove a constitutional protection on the First Respondent. Accordingly Applicant,

---

15 S 26(1) provided that: "Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory."

16 See for example *Waltons Stationery Co. (Edms) Bpk v Fourie en 'n ander* 1994 (4) SA 507 (O) at 511B-E; *Kotze and Genis (Edms) Bpk v Fourie en 'n ander* 1993 (4) SA 507 (O); *Knox D'Arcy and another v Shaw and another* 1906 (2) SA 651 (W) at 660D; *CTP Limited and others v Independent Newspapers Holdings Limited* 1991 (1) SA 452 (W) at 468G; *Quik Kopy (SA) (Pty) Limited v Van Haarlem and another* 1999 (1) SA 472 (W) at 483F-G.

17 S 22 provides that : "Every citizen has the right to choose their trade, occupation or profession freely. The practise of a trade, occupation or profession may be regulated by law."

18 *Canon KwaZulu-Natal (Pty) Limited t/a Canon Office Automation v Booth and another, supra* at 209D-E

> which seeks to restrict First Respondent's fundamental right, has the duty of establishing that First Respondent has forfeited his right to constitutional protection".

In the result the court held that an applicant seeking to enforce the provisions of a restraint of trade agreement not only had to prove the breach or threatened breach of that agreement but had to show that the restraint was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[19] This approach also appears to have the support of the court in *Advtech, supra*.[20]

[30] Whilst *Barkhuizen v Napier* dealt with section 34 of the Constitution I believe that the cited portion of Ngcobo J's judgment is equally pertinent to s 22 of the Constitution. If a restraint of trade agreement is treated as automatically infringing the right to choose a trade, occupation or profession freely in accordance with the first sentence of s 22, then I fail to see on what basis the party seeking to enforce the restraint of trade agreement can overcome the problem that it is seeking to enforce a contractual entitlement that breaches a constitutional right. Neither the entitlement in terms of the second sentence to regulate the practise of a trade, occupation or profession by law nor the ability under s 36(1) to limit rights in the Bill of Rights in terms of a law of general application are available to be invoked by a private citizen. As Ngcobo J has emphasised private citizens do not make law. Under our Constitution that is a power vested in the three spheres of government identified in s 40(1) of the Constitution. The direct

---

19 This view attracted support in *Life Guards Africa (Pty) Limited v Raubenheimer* 2006 (5) SA 364 (D), para. [30] at 475A-C.

20 See paras. [27] and [28] of the judgment.

application of the right of every citizen to choose their trade, occupation or profession freely to natural or juristic persons who are party to restraint of trade agreements would have the inevitable effect of nullifying all such agreements, however appropriate and desirable, in South African law. Such a result seems to be an unlikely construction of the Bill of Rights. The flaw lies, in my respectful opinion, in overlooking the words in s 8(2) of the Constitution that provide that a provision of the Bill of Rights binds a natural or a juristic person:-

> "...if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

Once it is recognised[21] that the right embodied in the first sentence of s 22(1) cannot be separated from the entitlement to regulate by law the practise of a trade, occupation or profession, in terms of the second sentence it is I think apparent that the nature of the right embodied in s 22 and the nature of the duties imposed by the right are not appropriate to be rendered applicable to natural or juristic persons in the context of contractual relationships. To the extent that it was argued or held in the cases to which I have referred that s 22 had direct application to restraint of trade agreements I must respectfully disagree.

[31] That does not, however, mean that s 22 has no bearing upon the enforceability of restraint of trade agreements. That it does is apparent from the following further passage in the judgment of Ngcobo J where he goes on to deal with public policy under the Constitution. The passage reads as follows:-

---

21 As the Constitutional Court has done in *Affordable Medicines Trust and others v Minister of Health of the Republic of South Africa and others* 2006 (3) SA 247 (CC), para. [63] at 275.

[27] What then is the proper approach of constitutional challenges to contractual terms where both parties are private parties? Different considerations may apply to certain contracts where the State is a party. This does not arise in this case.

[28] Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone of that democracy': 'it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'.

[29] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

[30] In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as

> evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."

[32] In summary the approach of the Constitutional Court is that contractual obligations are enforceable unless they are contrary to public policy, which is to be discerned from the values embodied in the Constitution and in particular in the Bill of Rights. Where the enforcement of a contractual provision would be unreasonable and unfair in the light of those fundamental values it will be contrary to public policy to enforce the contract or the contractual term in question. This does not, however, mean that compliance with contractual obligations freely and voluntarily undertaken is irrelevant to the enquiry into public policy. Far from it. As Ngcobo J said[22]:-

> "On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity."

---

22 Para. [57] at 341B-C

[33] It appears with respect that Davis J overlooked this portion of Ngcobo J's judgment when he suggested in *Advtech*[23] that:-

> "The uncritical use of the concept "contractual autonomy as part of freedom in forming the constitutional value of dignity" may be incongruent with the principles contained in the development clauses in the Constitution (section 8 and section 39(2)), the objective of which is to transform existing concepts of law where the content of such concepts is at war with the fundamental values of the Constitution.
>
> The use of the phrase "contractual autonomy" wrenched from any examination of the concept of existing power relationships is, in my view, reflective of a libertarian view of the world, clearly evident in *Magna Alloys* ... and which is in conflict with the spirit of the Constitution read as a whole which promotes an entirely different vision of our society."

To the extent that the learned judge was suggesting that contractual autonomy is not in appropriate circumstances reflective of freedom and gives effect to the central constitutional values of freedom and dignity that approach is contrary to the views of both the Constitutional Court and the Supreme Court of Appeal. To the extent that he was suggesting that contractual autonomy is not a shibboleth incapable of examination when issues of public policy arise that is not a novel proposition. It had been held to be a relevant factor in regard to restraints of trade in our pre-constitutional jurisprudence[24] and was expressly recognised by Ngcobo J in the following paragraph in his judgment:-

---

23 Para. [30]

24 *Reeves and another v Marfield Insurance Brokers CC and another, supra,* at 776E-F

> [87] In his dissenting judgment Sachs J deals with a range of issues and concerns, including standard-form contracts, actual and implied consensus, public policy, the significance of small print in written contracts and the power imbalance between insurers supported by legal expertise and people without expertise. I share many of his concerns and sentiments. *Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. But the general rule that agreements must be honoured cannot apply to immoral agreements that violate public policy. As indicated above, courts have recognised this and our Constitution reinforces it. Furthermore, the application of *pacta sunt servanda* often raises the question whether a purported agreement or pact is indeed a real one, in other words whether true consensus was reached. Therefore the relevance of power imbalances between contracting parties and the question whether true consensus could for that matter ever be reached, have often been emphasised."

This is an important point. I know of no developed system of jurisprudence that does not recognise the need, subject to some exceptions such as fraud, misrepresentation, public policy or the like, to enforce contractual obligations. Problems that may arise from the disparate power relationships of the parties are dealt with in a variety of ways and particularly by legislation.[25] However as a general proposition most societies regard the enforcement of contractual obligations as having a value in itself. This is hardly surprising as recent studies in the field of economics have recognised that economic development is closely linked to the rule of law - one of our fundamental constitutional principles - one of the aspects of which is seen as manifested in free and independent courts that

---

25 The judgment of Sachs J in *Barkhuizen v Napier, supra,* is instructive in this regard.

among other things enforce contractual obligations.

[34] Lastly it is by means clear what Davis J means (and seeks to condemn) by his reference to "a libertarian view of the world". Philosophically speaking libertarianism assets the freedom of the will and is contrasted with determinism.[26] As our Constitution proclaims in s 1(a) thereof that South Africa is one sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, libertarianism seems consonant with the underlying spirit of the Constitution and broadly in tune with the freedoms protected under the Bill of Rights. Political libertarianism is understood as a theory grounded in the right of freedom of choice, but its manifestations are diverse as reflected in the concepts of "left-libertarianism" and "right-wing libertarianism".[27] In view of that it seems to me, with respect, unhelpful to tar the authoritative judgments of our courts with a pejorative label, the nature of which is imprecise and which is capable of misleading the unwary. I merely note that both the values that underpin contractual autonomy and the need for courts to be aware of the power relationships reflected in a particular contract merely reflect features that have long been in the forefront of the approach of courts to the assessment of questions of public policy. The reference to the influence of community on contracts is obscure as contracts are concluded by people and entities not communities. Surely this is only relevant where the community values reflected in the Constitution and underpinning our notions of public policy lead courts to strike down contracts on the grounds that they are

---

26 The Oxford Companion to Philosophy (2nd Ed.), *sv "libertarianism"*, p516

27 The Oxford Companion to Philosophy, *supra*, *sv* "libertarianism, left-" and libertarianism, political", pp 516-7.

oppressive, unreasonable or unconscionable and contrary to public policy?[28]

[35] My broader overall concern with these passages in the judgment of Davis J is that underpinning them and his ultimate conclusion that:-

> "There is, therefore, a powerful and important argument which should prompt courts to grasp the nettle and either through the prism of section 8 or section 39(2) revisit the entire issue of restraint of trade within the context which I have outlined."

appears to be a view that restraint of trade agreements justify special and separate treatment within our law of contract and that the existing state of our law requires reconsideration. The further impression left by all this is that there is in principle an objection to such agreements. If that is a correct reading then on both grounds I am unable to share the learned judge's views. The importance of the decision in *Magna Alloys* is that it removed restraint of trade agreements from being a special and isolated type of contract looked upon with particular approbation by the courts and placed them squarely within the mainstream of the law of contract as agreements concluded and enforceable in the ordinary course, but unenforceable where their enforcement would be in conflict with public policy. Bearing in mind the range of circumstances which may give rise to the conclusion of a restraint of trade agreement, spanning the spectrum from the hugely

---

28 In *Mort N.O. v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 475D-E the same learned judge, after an analysis of the concept of good faith in contract in the light of the Constitution reached the conclusion that oppressive, unreasonable or unconscionable contracts can fall foul of the values of the Constitution. Equally it should be noted that even in the pre-constitutional order contracts that were oppressive or unconscionable could be rendered unenforceable on the grounds of public policy. It seems in the light of *Barkhuizen v Napier, supra,* that unfairness, at least where it is extreme, may render contracts unenforceable on grounds of public policy.

successful business person who sells the business that he or she has built up for massive amounts of money and is required to sign a restraint of trade agreement in order that the purchaser may protect its investment to relatively humble employees who may be required to sign such an agreement as a matter of rote and possibly *in terrorem* to deter them from seeking a more advantageous position, it is more appropriate that like other types of contract their enforceability should depend, not on an arbitrary classification as a type of contract not favoured by the law, but by the flexible yardstick which public policy provides. Secondly, there seems to me to be no legitimate basis for treating restraint of trade agreements as warranting a particularly jaundiced approach by the courts. We have a developed jurisprudence designed to ensure fairness in the competitive arena of trade and business. Thus our law prohibits passing off and other forms of unfair competition such as the misappropriation of another's designs,[29] the appropriation of information gathered from the public domain by another for commercial purposes;[30] the use of a get-up misappropriated before it could be placed in the public domain;[31] misrepresentations regarding one's own or a competitor's business[32] and the use by a competitor of confidential information. The person who sells a business and then seeks to make use of the trade connection that he sold will be interdicted from doing so even in the absence of a restraint of trade agreement.[33] The employee

---

29 *Schultz v Butt* 1986 (3) SA 667 (A).

30 *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C).

31 *Stellenbosch Wine Trust Ltd and Another v Oude Meester Group Ltd ; Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd and Another* 1972 (3) SA 152 (C)

32 *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A)

33 *A Becker & Co (Pty) Ltd v Becker and Others* 1981 (3) SA 406 (A).

who seeks to turn their employer's confidential information, trade secrets or trade or customer connection to their own account for the benefit of themselves or a competitor of their employer acts in a no less reprehensible fashion and I can think of no good reason why our law should not afford a remedy to a business that seeks protection against this type of unfair competition. Where the business has sought to protect itself by securing a restraint of trade undertaking from the employee there is no reason for the courts or the law to view this with disfavour. It is only where the bounds of public policy are overstepped that the court will withhold its assistance.

[36] Finally, reverting to legal principle, one of the perennial problems in the field of restraint of trade agreements has been that of over-breadth. At the stage when the contract is concluded it is often difficult to foresee with any degree of exactness which interests of the employer will warrant protection after the termination of the employment and what actions by the employee may constitute an infringement of those interests. This is always a difficult question when one is dealing with an ongoing relationship, such as employment, in the context of a business which is constrained by market forces to adapt its operations to meet current exigencies. Both the employment relationship and the nature of the business tend to change over time. In order to accommodate this the usual result is that those who draft restraint of trade undertakings tend to err on the side of generosity. That is compounded by their endeavours to foresee and forestall the endeavours that former employees may adopt to circumvent restraint undertakings.[34] In the result, when the time for enforcement arose, whilst the conduct of the former employee might fall squarely within the terms of the restraint, its breadth would provide

---

34 See *Gilford Motor Co Limited v Horne* [1933] Ch 935 (CA); *Le'Bergo Fashions CC v Lee and another* 1998 (2) SA 608 (C).

fertile ground for an argument that it was unreasonable and hence unenforceable.

[37] In order to deal to some extent with this situation the courts in South Africa, following English decisions, adapted the doctrine of severability to the particular situation of a restraint of trade undertaking.[35] In summary the rules that were evolved were the following. In order for the unreasonable and therefore unenforceable portion of the restraint to be excised it had to constitute a distinct portion of the undertaking. The apparent intention of the parties needed to be that the excised portion was sufficiently distinct from the other portions of their agreement that it could be inferred that in its absence they would nonetheless have concluded the contract as truncated. The starting point for any consideration of severability was the notional "blue pencil" test whereunder the offending portion of the agreement had to be capable of grammatical excision leaving the balance as an independent whole bearing the same meaning as it had borne prior to the excision.

[38] The irrationality of this test was recognised by Didcott J in *Roffey v Catterall, Edwards and Goudré (Pty) Limited*[36]

"Thus tested, a covenant is severable when, for instance, it

---

35 There were divergent views on the extent to which the ordinary common law rules regarding severability and severability in the context of restraint of trade agreements overlapped. Schreiner JA in *Baines Motors v Peak* 1955 (1) SA 534 (A) at 541E-F thought that there was an analogy between the two situations and a "rough correspondence" of approach. By contrast F H Grosskopf JA in *Bob's Shoe Centre v Henneway's Freight Service (Pty) Limited* 1995 (2) SA 421 (A) at 429B-D thought that little assistance could be derived from cases dealing with severability in contracts in restraint of trade when dealing with severability in a different context.

36 . 1977 (4) SA 494 (N) at 507. This judgment is the origin of the ferment in our law that led to the decision in *Magna Alloys.*

> provides a restraint in Durban and also throughout the rest of Natal, but not when it more simply imposes one throughout Natal; and the reason for this odd distinction is that, while in the former case the reference to the rest of Natal can be deleted by the notional blue pencil and the remainder of the parties' agreement left intact, that cannot be done in the latter case and, because the court is powerless to redraft the contract, nor can anything else. Its undue emphasis on form at the expense of substance can result in the entire destruction of restraints eminently reasonable for most of their area. This has been described as the risk covenantees must run if they are greedy. But that imputes to them a highly developed ability to prophesy what a Court would be likely to regard as reasonable in the event of litigation years later."

[39] The point made by Didcott J was shortly afterwards taken up by Botha J in *National Chemsearch (SA)(Pty) Limited v Borrowman and another*[37] where he said of th existing rules:-

> "...[I]f a restraint is so worded that according to its terms it can become operative in eventuality A and in eventuality B, and it appears that it will operate reasonably in eventuality A but unreasonably in eventuality B, then, even although it is eventuality A that actually materialises, it is still unenforceable. I can perceive no principles of logic or justice in such an approach. In my view it loses sight, once again, of what seems to me to be the decisive question in cases of this kind, namely the dictates of public policy as at the time when the Court is asked to enforce the restraint. Why, if the fact before the court is A, and an order to enforce the restraint on that basis would not be contrary to public policy, should the court refuse to enforce it, simply because the agreement also happened to provide for eventuality B, which has turned out to be purely academic? In cases of restraint of trade public policy requires the Court to consider the effect of the order it

---

37 1979 (3) SA 1092 (T) at 1108D-G

> is asked to issue, but to my mind neither public policy, nor any other principle of law, requires the Court to ignore the concrete facts before it and to pronounce *in abstracto* on the validity of the restraint clause as at the time of its creation, speculating in the process upon all sorts of possibilities which it knows never eventuated."

[40] In is impossible in the space of a judgment and subject to the constraints of time under which this judgment has been prepared to do justice to the reasoning and analysis of Botha J and the reader is commended to a consideration of the judgment in its entirety. In brief the court was faced with two clauses embodying the restraint. Both on their terms were unreasonable: the first as to its extent and the second as a restraint against competition *per se*. The court was thus confronted with the position that the two clauses when viewed disjunctively had not been shown to contain reasonable restraints. However the appellant had succeeded in combining the two clauses by taking the good and leaving the bad out of each and distilling from them together a reasonable restraint which it asked the court to enforce. The question was whether this could be done.

[41] In answering this question Botha J pointed out that our courts had historically followed English precedents on this topic and in criticising that approach cited with approval[38] a passage from *Corbin on Contracts* which is worth repeating:-

> "An agreement restricting competition may be perfectly reasonable as to a part of the territory included within the restriction but unreasonable as to the rest. Will the courts enforce such an agreement in part while holding the remainder invalid? It renders no service to say that the

---

38 At 1112H-1113C

> answer depends upon whether or not the contract is 'divisible'. 'Divisibility' is a term that has no general and invariable definition; instead the term varies so much with the subject matter involved and the purposes in view that its use either as an aid to decision or in the statement of results tends to befog the real issue.
>
> With respect to partial illegality, the real issue is whether partial enforcement is possible without injury to the public and without injustice to the parties themselves. It is believed that such enforcement is quite possible in the great majority of cases."

The editors of *Corbin* go on to point out that it is a fallacy to suggest that partial enforcement of a restraint not severable in accordance with the blue pencil test would amount to making a new contract for the parties, whilst severability by the use of the blue pencil would not[39]

[42] Two further passages from *Corbin* cited by Botha J[40] are worthy of repetition. They are the following:-

> "In very many cases the courts have held the whole contract to be illegal and void where the restraint imposed was in excess of what was reasonable and the terms of the agreement indicated no line of division that could be marked with a "blue pencil". In the best considered modern cases, however, the court has decreed enforcement as against a defendant whose breaches occurred within an area in which restriction would clearly be reasonable, even though the terms of the agreement imposed a larger and unreasonable restraint."

---

39 This is a point also made by Botha J and in the passage I quote from the judgment in *Magna Alloys.*

40 At 1113D-G

and further on:-

> "What has been said above with respect to 'divisibility' of territory included within the restriction is equally applicable where the restriction is excessive in matters other than extent of time or space. Thus, when a baker sells his business and goodwill to a large department store and promises not to compete in any way with the business carried on by the buyer, the restraint is excessive and illegal. But the fact that in the restraining promise no division is suggested between the bakery business and the many other departments run by the buyer, such as furniture, dress goods, or hardware, does not prevent a court from making such a division. The living facts make as clean a division between bread and furniture as do the two words themselves; and the court should enforce the baker's promise not to compete in the bakery line so far as the business sold by him had established customers and goodwill, while refusing to enforce the promise not to compete in furniture and hardware."

[43] The citation of two further passages from the judgment of Botha J completes this summary of his judgment. Firstly he rejected the argument that partial enforcement of a restraint undertaking that is as a whole too wide amounts to making an agreement for the parties. He said:-

> "The root of the problem, it seems to me, lies in the avowed refusal of the English courts to make an agreement for the parties that they themselves did not make, or to "re-write" their agreement for them. .... From the point of view of sound jurisprudence I do not see why this consideration should enter into the picture at all. If a restraint has been couched in unreasonably wide terms, but a court is prepared to enforce it to the extent that it is reasonable, there is no question, to my mind, of the court making a new agreement for the parties. I have tried already to postulate the theory that the dictates of

> public policy in restraint of trade cases relate directly to the effect of the Court's order, and not primarily to the terms upon which the parties happened to have agreed. If this is the correct approach, as I think it is, the present formal and artificial rules as to severability may become largely academic."

[44] In the result Botha J rejected the traditional approach as being artificial, ill-defined and internally inconsistent and resting upon an unsound foundation. He added that if the application of those rules to the facts of the case before him were to result in the appellant being denied any relief at all this would constitute a substantial injustice as between the appellant and the respondents. It seems to me that this is precisely what would occur in this case were I to accede to Mr. Choudree's submission. There can be no doubt whatsoever and is conceded that what Mr. Pillay proposes to do falls squarely within the conduct that is prohibited by the restraint undertaking. It involves an infringement on the protectable interests of the Applicant and plainly has the potential to cause it substantial harm. To refuse to enforce a restraint against that conduct on the grounds of provisions of the restraint undertaking that have absolutely nothing to do with this conduct and in respect of which no relief is sought seems to me unjust.

[45] In the result Botha J concluded that the proper approach to the enforcement of restraint of trade undertakings should be the following[41]:-

> "...[W]hen a restraint according to its terms as agreed upon is found to be unreasonably wide in its scope of operation, the Court can, in a proper case, enforce the restraint partially, by issuing an order incorporating the addition of such limiting words to the restraint as agreed upon as are appropriate to

---

41 At 1116D-G

> restrict its scope of operation to what is found to be reasonable.
>
> I have said "in a proper case", because it is clear that the Court's power of partial enforcement in the manner indicated must be subject to limitations. As I do not profess to be able to envisage, even approximately, the different situations that can arise in which the Court's power may be invoked I shall make no attempt to circumscribe in general terms the circumstances under which the Court might or might not be prepared to exercise such power. I shall simply mention the features of the present case which have occurred to me as being circumstances making it a proper case in which to exercise the power referred to."

The factors to which the learned judge then referred were firstly that the form of order sought was narrower than the restraint clauses as agreed upon; secondly that the words that needed to be inserted did not constitute a radical departure from the terms of the restraint and thirdly, although the restraints when viewed as a whole were extensive and covered a multitude of forms of conduct sought to be prevented, there was no reason to believe that they were calculated to be unduly oppressive towards the Respondent or were designed to operate *in terrorem*.

[46] In *Magna Alloys* not only did the Court hold that the onus of proving that a restraint was unreasonable rested upon the party bound by the restraint, but in regard to the proper approach to the enforceability of a restraint its judgment can only be read as an endorsement of the views of Botha J. In particular the Court expressly endorsed the approach of Botha J that in general the enforceability of a restraint of trade agreement in the light of public policy is to be considered at the time at which enforcement is sought[42] and it approved the notion of the Court

---

42 There is a reservation in certain circumstances in a passage at 895H-I, but that

having a general discretionary power to enforce a restraint partially in accordance with what it considers to be reasonable as a matter of substance and without the need to resort to formal rules relating to severability. Like Botha J the Court rejected the proposition that this involved a rewriting of the agreement as opposed to the Court determining in accordance with principles of public policy when it should lend its aid to the enforcement of all or part of a restraint of trade agreement. The relevant passage in the judgment reads as follows:-

> "Aanvaarding van die sienswyse dat wanneer 'n Hof gevra word om 'n beperkende bepaling af the dwing, hy ag slaan op omstandighede wat heers wanneer hy gevra word om die beperking af the dwing, bring myns insiens verder logies mee dat die Hof op daardie tydstip moet beslis of hy gaan beveel dat die geheel, of slegs 'n gedeelte. of geen gedeelte, van die beperking afgedwing behoort the word. Dit sou miskien gesê kan word dat die afdwing van enigiets minder as die geheel van die beperking waarop die partye oorspronklik ooreengekom het, daarop neerkom dat die Hof se bevel op 'n wysiging van die ooreenkoms wat die partye aangegaan het, neerkom en in 'n sekere sin is dit natuurlik so. Hou 'n mens egter in gedagte dat die vraag waarom dit gaan die afdwingbaarheid al dan nie van die beperkende bepaling is en, verder, dat oorwegings van die openbare belang bepaal of so 'n beperking afdwingbaar behoort the wees, dan is dit myns insiens logies en realisties om die houding in the neem dat indien die afdwing van enige gedeelte van 'n beperking op die relevante tydstip vir die gemeenskap skadelik sou wees, die Hof by magte moet wees om the beveel dat daardie gedeelte nie afgedwing kan word nie. Hierdie gedagte dat die Hof nie daartoe beperk moet wees om the kan sê dat 'n beperking in sy geheel of afdwingbaar of onafdwingbaar is nie, maar dat hy ook by magte moet wees om in 'n gepaste geval, in die lig van die vereistes van die openbare belang, the kan sê dat 'n beperking slegs ten dele afdwingbaar of onafdwingbaar is, is

---

does not effect the general proposition.

> reeds in sekere onlangse beslissings uitgespreek, en ek stem daarmee saam.".[43]

[47] I have deliberately analysed at some length the judgment in *National Chemsearch v Borrowman* because it seems to me that the principles adopted in that judgment and endorsed in *Magna Alloys* and the line of cases in the Supreme Court of Appeal that now extends to *Reddy v Siemens Telecommunications*, have not always been appreciated or applied. Thus for example, Professor Christie in his work on the law of contract[44] refers to one or two cases in provincial divisions from which he infers that the judgment of Botha J "is only mildly revolutionary". A fair reading of the judgment makes it plain that this description is inaccurate. The judgment transformed the approach of our Courts to the enforcement of restraint of trade agreements. As Botha J himself recognised it rendered the existing rules as to severability on the context of a restraint of trade agreement academic. It should have reinforced the view that in the field of restraint of trade agreements the ordinary contractual principles of severability applied in relation to provisions in a contract that are illegal or void for vagueness, have no role to play.

[48] With respect, it seems to me that it is in this area that Davis J erred in *Advtech*. In that case, as in this one, the restraint of trade agreement was widely drawn. However, the conduct complained of was that the employee had gone to work for a competitor in the same town servicing the same clients.[45] In those

---

43 At 896A-E.

44 The Law of Contract in South Africa, 5th edition, 368

45 It is irrelevant for the purposes of this judgment to consider the other grounds upon which Davis J held that the application ought to fail namely that the applicant had no protectable interest. My only concern is the reliance placed upon his judgment in this case for the

circumstances the order being sought would have been directed at the employment that the Respondent was undertaking. However, the Court held that "this is a case where the Court is being asked to narrow the very essence of the restraint clause". Accordingly, so it held, the restraint clause could only be saved by way of an application of the severability clause, which was in its terms similar to the clause in the agreement before me and to that which was considered by Smalberger JA in *Sasfin (Pty) Limited v Beukes*[46]. On the basis of that decision Davis J held that the agreement as a whole was unenforceable "for being over-broad, too wide in scope". He condemned the attempt of the Applicant to seek under the guise of a severability clause to request the Court "to develop what is in effect, an entirely different contract."

[49] The conclusions reached by Davis J were expressed in the following terms:-

> [45] ... on what conceivable basis can it be concluded that an employee should be compelled to sign an agreement so wide, so vast in scope and application, and be compelled to be restrained from working on so vague a basis, namely that a Court will take care of the width of the agreement and read it down so as to render it reasonable? This is surely incongruent with the principles of transparency and fairness which are inherent in our constitutional framework and part of the test of proportionality.
>
> [46] Given the nature of the restraint clause and the need for courts to balance the contractual provisions against the rights to be a productive worker, a restraint clause

---

proposition that because of the over-breadth of the restraint undertaking it is unenforceable as a whole.

46 1989 (1) SA 1 (A) at 16G-17A.

> should be drafted to reflect this balance. To the extent the geography or time limits are excessively stated it may well be possible to read the clause down. By contrast, in this case, every component of the clause would have to be simultaneously restricted in order to render it valid."

[50] I regret to say that I find myself in profound disagreement with these conclusions which seem to me to be both contrary to established and binding precedent and to show a lack of appreciation for the commercial realities that underpin the drafting of restraint of trade agreements. As regards the authorities I have dealt with those above. They show in my view that it is inappropriate to have resort to general principles of severability in approaching a restraint of trade agreement that is too widely drawn but which is sought to be enforced only in respect of conduct that manifestly falls within its terms and in respect of which the enforcement would be fair and reasonable in accordance with the norms of public policy derived from the Constitution. In my view it forms no part of the analysis in that situation to ask whether the agreement as a whole is so broad that it will be unenforceable if enforcement is sought of its terms in their entirety. The mere fact that only limited relief is being sought will ordinarily indicate that this is the case. The proper approach in my view is for the Court to ask itself whether the conduct that the Applicant seeks to restrain by way of an interdict is conduct that falls within the terms of the restraint agreement and from which the former employee agreed to abstain. If the answer to that question is in the affirmative the court then moves to an analysis of whether it should, in accordance with the principles of public policy, enforce the agreement to that extent by granting relief to the Applicant. It has no need in those circumstances to have regard to those portions of the agreement that are more extensive than the relief actually being sought.

[51] It is also wrong, I believe, for Courts reflexively to criticise those who draft restraint of trade agreements in very broad terms for doing so. I have already mentioned that both the employment relationship and the conduct of business is dynamic and ever- changing. It is wholly undesirable and inconvenient to both the employer and the employee to have to engage in an on-going and relatively continuous process of renegotiating the terms of a restraint undertaking in order to accommodate new elements that enter into their relationship, whether by way of the acquisition of additional confidential information or because the employee is promoted to a higher position in the firm or because the nature of the employer's business changes or it chooses to conduct its business through different business structures, for example, by the creation of subsidiaries or the closure of existing subsidiaries and bringing their business back within the fold of the mother company. Equally it can never be foreseen whether an employee will simply resign to take up similar employment with a competitor or choose to establish his or her own competitive business or decide to market their skills as a consultant generally to other participants in the same industry. Every possibility must be covered and this result in great detail and unfortunate prolixity. In drafting account must be taken of an extensive body of case law that is by no means consistent. Accordingly they should not be blamed, when the courts said under the old dispensation that an intention that different portions of an over-broad agreement needed to stand on their own if severability was to operate, for inserting a clause proclaiming that fact as clearly and comprehensively as possible. Nor should they be criticised for including a string of acknowledgments of dubious value[47] when the reported cases suggest that nonetheless there may be some value in the party

---

47 *David Wuhl (Pty) Ltd and others v Badler and another* 1984 (3) SA 427 (W) at 434G-I; *Bonnet and others v Schofield* 1989 (2) SA 156 (D) at 160B-C.

sought to be restrained having made such acknowledgements. After all the task of the draftsman is to secure as best they can that their client will enjoy protection at the end of the day. Lastly, as Didcott J pointed out the ability of lawyers drafting agreements to predict with accuracy what a court will in the future regard as fair and reasonable in the light of facts that are not known at the time the agreement is drafted is limited. Against the background of those practical realities there seems to me nothing wrong with a restraint of trade agreement that seeks to cover all existing and future eventualities, provided only that its terms do not give rise to the inference mentioned by Botha J that it was intended to operate *in terrorem*. I think it quite impractical to suggest that restraint agreements be drafted on the basis of greater accuracy and precision. That demands a prescience that is rarely present in life. It is significant that in the present case there is no complaint by Mr. Pillay that he did not understand the scope and ambit of the restraint imposed upon him or that it prohibited him from taking up employment with a competitor.

[52] I am mindful of the fact that in one case a restraint agreement drafted in broad terms, as was the one before me, was described as having been "maliciously and skilfully drawn in order to be as wide as possible and to cover as many situations as possible."[48] However, unless there is something in the circumstances in which the restraint was concluded or that emerges expressly from the language to justify the inference that its terms are dictated by some improper purpose, it seems to me wrong to condemn a broadly phrased agreement as malicious. Courts do not lightly draw such an inference, particularly where there is an entirely plausible alternative, namely that the draftsman was seeking to be as prescient as possible and to cover all potential situations in which the employer's interests might need

---

48 *Freight Bureau (Pty) Limited v Kruger* 1979 (4) SA 337 (W) at 339E.

protection against the possible conduct of the particular employee. It would also be relevant in this regard to consider whether the restraint agreement has been drafted generally for use in the employer's business and for signature by employees at various different levels within the business. That fact will go far to indicating that there is no improper intention underlying the extensive terms of the agreement.

[53] Lastly, I am aware that there are a number of cases in which courts have relied upon the following statement by Botha J in *National Chemsearch v Borrowman*[49]*:-*

> "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."

in order to refuse relief under broadly drawn restraint of trade agreements[50] It is unnecessary for me to examine those cases in any detail as the conclusion of the judge in each one was dependent on its own facts. I would simply say that Botha J made this remark in the context of the need to add words to the terms of the restraint before him in order to limit the scope of its operation. When the Court in *Sunshine Records v Frohling, supra*, refused to undertake a similar exercise it did so in the context that what was proposed would have involved the elimination of very nearly 50% of the clauses in a contract between the members of a pop group and its prospective manager. The result of the excision would have been to leave

---

49 At 1117A-B

50 The cases are collected in *Christie, supra,* p368 footnote 183.

a husk of the original contract in which the relationships between the parties would have been wholly different. Furthermore the case was one in which the plaintiff was claiming damages on the basis of the repudiation by the members of the pop group of their obligations under the agreement as a whole. That is a very different situation from one where an erstwhile employer seeks to interdict a former employee from engaging in conduct that falls squarely within the terms of a restraint agreement without regard to broader conduct of a nature that the employee has not undertaken and which is wholly irrelevant to the application before the Court.[51]

[54] It follows that for those reasons I find myself in respectful disagreement with the views of Davis J in *Advtech* and with any views to similar effect expressed in the cases referred to in footnote 50 of this judgment. In doing so I do not necessarily criticise the results of those cases many of which turned upon the absence of any protectable interest vested in the applicant. That is an entirely different question. I confine my remarks to the question whether a restraint of trade agreement that is too broad in its terms can on those grounds be held to be contrary to public policy and unenforceable in circumstances where, within the four corners of the agreement, there are restraints clearly spelt out which are reasonable in nature and which are the only restraints that the court is asked to enforce. In my judgment in that situation the court should in accordance with binding precedent grant relief to the applicant. There is no basis in law for it refusing to do so by holding the entire agreement to be unenforceable on the grounds of public policy. Such a finding is

---

51 Thus for example I fail to see the relevance of the possibility that the restraint in *Coin Sekerheidsgroep (Edms) Bpk v Kruger en 'n ander* 1993 (3) SA 564 (T) was capable of being construed as preventing the respondent from rejoining the police force or serving in the army, when the complaint was that he was working for a competitor of the applicant in the same East Rand area where he had been employed by the applicant.

in my view contrary to the law as first articulated by Botha J in *National Chemsearch v Borrowman, supra* and endorsed by the Appellate Division (as it then was) in *Magna Alloys* and by the Supreme Court of Appeal in a number of subsequent cases, of which *Reddy v Siemens Telecommunications* is the most recent. It is not appropriate in those circumstances to seek to apply the principles of severability applicable in other contractual situations as laid down in cases such as *Sasfin v Beukes, supra.*

[55] In the result the Applicant is entitled to confirmation of the rule although on terms narrower than originally formulated. Although no argument was addressed to me in the course of the hearing on the term of the restraint I had some concern about this in the course of preparing this judgment and raised the matter with leading counsel for the parties. It had been said, as noted already, that two years is the outer limit in a case of this type. On consideration I believe that it is simply too long and Mr van Niekerk reminded me that he had said as much in the course of the application for interim relief. In my view the period of the restraint should not be any longer than is necessary to enable the Applicant to place a new salesperson in the field, enable them to become acquainted with the products and the customers and to make it plain to the latter that they are now the person with whom to deal on behalf of the Applicant. Having regard to the nature of the products, the type of customer to whom they are sold and the number of customers who will need to be contacted I think that a period of 8 months is sufficient for those purposes. This was not seriously disputed by Mr van Niekerk and was supported by Mr Sewpal in the absence of his leader, save that he urged a period of 3 to 6 months. As the Applicant has no doubt already started to put these matters in train that period should commence from 1 March 2008 when Mr Pillay's resignation took effect. Accordingly the order I make is as follows:-

(1) The First Respondent is interdicted and restrained for a period of 8 months from 1 March 2008, from taking up or continuing with his employment with the Second Respondent in KwaZulu-Natal.

(2) The First Respondent is interdicted and restrained for a period of 8 months from 1 March 2008 from contacting or soliciting, drawing away or dealing with, canvassing or enticing or attempting to draw away, deal with, canvass or entice any of the Applicant's customers, that were customers of the Applicant as at the date of termination of his employment with the Applicant with a view to causing them to terminate their relationship with the Applicant.

(3) The First Respondent is to pay the costs of this application, such costs to include those consequent upon the employment of two counsel.

DATE OF HEARING: 20 March 2008

DATE OF JUDGMENT: 27 March 2008

COUNSEL FOR THE APPLICANT: Mr G O VAN NIEKERK SC (with him Mr M E STEWART)

ATTORNEY FOR THE APPLICANT: BICCARI, BOLLO & MARIANO INC

COUNSEL FOR THE FIRST RESPONDENT: Mr R B G CHOUDREE SC (with him Mr M SEWPAL)

ATTORNEY FOR THE FIRST RESPONDENT: NAIDOO AND ASSOCIATES

SECOND RESPONDENT: No appearance.