IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: 8325/2016

In the matter between:

FRIDGE FOODS GROUP (PTY) LTD Applicant

And

GABRI VAN KRADENBURG First Respondent
N1 RESTAURANT SUPPLIERS MEATS (PTY) LTD Second Respondent
T/A N1 MEATS

JUDGMENT: 14 October 2016

DAVIS J

Introduction

[1] Applicant seeks to enforce the provisions of a contractual restraint of trade contained in an employment contract together with a separate restraint of trade agreement that first respondent concluded with applicant, who was his erstwhile employer. Second respondent, which applicant alleges trades in competition with the applicant has been joined in this application in that it is the current employer of first respondent. The relief sought by applicant is in the form of a final interdict such that until 31 March 2017 first respondent is sought to be restrained from continuing employment with the second respondent and further restrained:

> '…from directly or indirectly carrying on or being interested in or engaged in or being concerned with or employed by any entity in the Western Cape, which is in any

manner involved in the distribution and/or wholesale of foodstuffs or which competes in any manner with the applicant, including but not limited to the second respondent.'

[2] Applicant seeks further relief in terms of the application, namely that first respondent should be restrained from directly or indirectly in any capacity or in any part of the Eastern Cape or Western Cape from:

1. soliciting orders from customers of the applicant; or
2. canvassing business from customers of the applicant, or
3. sell or otherwise supply any services to any customer of the applicant; or
4. render any services to any customer of the applicant.

Factual Matrix

[3] Applicant is a distributor of wholesale and other food stuffs in the food service industry and has been in this business for more than 40 years. I shall return to the details therefore presently.

[4] First respondent was employed by applicant in July 2009 as a branch manager in Cape Town. At the time of the termination of his employment on 22 March 2016, following a one month resignation and notice period, first respondent headed applicant's Western Cape regional operations as its regional manager, which was its most senior employee of in the Western Cape.

[5] On 27 July 2009 applicant entered into a contract of employment with the first respondent. Of relevance is clause 15 of the contract which reads thus:

'CONFIDENTIAL AND ENTICEMENT

The employee hereby undertakes:

15.1 that he/she shall not either during or after the termination of his/her employment with the company, divulge or communicate any of its secrets or other confidential information, which he/she may receive or obtain in relation to the company's affairs to any third person.

15.2 That he/she shall not for a period of 3(three) years after termination of his/her employment, solicit or entice any of the company's employees or persuade them to leave the company's employ;

15.3 that he/she shall not entice or attempt to entice any of the company's customers for 3(three) years after termination of his/her employment.

15.4 that he/she may not take up employment with any company which distributes or wholesales foodstuffs in the provinces of the Eastern Cape and Western Cape, for a period of 1 year after termination of his /her employment with the Fridge Foods Group.'

[6] On the same day, a further agreement regulating a restraint of trade was entered into between the parties. The relevant provisions provide thus:

'RESTRAINT AS TO EMPLOYMENT

Without derogating from the obligations of the employee under the employment agreement entered into with the company, the employee shall not during the course of this employment with the company or during the period directly or indirectly carry on or be interested in or engaged in or be concerned with or employed by any entity in any capacity.

3. RESTRAINT AS TO EMPLOYEES

The employee undertakes that neither he nor any entity in which he is directly or indirectly interested in or employed by during the period shall directly or indirectly:

1. encourage or entice or incite or persuade or induce any employee of the company to terminate his employment with the company; or
2. furnish information or advice to any employee then employed by the company or to any prospective employer of such employee or use any other means which are directly or indirectly designed, or in the ordinary course of events calculated, to result in such employee terminating his employment with the company and/or becoming employed by or directly or indirectly in any way interested in or associated with any entity.

5. RESTRAINT AS TO CUSTOMERS

The employee undertakes that neither he nor any entity in which he is directly or indirectly interested or concerned or by which he is employed will during the period directly or indirectly in any capacity in any part of the territory:

1. solicit orders from customers of the company; or
2. canvass business from customers of the company; or
3. sell or otherwise supply any services to any customer of the company; or
4. render any services to any customer of the company.'

In limine **objection**

[7] First respondent raised an objection *in limine* to any order which the court might grant in favour of the applicant. Mr Ferreira, on behalf of the respondents, contended that first respondent's employment with the applicant had terminated on 26 March 2016. It was only two months later that applicant launched the present application which was served on respondents on 17 May 2016: Mr Ferreira noted that the applicant was aware a week before the first respondent left its employment that he was to be employed by second respondent. Nonetheless, it delayed the launch of the application. The notice of motion did not contain a specific date for

set down in the fast lane of the High Court as would have been expected in a case of this kind. Applicant then sought a further postponement of the application, the first date having been agreed upon being 5 August 2016. The case was finally heard on 13 September 2016 which was some six months after the termination of first respondent's employment.

[8] Mr Ferreira contended that, given the lapse of time to restrain respondent, it would now amount to a pointless exercise in that it was inconceivable that any protectable interest of applicant would exist or may have existed which now stood to be protected. At the very least, the only viable remedy at this stage would be an action for damages which was not the basis upon which this case was heard before this court.

[9] By contrast, Mr Steenkamp, on behalf of applicant, submitted that when the matter was postponed for hearing on the semi-urgent roll on 03 June 2016, this was done pursuant to an order granted by Hlophe JP by agreement between the parties. The further postponement on 05 August 2016 which was also granted by the learned Judge President followed an agreement between the parties and accordingly the delay could hardly be placed at the door of the applicant alone.

[10] Mr Steenkamp also referred to a notice delivered to respondents in terms of Rule 35 (12) of the Uniform Rules of the High Court, on 30 June 2016 in which applicant requested a number of documents referred to in the answering and confirmatory affidavits. By 12 July 2016 these documents had not yet been provided. They were only delivered on 287 July 2016 in the form of two discovery affidavits of thirteen pages to which was attached approximately 421 pages of

annexures. Hence, by this time the periods provided for in applicant's replying affidavits in terms of the order granted in June 2016 had long been exceeded. The hearing date of 23 August 2016 was therefore not realistic. It is for this reason that the dispute was postponed. Mr Steenkamp also submitted that, if the court finds that the applicant has a protectable interest, the fact that six months remained in terms of the current restraint agreement was a factor which would still favour the granting of the application.

[11] For this reason it is important then to examine the protectable interest sought to form the basis of the relief of applicant as I have outlined it.

Protectable interest

[12] The applicant alleges that it has a protectable interest for the following reasons which are set out in the founding affidavit of Mr Mark Rogers, a director of applicant:

1. The applicant enjoys a unique relationship with its customers and suppliers or to put it in Mr Rogers' words "there is a unique relationship between the applicant's sales and buying personnel and management (especially senior executive positions like first respondent held) on the one hand and its customers and supplies on the others."
2. This unique relationship, particularly with customers, "derives from and is also based on the particular service strategy, pricing, product range and negotiated trading terms with them."
3. Mr Rogers continues "it is a supplier relations, pricing and trade terms of the supplier that are of most value to the Applicant, and that enables it to

channel products to its customers at a reasonable and foreseeable mark-up."

4. Furthermore, Mr Rogers contends that first respondent gained access to applicant's confidential information regarding business methods and techniques.

[13] Bearing in mind that applicant seeks a final interdict, it is required to show that it is entitled to relief sought on the facts stated by the respondent together with the admitted facts contained in the applicant's founding affidavit. See *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 4 together with the cases cited at footnote 2 of this judgment.

[14] In his answering affidavit the first respondent raised fourteen grounds of opposition to the application. Of particular relevance to the present component of the dispute was the averment that second respondent and applicant are not in direct competition due to material differences in their respective business operations, business plans and the products they distribute. I shall return to this shortly.

[15] The information pertaining to applicant's customers in the view of first respondent, is in the public domain and generally easily available: "It is generally available in the industry and easily accessible to the public especially considering the relatively small industry within which N1 operates within the Western Cape Province." Furthermore first respondent points out that the applicant has approximately 80 suppliers of which second respondent only utilizes two, both of

whom were suppliers prior to the commencement of his employment with second respondent. All the contact details and other details and other information pertaining to suppliers of first respondent falls within the public domain and is easily accessible. Hence it is in his view not worthy of protection. The further denied that the alleged customer relationships which is alleged to exist between applicant's employees and customers is unique or that the customers have exclusively relationships with applicant's employees.

[16] In amplification of these objections first respondent said the following:

> 'FFG purchase approximately 1500 different products in large quantities from approximately 80 suppliers. FFG then stocks these products in a warehouse and thereafter sell those items to its customers at a profit. To the contrary, N1 is primarily a food manufacturing and distributing business that purchases red meat an chicken from producers and/or farmers ("Raw Products") and then reproduces the raw products by cutting, trimming, vacuum sealing and re-packing the products into N1's branded packaging material at N1's factories ("Primary Products"). N1 is in essence a wholesale butchery which supplies its primary products to the Food Service Industry ("the industry"). Through the years, N1 indeed added a limited number of finished foods which primarily consist of Frozen Chips and vegetables, in an attempt to deliver a value added service to its customers ("add-on products").'

[17] He further stated that none of applicant's customers exclusively purchased all their food stuffs from applicant. He further says that all 'role-players with the industry know exactly who all the potential consumers of such products are and it is easily ascertainable...'. customers of both applicant and second respondent 'primarily

consist of restaurants, school, hospitals, old age homes, universities and hostels … these are easily located and identified as if it is common knowledge that all these business are consumers of the products that N1 manufacture and distribute the same situation applies to the FFG's customers in that they target the same industry as N1.'

[18] First respondent then referred to applicant's reaction to the loss of a previous employee as follows:

> 'I find the applicant's attempt to enforce my restraint of trade to be peculiar considering that a previous employee of the applicant, Marguerite Lezar ("Lezar") who was employed by the applicant as a sales representative until 2012 also left the employment of the applicant and commenced employment with N1 during March 2013. I was personally instructed by Rogers to call Lezar and remind her of the very same restraint of trade incorporated in her contract of employment and Restrain of trade Agreement, contained in annexures MR 2 and MR3. Lezar at that point in time raised the very same arguments as I have done in this affidavit, explaining the material differences in the business operations products marketed of the applicant and N1.
>
> I accordingly reported back to Rogers subsequent to a telephone discussion between Lezar and myself. Rogers conceded that there are indeed material difference in the business concepts of the applicant and N1 and instructed me not to take any further actions against Lezar. I attach hereto a confirmatory affidavit of Lezar confirming the aforegoing.'

[19] It is apparent from this reproduction of evidence from the two key affidavits that there is considerable dispute between the parties: hence the question of the use of a lengthy replying affidavit by applicant was hotly contested. Suffice it to say

that Mr Steenkamp justified its length on the basis that applicant was required to address fourteen substantive separate grounds of opposition raised in the answering affidavit. In particular, be a submitted that the replying affidavit showed that the first respondent was "plainly untruthful in his answering affidavit" by, inter alia, claiming falsely that the parties were not in direct competition. As shown in emails of 2013 relating to Ms Lezar, first respondent had accepted that the applicant and second respondent were direct competitors.

Evaluation

[20] Much was made by both parties of a decision of *Random Logic (Pty) Ltd t/a Nashua Cape Town v Dempster* [2008] ZAWCHC 74. In that case, respondent was employed by the appellant as a sales representative for three years until his resignation. In a matter of weeks thereafter, he began working for a competitor of appellant within the designated franchise area. Of particular relevance to the present dispute was the argument by respondent that appellant's claim for trade secrets and confidential information could not be justified. He further contended that, when he took up his position with the competitor he had undertaken contractually not to employ any of the information to which he had access while he was employed by appellant nor to divulge such information to his new employer.

[21] Bozalek J carefully considered the relevant law and concluded that, where an enforcement of a contractual provision would be unreasonably unfair in the light of fundamental constitutional values of freedom and dignity, the clause would be contrary to public policy and could not be enforced. (see para 19) Bozalek J concluded as follows:

> 'Respondent concluded the restraint agreement for no consideration as a junior employee. When he left some three years later to work in the same industry, but in a different area of Cape Town, he was still a relatively junior sales person. He undertook not to use his customer connections during the term of the restraint and there was no indication that he would do so. I have previously noted that the reach of the restraint was wide, particularly its duration of two years. As Wallis AJ pointed out in *Den Braven,* a two year term constitutes the upper – limit of such proscriptions. The geographical reach of the restraint, although apparently only limited to a portion of Cape Town is, in practice, extended by virtue of the fact that most major suppliers of office automation equipment will in all likelihood look to do business in central Cape Town and the southern suburbs having regard to the amount of economic activity carried on in those areas. A further important factor is appellant's acceptance that the limit of the risk which it faced should respondent remain unrestrained, was no more than that of his inadvertently, or art worst even deliberately, supplying information regarding his former customers to fellow employees of this new employer.'

[22] Mr Steenkamp contended that the same conclusion did not apply to the present dispute. In the first place first respondent had not commenced employment in a junior position as branch manager in Cape Town. He had some seven years' experience at a number of major companies in relatively senior positions prior to his employment with applicant. He had worked for a much longer period than the employee had done in *Random Logic,* that is from July 2009 to March 2016. When he left the employ of the applicant he did so in a key position; that is as the most senior manager in the employ of the applicant in the Western Cape in charge of the Western Cape operations with its main focus being on sales and procurement. He

was remunerated by way of a substantial salary. Furthermore, there was no indication that first respondent, as was the case in *Random Logic,* had undertaken not to use his customer connections during the terms of his restraint.

[23] Furthermore it was contended by Mr Steenkamp that first respondent would operate in the very industry with one of applicant's fiercest competitors and would engage directly with applicant's customers or clients but not exactly in the same position as he had when employed by applicant.

[24] The question which requires determination in the present case should be less concerned with the respective status of the employee in *Random Logic* compared to the present dispute and more with attempting to divine the distinction between the need to protect information which stands to be protected as confidential on the one hand and that of precluding a person from making use of his or her own skills and abilities on the other.

[25] Kroon J set out the position clearly in *Aranda Textile Mills (Pty) Ltd v Hurn* [2000] 4 All SA 183 (E) at para 33 as follows:

> 'A man's skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble of expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know

how or skills. Such know how and skills in the public domain become attributes of the workman himself do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy.'

[26] Striking this balance is vital for the determination of the reasonableness of a restraint of trade provision. Recall the test set out in *Basson v Chilwan* 1993 (3) SA 742 (A) at 767 G-H, namely the necessity to engage by way of the interrogation of the following four questions:

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

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

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

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

[27] Mr Steenkamp sought to locate the nature of the protectable interest in two emails generated by first respondent, and which were sent to Mr Rogers relating to the resignation of Ms Lezar. Mr Rogers writes, regarding Ms Lezar; 'may still be worth speaking to him before we decide a route – the doc that she signed would be difficult to enforce but he would not know that.' First respondent replies, 'ok I will phone him just think that he will Never be adhered to – making it almost pointless (my opinion)

Competition is fierce they will do everything in their power to take customers from us and use in info supplied by Margie to target our customers.'

[28] In an earlier email generated on the same day, 26 June 2013, first respondent tells Mr Rogers, 'Please note this is N1 Restaurant supplies – not a supplier to us direct opposition you must be thinking of N1 Meat.' There was a further discussion concerning the overlap between the business of applicant and second respondent.

[29] It appeared to be common cause that, during the first half year of 2016, there was an overlap in the two business, that is in the areas in which they competed with each other, which totalled approximately R 11 million out of second respondent's complete turnover of R 68 747.176; Mr Ferreira submitted that this was effectively an overlap of 16% of second respondent's turnover whereas Mr Steenkamp contended that over a year this would have amounted to a turnover of R 22 million in competition with applicant; a significant similarity between the business to justify the protection sought in the relief.

Conclusion

[30] It is useful to commence an evaluation of this case by examining the nature of the two businesses respectively. In his founding affidavit Mr Rogers describes the business of applicant thus:

> 'The applicant is a distributor and wholesaler of foodstuffs to food service companies and institutions such as restaurants, contract caterers, canteens, old-age homes, prisons, schools, hospitals, retailers and ship chandler's based in the Western and Eastern Cape. The applicant's products range from poultry, fish, meat,

frozen vegetables (including house brands), pies, pastries and snacks, dairy products and ice cream, cooking oil, spices and sauces, mayonnaise and dressings, sachets, pasta, canned and tinned goods, baking range, cereals and porridge, deserts and other groceries.'

[31] By contrast first respondent says of second respondent's business:

'N1's core business remains fresh red meat wholesale and distribution roughly 90% of N1's business constitutes reproduction and manufacturing as opposed to FFG which merely only sells finished products.'

This claim is confirmed by Mr Youlton, on behalf of second respondent, who notes that N1 'purchases its lamb carcasses locally and from New Zealand, its beef from local abattoirs and European abattoirs, chicken from local producers and South America and Europe. N1 is known for its self-manufactured burger patties and sausages. N1 predominantly use the chicken that it procures from the producers to manufacture its own signature chicken burger, sausages, mince, goulash and strips.' Insofar as the other overlap, namely vegetables is concerned he says, 'Second Respondent is an importer of vegetables in bulk quantities which the second respondent then processes and repackages in its factory. The Applicant does not even import vegetables at all. The Second Respondent also reprocesses the vegetable inter alia into baby food which is manufactured in our factory.'

[32] Mr Steenkamp was constrained to accept that a party must make out its case in the founding papers. But he urged this court to consider the contents of the replying affidavit which, given the answers about the competing businesses clearly was required to be read into applicant's case if the latter was to justify the final relief which it seeks.

[33] In this connection Mr Steenkamp referred to *Finishing Touch 163 v BHP Billiton Energy Coal SA* 2013 (2) SA 204 (SCA) at para 26 where Mhlantla JA (as she then was) said:

> 'Counsel for Finishing Touch urged us to reject this explanation as it had been raised for the first time in the replying affidavit. It is true that the explanation was proffered by BHP in reply, but the rule that all the necessary allegations upon which the applicant relies must appear in his or her founding affidavit is not an absolute one. The court has a discretion to allow new matter in a replying affidavit in exceptional circumstances. A distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared, and one in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant.'

[34] By contrast, Mr Ferreira referred to the observation of Schutz J*A in Minister of Environmental Affairs and tourism and others v Phambili Fisheries (Pty) Ltd v Minister of Environment and Tourism* 2003 (6) SA 407 (SCA) at paragraph 80:

> 'There is one other matter that I am compelled to mention – replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest – and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the Courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.'

[35] The legal position can be summarised thus: there is no absolute bar to a court refusing to exercise a discretion to allow new matter in a replying affidavit see Erasmus Superior Courts Practice D1-66 and the cases cited in footnote 2 thereof. But a distinction must be drawn between a situation which the new materials are first brought to light by the applicant in the replying affidavit, particularly where the applicant knew of the material at the time when the founding affidavit was prepared and the case in which facts alleged in the first respondent's answering affidavit reveal the existence or possible existence for a further ground for relief sought by the applicant.

[36] This question is relevant to the determination of the question of the protectable interest. The only component of the replying affidavit that appears to me to falls within the scope in which the court can exercise its discretion favourably towards the applicant is where applicant was able show in the replying affidavit that in terms of the 2013 emails relating to Lezar first respondent had conceded that the applicant and second respondent were competitors.

[37] On this basis the question arises as to whether the factual edifice as set out in the founding affidavit as well as the facts admitted by the respondents in the answering affidavits together with the 2013 Lezar emails is sufficient to answer the question positively, namely that applicant has an interest which is deserving of protection and that the interest is prejudiced by the other party of course the two further questions posed in Basson's case supra must also be answered in favour of the applicant.

[38] A further consideration in answering these questions is first respondent's description of his employment with second respondent. In his answering affidavit he writes:

> 'My employment entailed the overseeing of all sales and sale administration of N1's Western Cape and Gauteng operations although I was specifically informed that my main focus would initially be to establish and grow the new Gauteng focus area of N1's business. The aforesaid prioritising of the Gauteng area has subsequently led thereto that I have spent the majority of my time since I commenced my employment with N1 in Gauteng and I confirm that this will remain the position for at least the next 3 to 5 years. I however concede that N1's head office is situated in Montagu Gardens, Cape Town and that I am also responsible for sales in the Western Cape Province.'

[39] Finally, consideration must be given to the nature of the content of the restraint agreement and what Mr Ferreira described as the extremely loose language employed therein. As is evident from clause 3, which is reproduced earlier in this judgment, the prohibition during the period of a year after the employment of first respondent with second respondent is that he cannot 'be interested in or engaged in or be concerned with or employed by any entity or in any capacity'. Entity is defined as any company firm or close corporation, undertaking or concern in the territory (the Western Cape) which is in any manner involved in the distribution and/or wholesale of foodstuffs or which competes in any manner whatsoever with the company in the territory. (my emphasis)

[40] He is further restrained from dealing with customers of applicant. This is set out specifically in clause 5. There are two observations must be made about these

clauses.. In the first place the concept 'entity' is extremely widely defined. Foodstuffs is not defined in the agreement and, while applicant describes its product range fairly widely, it is not an entirely clear definition. What is clear however is that the detailed restraint as to customers says nothing with regard to suppliers. That may be an omission. It may be possible to read clause 3 as opposed to clause 5 to include suppliers but this is hardly clear. Furthermore, clause 3 refers to the prohibition of being involved in any entity "in any capacity" and that to reveals the use of very vague and undefined language.

[41] On its own, the sloppy employment of words in a contract in restraint of trade which has been signed by two parties is not fatal. As *Nienaber JA said in CTP Ltd v Argus Holdings Ltd* 1995 (4) SA 774 (a) at 787 (EG):

> 'Viewed *in vacuo* the precise line between the concepts of 'regional' and 'local' is doubles difficult to define. But does that make the restraint clauses void for vagueness? Three points need to be made. One, the words in the contract must not be interpreted in the abstract and out of context (of *Swart en 'n Ander v Cape Fabris (Pty) Ltd* 1979 1 SA 195 (A) at 202 C). Two, a restraint which in general terms may be unduly wide or imprecise can be trimmed to fit the common understanding and perceptions of the parties in the light of the circumstances prevailing at the time of its enforcement (cf *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) at 896 A-E, 898D). Three, a conclusion of invalidity will only be reached as a last resort (cf *Haviland Estates (Pty) Ltd and Another v McMaster* 1969 2 SA 312 (A) at 337H; *Lewis v Oneanate (Pty) Ltd and Another* 1992 4 SA 811 (A) at 819 E-J).'

[42] In the final analysis it would appear to me that there is a protectable interest, given a clear competitive intersection between the businesses of applicant and second respondent, at the very least to an extent sufficient to justify the positive finding. And, in view thereof the second question posed in *Basson* should also be answered in favour of the applicant, subject to a qualification. In reading the clause to render it meaningful to the bargain struck between the parties, the omission of suppliers is not a component that can necessarily be fixed by way of a court intervention. This therefore renders the factual edifice upon which the entire case of applicant rests somewhat less sturdy than that which was argued for by Mr Steenkamp.

[43] In summary, there is a protectable interest, although it is narrowly constrained to those areas where there is an overlap between the businesses as I am able to divine it from the founding, answering affidavit supplemented by the component of the replying affidavit which in my view is relevant. To an extent the interest is prejudiced by first respondent who has knowledge of these components of the business, although, again, there is considerable difficulty in precisely ascertaining from the factual matrix of which I am entitled to take account as to the extent of this prejudice, particularly because of the averments of significant information which respondents contend is already in the public domain and further because much of the activity of the first respondent in terms of his new contract of employment with second respondent is located outside of the territory as defined in the restraint agreement.

[44] There is the further consideration that there is less than six months to run on the restraint. For more than six months, the first respondent has been employed by

second respondent and there is no suggestion in the voluminous replying affidavit as to the prejudice which has been caused to the business of applicant during this period. At the very least, the injury actually committed after seven months or which might have reasonably been apprehended as a result of the conduct could have been made clearer in this affidavit, particularly in the light of the sheer detail traversed in this affidavit.

[45] All of these considerations, taken together, militate against an order which will now endure for a further short period; that is of less than six months. In the context of this case, a more satisfactory remedy would probably be the institution for a claim for damages in the event that this could be proved.

[46] I have sought to determine this case in terms of precedent. That precedent was set in the decision in *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A) in which contracts in restraint of trade were held not to be contrary to public policy. Accordingly a restraint of trade such as any other contractually term should, in principle, be regarded as enforceable and not to be contrary to the public interest. It is clear from a reading of the judgment of Rabie CJ that a major concern of the court in *Magna Alloys, supra* was to purge this area of law of English influence. After an exhaustive investigation of existing law as well as the English law and references to Roman-Dutch authorities Rabie CJ concluded:

> ‘’n Mens kan dus met veiligheid aanvaar dat daar in ons gemene reg niks is wat verklaar dat ‘n bepaling in ‘n ooreenkoms wat die handels vryhied van ‘n party inkort bloot om daardie rede ongeldig of onafdwingbaar is nie. Dit volg dus dat daar in ons gemene reg nie gesag te vind is vir die benadering wat al so lank deur ons

> Howe gevolg word nie, naamlik dat ‘n bepaling in ‘n ooreenkoms wat ‘n beperking op die handelsvryheid van ‘n party plaas, prima facie ongeldig of onafdwingbaar is. Dit is ‘n benadering wat in navolging van die Engelse reg gevolg word.’ (at 891 B-C)

[47] One searches in vain in this judgment for any discussion of whether the English approach in which the employer was required to establish that the restraint was fair and reasonable is appropriate in a modern economy. Nonetheless, *Magna Alloys* has survived into our constitutional era. The consequence that a standard form restraint clause now applies in many employment contracts, drafted as in this case, in somewhat vague language, and, in many cases, in an obscure and impenetrable language in which it is hardly possible for a lay person to understand the contents perfectly, remain to be proved to be unenforceable by the employee. It is regrettable that this area of law has remained in stasis, notwithstanding the occasional vigorous nod in the direction of constitutional values, which sadly then receives very little focussed engagement.

[48] That having been said, in this case, on the standard approach adopted to restraint clauses as posed in the questions which this court is obliged to follow in terms of *Basson*, I do not consider that the case made out in the founding papers, together with the facts to which I am entitled to take account in the answering and replying papers, has justified the relief which applicant has sought.

[49] For these reasons, the application is dismissed with costs.

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DAVIS J