REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/29946

In the matter between:

INTERPARK (SOUTH AFRICA) LTD	Applicant
and	
ANDRÉ JOUBERT	First Respondent
REALLY USEFUL PARKING COMPANY (PTY) LTD t/a EASIPARK	Second Respondent

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REASONS FOR DECISION

SPILG, J:

THE APPLICATION

[1] The applicant, Interpark (South Africa) (Pty) Ltd ("*Interpark*") seeks a final order in motion proceedings against the first respondent, Mr Joubert, to enforce a restraint of trade agreement. The substantive prayer reads:

> "*The First Respondent is restrained until 31 October 2010 from being associated with the business of the Second Respondent, whether directly or indirectly, and whether as proprietor, principal, member, agent, partner, representative, shareholder, director, manager, employee, consultant, adviser, financier, or administrator.*"

[2] The applicant relies on a written restraint covenant which is for a period of two years. The restraint became effective when Mr Joubert's employment with it terminated on 31 October 2008.

[3] Mr Joubert's current employer, a company that trades under the name Easipark, is joined as the second respondent. It employed Mr Joubert from 15 June 2008 in its internal audit and operations projects. Easipark provides parking management services to shopping centres, hotels and municipalities.

[4] The application came before me on 6 November 2009 – more than a year after the restraint period commenced. This explains why the applicant did not seek an alternative order to cut down the restraint period should it be found excessive.

[5] Accordingly, the application must fail if the restraint cannot be justified for a period of at least a year.

APPLICANT'S ARGUMENT

[6] The applicant contends that:

(a) It has a protectable interest in the form of proprietary confidential information to which Mr Joubert was exposed.

(b) Mr Joubert contractually undertook not to be employed by a competitor for a period of 24 months precisely because he would be exposed to such protectable information.

THE FACTS

[7] Mr Joubert commenced employment with Interpark as a cashbook clerk on a temporary basis in March 2006. On 6 May 2006 he obtained a permanent position as a car park manager at the Oriental Plaza with a commencing salary on a cost to company basis of R10 000,00 per month (from which medical aid, if elected, was deducted in full). The salary was reviewable in July of each year. He subsequently applied for, and was promoted as from 1 November 2006, to the post of Operations Manager; South Gauteng. This position covered large complexes such as the Oriental Plaza with approximately 3 500 parking bays as well as smaller shopping centres such as The Wedge with about 400 bays. At the time he resigned from employment, Mr Joubert's gross package had increased to R17 876,00 per month.

[8] Mr Joubert's letter of appointment dated 1 November 2007 contained a provision that his engagement was conditional upon a restraint being signed.

[9] The appointment letter also included:

(a) A term recognising that the employee would have access to confidential information which he was required not to divulge.

(b) A notice period for terminating his employment that varied depending on the length of actual service. By the time Mr Joubert resigned the notice period was four weeks, which he duly gave.

[10] The restraint was embodied in a 12 page standard form document signed some time earlier in May 2006. Presumably it was signed at the time he took up permanent employment. In terms of the restraint:

(a) The employee recognised that he will have access to trade secrets and confidential information not only in respect of Interpark but also of associated companies within the group of which Interpark was a division, namely the PEM Group which has 12 other subsidiaries variously engaged in the software, media or security industries.

(b) The employer recognised that the PEM Group's trade secrets will be prejudiced if the employee was to take up employment with a competitor that provided the same goods and services as any company within the PEM Group. The affected goods and services , according to the agreement, were to be identified in an annexure to the restraint. It is common cause that the annexure was never provided to Mr Joubert and accordingly never formed part of the documentation signed by him nor was he aware of its contents.

(c) Mr Joubert was precluded from becoming involved directly or indirectly and as an employee, proprietor, shareholder or otherwise in any undertaking that "*carries on any restricted business or provides the prescribed services anywhere in the prescribed areas*".

(d) The terms "*restricted business*" and "*prescribed services*" were widely defined to include effectively any activity of any company or division within the PEM Group. The "*prescribed area*" was defined by reference to each of the provinces within South Africa as well as Swaziland and any other country where the PEM Group conducted business "*at the date of signature of this agreement and/or as at the termination date*".

(e) The trade secrets were identified in clause 2.3 to include know-how processes and techniques in relation to the PEM Group's operational, manufacturing and distribution activities, details of training methods and programs. It also included knowledge of and influence over the suppliers, principals, clients and business associates of the PEM Group as well as contractual and financial arrangements between them. In addition the term "*trade secrets*" included costing and profitability calculations, client lists and the terms, conditions, value and period of contracts with clients as well as the names of prospective clients and their requirements. Information concerning competitors as well as other information was included together with a final omnibus provision within the term's definition, that covered:

> "*Other matters which relate to the business of the PEM Group and in respect of which information is not readily available in the ordinary course of business to a competitor of the PEM Group but limited to the prescribed services as per annexure (1).*"

[11] By reason of the view I take it is unnecessary to consider whether the terms of the restraint are too broad in respect of the area or activity. It is also unnecessary to consider the effect of omitting a document (Annexure (1)) that was integral to defining the prescribed services or activities conducted by the Group. It is sufficient to have regard to the trade secret provisions and assume for the purposes of this case and in the applicant's favour that an adequate limitation to prescribed services and activities can be garnered by

reference to the business conducted by Interpark and any business activity of the PEM Group that may be construed as confidential to it and to which Mr Joubert may have had access.

[12] Mr Joubert does not dispute that Interpark is the country's largest and foremost provider of what it terms comprehensive parking management solutions.

[13] Interpark identifies this term to include the efficient operation of a successful parking garage within a shopping complex. This involves collecting revenues from both casual and prescribed monthly users, risk management, parking design, entire revenue cycle audits within parking facilities, the management and audit of statistics on a daily basis, credit management of the parking garage (providing for both casual and monthly users), the installation and management of what are referred to as "*conventional Pay-At-Exit parking control equipment and the Pay-on-Foot systems*" and the provision of car washing and car cleaning facilities within the parking areas.

[14] None of these activities are said to amount to trade secrets whether individually or in any unique combination. Nor is it claimed that the methods and activities adopted by Interpark in providing a comprehensive parking management solution are unique to it, aside from what can be gleaned from its broad definition of what constitutes its "*trade secrets*". It is however trite that the determination of what constitutes trade secrets or confidential information is an objective one and not the subjective view of the parties to a

signed document even if they are of equal bargaining strength (although their views will carry evidentiary weight). See *Basson v Chilwan and Others* 1993 (3) SA 942 (A) at 768A-C.

[15] Interpark claimed that on taking up employment with Easipark, Mr Joubert "*… commenced putting in place in the business of the second respondent the same systems and procedures utilised by the applicant*". The applicant relies on an undisclosed source. Aside from correctly pointing out that there is no express allegation that these systems and procedures constitute trade secrets or other protectable commercial interests, both Mr Joubert and Easipark's Managing Director, Mr Clark, denied the accusation and referred to the work performed by Mr Joubert and the different software systems used by Easipark.

[16] Mr Joubert admitted that he was required to know and implement Interpark's standard operating procedures and "*proprietary systems and controls*". He was also aware of Interpark's management information system but only as the recipient of reports that others produced from this system.

[17] Perhaps the most significant issues raised by Mr Joubert are that the management of car parks is not a sophisticated business operation and that the equipment and software used by the applicant are not exclusive to it but are utilised by other parking management companies.

[18] In this regard the salient averments by Mr Joubert at paragraphs 33 and 34 of his answering affidavit are:

(a) First, the business is not sophisticated as it involves basically the use of access control systems, software and pay point equipment either prior to users returning to their cars or when exiting the parking lot.

(b) Industry operators use the same suppliers for equipment and software. Moreover the software is backed up by standard financial and accounting systems that are not unique.

(c) Although Interpark has a management information system which generates reports, Mr Joubert was not involved in their compilation. However he did use them to monitor the performance of car parks under his control. Mr Joubert confirms that Easipark generates similar reports which he understands utilises Easipark's own systems. Easipark's affidavit confirms this.

(d) There is little to distinguish between Interpark's and Easipark's modes of operation, and, at the level he was employed as

operations manager, the equipment and software of which he was aware are relatively standardized.

(e) Although Interpark uses a different software tool to Easipark, it can only be implemented if a copy of the program is procured. Interpark has its own system for performing the same function. If there is any other unique proprietary information then the applicant as operations manager did not have access to it.

[19] In reply, Interpark contended that once an employee, in the position of Mr Joubert, utilised the systems and the reports created by it he will be able to appreciate the purpose and advantage of what are termed "*these functions and is able to duplicate these proprietary methodologies when in the employ of a competitor, even if inadvertently*" (my emphasis). This is said to be the real danger faced by Interpark if an employee is not bound to a restraint covenant. It is however significant that the applicant has diluted its confidential information to something that may be applied purely fortuitously. I will however assume that the applicant intended to convey that the performance of the function itself is confidential even if it might be witnessed by others.

[20] Interpark contends that these functions are "*… made available through the customised software that facilities the smooth running of the operations*" (para 30.8). The functions are not identified but appear to relate to tasks devised by Interpark that its' staff is required to perform in order to overcome the "*perennial difficulties*" of ensuring that cash received reaches its intended

destination since major difficulties arise in controlling enormous volumes of small transactions.

[21] The applicant concedes that Mr Joubert did not have access to software programming or similar data (at para 30.8). However it contends that Mr Joubert received specialised training in order to correctly apply the applicant's methodology, procedures and forms, such as specific cash-up procedures, reconciliation templates and operating and report back procedures to property owners.

[22] In summary, Interpark concedes that Mr Joubert did not have access to the programs themselves but contends that he was exposed to the procedures it had devised and which it claims are unique. It is difficult to appreciate why this was not set out in simple terms or why the court was not enlightened as to what made the methodology confidential or unique. The applicant's only explanation is to claim that it "*can obviously not divulge the exact details and specifications of the systems and methodologies referred to, as this would defeat the purpose of both this application and agreements in restraint of trade …*" I disagree. Procedural means exist to ensure that information alleged to be sensitive is provided to the court without being revealed to a respondent competitor. It is only in this manner that an allegation can be properly tested and a litigant's failure to make use of these procedures ought to be held against it.

[23] In any event the applicant appears to have obfuscated the issue. The court has no interest in the specifications of the systems that comprise software information to which only senior management has access. The case made out is that Interpark adopts unique procedures to which Mr Joubert became privy and that they are different from those of its competitors.

[24] There is a further difficulty facing Interpark, namely its statement at paragraph 30.1 that its information, control and reporting mechanisms are developed and upgraded on a continuous basis "*… as more and more sophisticated tools become available*".

[25] If the systems are as sophisticated as Interpark indicates and are under reasonably regular review and upgrade then, on the case it makes out, the procedures and methods applied by an operations manager will consequently be revised on a reasonably regular basis.

[26] I must now determine the essential facts before me. This is an application for final relief and the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635C apply. I have no reason to doubt the genuineness of the facts raised by Mr Joubert nor is there another basis to reject them. Furthermore, the applicant did not request that the matter be referred to the hearing of evidence.

[27] In applying *Plascon-Evans*, I consider that the following factual evidence is before me:

(a) Mr Joubert did not have access to details of the systems and methodologies utilised by Interpark.

(b) Interpark's systems and methodologies are upgraded and revised which is a "*… continuous effort, as more and more sophisticated tools become available*" (at para 30.1).

(c) Mr Joubert was exposed to the applicant's manuals, instructions and forms, but these are likely to change and become outdated precisely because " *more and more sophisticated tools become available*"

(d) Mr Joubert was required to apply and therefore became aware of Interpark's functional procedures and methods.

(e) Interpark has not demonstrated if, and to what extent, the methods and procedures that Mr Joubert was required to apply are unique to it.

RESPONDENTS' ADDITIONAL SUBMISSIONS

[28] These may be divided into factual contentions and legal submissions.

[29] I deal firstly with the additional factual issues. Mr Joubert maintains that:

(a) He left Interpark's employ because of concern for his family's safety. This arose after employees at parking areas for which he was responsible were dismissed when they were caught stealing. Subsequent to their dismissal, Mr Joubert received threatening calls and there were two further disturbing events. As a result, and although Mr Joubert did not know if the events were linked, he and his wife decided that they should not put their family at risk and he commenced looking for alternate employment.

(b) He resigned from the applicant in order to join his father–in-law's business. Due to the recession, this proved unsuccessful despite approaching a number of employment agencies, and even seeking the position of an operations manager with the applicant in Cape Town. Mr Joubert became increasingly despondent and desperate for work.

(c) Mr Joubert's financial position deteriorated and he was obliged to put his house up for sale. It was only at this stage that he looked for employment in the parking management sector again. Three companies in the sector had vacancies. He was

interviewed by two of them and secured employment with Easipark.

[30] Essentially the case made out is that in order to retain his personal dignity through work and to avoid financial ruin and its adverse effects on his family, which includes four children, Mr Joubert was obliged to take up the only employment available, some six months since his father-in-law's business collapsed. His employment was with a competitor to the applicant, and at a slightly higher salary than received when he left Interpark almost a year previously. This despite offering himself for employment again with Interpark.

[31] Mr Joubert also contends that he was "*instructed*" to sign the restraint agreement failing which he would not obtain employment. He did so because he needed to obtain permanent employment. He felt that he was not in a position to refuse signing the restraint in its terms.

[32] Interpark denies that Mr Joubert was "*instructed*" to sign the restraint agreement and relies on his concession that the restraint agreement was signed because he wished to obtain permanent employment. Interpark avers that Mr Kruger had tendered his resignation on two previous occasions which were subsequently withdrawn after Interpark's representatives advised that they were not willing to accept these. Save for these facts, the balance of Mr Joubert's allegations constitute the evidence before me.

[33] Although it is evident that Mr Joubert had previously sought to resign and was discouraged from doing so, Interpark does not dispute the significant averment made by Mr Joubert that he had approached his superior at Interpark, a Mr Kruger, and informed him of the threats he had received. Interpark furthermore did not challenge the veracity or *bona fides* of Mr Joubert's statement that, as a result of the threats which he had mentioned to Mr Kruger, he was concerned about his family's safety and that this prompted his resignation (See para 21 on page 122). Interpark however disputes that Mr Joubert informed it that these were the reasons for wanting to leave.

[34] On a careful consideration of Mr Joubert's affidavit, it is apparent that he did not advise Interpark of his reasons for resigning. I am prepared to accept that there were a number of reasons which prompted Mr Joubert's resignation, including the potential for bettering himself and the unsettling threats he had received when performing his duties that resulted in disciplinary action being taken against employees for theft.

[35] The legal issues raised by Mr Joubert are:

(a) Interpark is not entitled to rely on the conclusion of the restraint agreement in order to enforce it but must demonstrate that there is a protectable interest which is more than just tenuous.

(b) Interpark only sought to demonstrate a protectable interest in its replying affidavit which is impermissible. This must be considered together with the further submission by Mr Joubert that Interpark bears the *onus* of demonstrating that the restraint is enforceable in law.

(c) The restraint is unduly broad and is for a two year period which he contends is too long, particularly when regard is had to the extensive geographical area covered by the restraint and the extent to which Mr Joubert is precluded from undertaking work not only within the parking management industry but every other industry in which companies within the PEM Group conduct their activities (which also includes the media and security services).

(d) The restraint is defeated by an undertaking given by both Mr Joubert and Easipark respectively that any confidential information will not be disseminated or utilised. I do not propose dealing with this submission in any detail. It is clearly wrong. See eg *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)at para [20] citing *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W) at p 57J to 58B:

(e) The person seeking to uphold the restraint covenant bears the *onus* of proving its enforceability. *Mr Chaskalson* argues that this arises by reason of the rights of the individual protected under the Constitution with particular reference to section 22

(freedom of trade, occupation and profession) considered with the right to dignity (section 10) as read with those provisions of the Constitution which give it horizontal application (section 8(2)) and the court's duty to develop the common law in a manner that promotes the spirit, purport and objects of the Bill of Rights (section 39(2) which uses the word "*must*"). In the alternative, it is argued that at the very least public policy is informed by the Constitution which in the present case involves a consideration of the freedom of occupation, the rights to dignity and to property (section 25) and the impact of inequality of bargaining power and anti-competitive behaviour.

APPROACH TO THE LEGAL ISSUES

[36] There is a significant overlap between the various legal issues raised. Moreover by reason of the conclusions I have reached I consider it unnecessary and inadvisable to deal with the suggested change of the *onus* to pre-*Magna- Alloys* (*infra*) since in my view this is an *a fortiori* case. The question of re-visiting the *onus* appears best left for determination in a case where it is decisive.

RESTRAINTS AND PUBLIC POLICY CONSIDERATIONS

[37] Since *Magna-Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) a restraint of trade agreement will be enforced unless it is contrary to

public policy. The principle enquiry is whether or not the party seeking to enforce the restraint has a protectable interest, and if so, whether that interest outweighs public interest considerations (at p 897F to 898D).

[38] While *Magna-Alloys* changed the incidence of the *onus*, it remained for *Basson v Chilwan and Others* 1993 (3) SA 743 (AD) to identify the underlying principles and to settle how they were to be applied within the limited context of terminated employment and partnership relationships.

[39] The issues that require determination when an employment or partnership relationship ends were identified in *Basson* to be the following:

(a) A restraint will not be implemented if it conflicts with public policy.

(b) A restraint will conflict with public policy if its effect is unreasonable.

(c) The reasonableness of the restraint is determined by reference both to the broad interests of the community on the one hand and the interests of the contracting parties themselves on the other.

(d) The broad interests of the community involve in turn a consideration of two conflicting interests, namely:

(i) an agreement should be enforced even if it promotes "*unproductivity*";

(ii) "*unproductivity*" should be discouraged even if it wrecks the agreement.

(e) The interests of the contracting parties are determined by reference to whether the restraining party has a protectable interest which is properly served by preventing the restrained party from participating freely in the commercial or professional world after termination of their contract. If it does not, then the restraint is contrary to public policy.

(f) Whether a restraint is reasonable *inter partes* is determined objectively. Accordingly no provision in a restraint covenant, however carefully worded, is decisive nor can it entrench an otherwise unreasonable provision. At best it is an evidential fact to be considered in determining the existence of a protectable interest and what is to be regarded as reasonable.

(g) Even if a restraint is reasonable *inter partes*, it may nonetheless damage the public interest (for a reason that might be unrelated to the parties), and *vice versa*.

[40] The mere elimination of competition as such is not a protectable interest, even if the restraint was required in order to protect an investment of capital or expenditure (whether in time or money) incurred in training the employee. There may be other satisfactory remedies that are more proportionate to the harm or potential harm suffered (eg. the repayment of agreed training costs such as those incurred by airline pilots). Conversely there are cases of genuine money compensation directly paid by the employer to sterilise the employee from competing after the relationship is terminated, as is evident when key-personnel resign or retire.

[41] Aside from setting out the basic principles governing restraint agreements, *Basson* made it clear that the outcome of the enquiry itself is determined casuistically and is based on a value judgment, the result of which may vary from case to case.

[42] *Basson* set out four enquiries that needed to be undertaken in each case in order to give practical effect to the principles enunciated. They are:

(a) Does the restraining party have an interest, once the agreement is at an end, which deserves protection.

(b) Is that interest being prejudiced by the other party.

(c) If so, then considered both qualitatively and quantitatively, is the restraining party's interest stronger than the other party's interest not to be economically inactive and unproductive; and

(d) Is there any other facet of public policy, that has nothing to do with the relationship between the parties, which requires that the restraint should either be maintained or rejected. If the restrained party's interests are greater than those of the other party (as determined in (c)), then as a rule it will also be greater than any public interest unrelated to the relationship between the parties (as considered under (d)).

[43] Since it did not arise in that case, the enquiries do not cover the issue of severability. Wunsh J introduced this further consideration in *Kwik Kopy (SA) Pty) Ltd v Van Haarlem and Another* 1999 (1) SA 472 (W) at 484E which involves the following enquiry:

> "*Whether the restraint is wider than what is necessary to protect the applicant's interest.*"

Nampesca (SA) (Pty) Ltd and Another v Zaderer and Others 1999 (1) SA 886 (C) at 894I-895B adopted this additional enquiry. The enquiry recognises the court's entitlement to restrict an overly extensive restraint provision to the

confines of what is necessary to protect the restraining party's interest, provided the test for severability or a reading down of the agreement satisfies accepted principles (cf *Nampesca* at 896A-C).

POST-BASSON **AND THE ROLE OF CONSTITUTIONAL NORMS**

[44] The principles enunciated in *Basson* and the enquiries that were formulated to give them practical effect have been extensively applied as borne out by case law.

[45] In *Drs Jacovides and Partners Inc v Dr Moodley and Others* (Case No. 10229/06 (SGHC) delivered on 13 October 2006 unreported) at para [20] I considered the effect of the Bill of Rights on public policy in respect of restraints to be the following:

> "*The determination of the public interest factor and its weight, where it is an element of a common law principle, must be fashioned by constitutional values. See section 39(2) of the Constitution and the body of now established case law such as Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) para [17]; Van Eerden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae) 2003 (1) SA 389 (SCA) at paras [10] to [12], Du Plessis v Road Accident Fund 2004 (1) SA 359 (SCA) at para [18] and Rail Commuters Action Group and Others v Transnet Ltd t/a Metro Rail and Others 2005 (2) SA 359 (CC) at paras [76] to [88].*" (at para [20])

[46] *Dr Jacovides* concerned a direct challenge to the enforceability of a restraint, based on the contention that the constitutional right of access to healthcare services under section 27(1) of the Constitution was determinative of the public policy element. This arose because an employee respondent

was one of very few medical practitioners engaged in providing HIV/Aids treatment in the region and it was argued that the effect of the restraint would prevent his patients from receiving adequate care.

[47] The subsequent case of *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para [11] makes it abundantly clear that:

> "*All agreements including agreements in restraint of trade are subject to constitutional rights obliging courts to consider fundamental constitutional values when applying and developing the law of contract in accordance with the Constitution. … Section 8 of the Constitution is imperative. The Bill of Rights applies to all law, also private law, and binds, inter alia, the judiciary (s 8(1)). Its provisions bind natural and juristic persons if, and to the extent that, they are applicable, taking into account the nature of the right and the nature of any duty imposed by the right (s 8(2)). In their application to natural and juristic persons a court must apply or, if necessary, develop the common law to give effect to the right when legislation does not do so (s 8(3)(a)). A court may also develop the common law to limit the right in accordance with s 36(8)(b)). Section 39(2) requires a court when interpreting and developing the common law to promote the spirit, purport and objects of the Bill of Rights.*"

[48] At paragraph [12] Malan AJA (at that time) in *Reddy* indicated that the purpose of the limitation of the exercise of a right by reason of another person's own fundamental rights (in order to determine whether there has been an unconstitutional limitation of a right) must be considered by reference to the purpose of the limitation in conjunction with all the other factors referred to in section 36(1) and that such a situation "*… may occur when the enforceability of agreements in restraint of trade and the balancing or reconciling of the concurring private and public interests are considered*".

[49] While recognising the impact that constitutional rights have in determining the enforceability of agreements in restraint of trade, the court in *Reddy* (at para [14]) left open the question of whether the *onus* still remained with the person seeking to avoid a restraint or whether this was in conflict with section 22 of the Constitution which guarantees freedom to engage in economic activity.

[50] *Reddy* left the question open (at para [14]) because it played no role in the outcome particularly as the facts had been fully canvassed and, being a motion matter effectively for final relief, were to be resolved in favour of the respondents on an application of *Plascon-Evans*.

[51] Mr Chaskalson on behalf of the first respondent argued that the applicant was not entitled to make out a case of protectable interest for the first time in reply. *Mr Hopkins* contended that the applicant was entitled to since the *onus* to demonstrate that the agreement was unenforceable rested with the respondent – the applicant only had to demonstrate a concluded restraint covenant. For this reason I must touch upon the issue of *onus* .

[52] The starting point is to establish the stage of the enquiry where *onus* becomes relevant.

In my view the question of what constitutes public policy and which interests are the stronger (i.e. the restraining or the restrained party's or the public's) is essentially determined by an application of substantive law and where *onus* generally plays little (such as during the formative stages) or no part. Compare *Second Restatement of the Law of Contracts* 2d, Vol2 Ch8, pp 3-4, 5, and p 37 para186. See also *Dickson v Pharmaceutical Society of Great Britain* [1970] AC 403 at 441. Whether such public policy considerations are actually present in a given case is a question of fact which may depend on which party bears the *onus*.

[53] However, in motion proceedings for final relief (or in effect final relief) the facts are not determined by the incidence of *onus* but by an application of *Plascon-Evans* which accepts the respondent's version (including admissions) unless there are justifiable grounds not to give them credence. See *Reddy* at para [14].

[54] In the present case it involves determining whether proper practice in motion proceedings requires an applicant employer to deal with the issues regarding a protectable interest in its founding papers or whether it is entitled to tactically overcome *Plascon-Evans* by leaving the aspect of protectable interest for reply. This is an issue of significant concern because the nature and scope of the protectable interest claimed is unlikely to be known to any but the top echelon of management which makes it difficult , if not impossible, for a respondent employee to anticipate what he must deal with if the applicant does not deal with it in the founding papers.

It therefore becomes necessary to recall the distinction between the burden of proof and the duty to produce evidence first. See High Court Rules 39(5), (9) and (13).

[55] In motion proceedings affidavits "*… serve not only to place evidence before the Court but also to define the issues between the parties … This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.*" See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F-G.

[56] More pertinently the founding affidavit "*… takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issues in the petitioner's favour, an objection that it does not support the relief claimed is sound*" (my emphasis). See *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C-E.

[57] However in *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) Stegmann J in a minority decision held that since the first respondent had the *onus* of proving that the appellants had no protectable interest it did not matter that it only dealt with this issue in reply (at p 493J-494A). See also *Swissborough* at 323J-324C.

[58] Although a respondent may ask a court for leave to file a further set of affidavits if it is prejudiced by new matter being raised, this is regarded as an indulgence. One should avoid the exception becoming the norm. In restraints the filing of an additional fourth set of affidavits would be almost inevitable if an applicant employer is not required to set out the essential evidence first. It will be recalled that courts have frowned on a landlord applicant claiming ejectment by relying in the founding papers only on its ownership and the respondent's possession (Graham *v Ridley* 1931 TPD 476) whereas the issue concerned a lease that the applicant had purported to terminate. In restraint cases the issue generally revolves on whether there is a protectable interest extant at the time it is sought to be enforced.

[59] In my view, in motion proceedings a party who seeks to enforce the restraint as an applicant must set out in its founding affidavit the proprietary interest it contends requires protection so that it can be meaningfully dealt with in the answering affidavit (and if necessary be dealt with by referral to oral evidence). This would be consistent with the requirements of placing facts relative to the issues in dispute in the founding papers. It would also accord with the requirement that facts peculiarly within the knowledge of the applicant should be produced by it (e.g. *Electra Home Appliances (Pty) Ltd v Five Star Transport (Pty) Ltd* 1972 (3) SA 583 (W) 585A and compare *Cotler v Variety Travel Goods (Pty) Ltd* 1974 (3) SA 621 (A) at 629D. See also

Ricke v Sack 1978 (1) SA 821 (A) and *Eskom v First National Bank of SA Ltd* 1995 (2) SA 386 (A) at 390G.

[61] In the present case, to the limited extent that the applicant dealt with the question of a protectable interest in a manner that went beyond the allegations of the Respondent, such averments have been treated with circumspection, as appears earlier in this judgment..

PROTECTABLE INTEREST

[62] The restraint is for a period of two years.

[63] At the time this case was argued, one year had already elapsed.

[64] The respondent contends that there is no protectable interest that has survived by the time this case was argued.

[65] It is clear from the applicant's papers that it struggled to identify precisely what constitutes its protectable interests. It certainly is not the software programmes themselves nor is it the customer connections. At best it is the knowledge acquired by the respondent in the day-to-day application of the procedures laid down by the applicant. The applicant confirms that these are not static but subject to ongoing development and change.

[66] In *Reddy*, the respondent employee was restrained for a period of one year because he had access to sophisticated intellectual technology of a major telecommunication corporation. There are few cases where the employee receives no compensation for sterilising his labour and is restrained for any period longer than a year. Having regard to the tenuous nature of the protectable interest claimed in the present case and the alleged regular developments in the industry it is sufficient for the purposes of this case to find that the respondent has demonstrated on paper that a restraint beyond at most a year is unreasonable and that the applicant has not produced evidence that is not adequately gainsaid by the respondent to demonstrate that the protectable interests it claims have survived a year since Mr Joubert resigned from its employment

I accordingly find that the restraint is now unenforceable.

CONSTITUTIONAL CONSIDERATIONS

[67] If I am wrong in regard to the applicant's protectable interest not surviving the year since Mr Joubert left its employment, it is necessary to deal with the constitutional challenge raised by Mr Chaskalson.

[68] This in turn requires the application of *Reddy* and *Darkhuizen v Napier 2007(5) SA 323 (CC)* with consideration being given to the decisions in *Advetech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn*

and Another 2008 (2) SA 375 (C), *Den Braven SA (Pty) Ltd Pillay and Another* 2008 (6) SA 229 (D&CLD) and *Mozart Ice-cream Franchises (Pty) Ltd Davidoff and Another* 2009 (3) SA 78 (C) with regard to whether there is in effect a presumption favouring the public policy value of upholding contracts in restraint cases. I have already indicated that it is unnecessary to consider the question of onus since it does not arise crisply for determination.

[69] I intend following the more flexible and nuanced approach articulated by Davis J in *Mozart Ice-cream.* In my respectful view it is more consonant with the import of *Reddy* (particular at para [12]).

Moreover, *Jacovides* is a useful illustration of a case where the assertion of a constitutional right of access to health care (section 27), if HIV/AIDS patients were prevented by a restraint imposed on the only medical doctor able to treat them, would presumably outweigh as a matter of public policy, holding the doctor to his restraint if no consideration was paid. In that case I found that the area of the restraint was sufficiently narrow to preclude the infringement of constitutional rights because the respondent could easily have set up his practice beyond the perimeter of the restraint without adversely affecting the interests of his patients

[70] Conversely, there are cases where the proprietary interest sought to be protected resulted in a negotiated restraint, where the employee was paid a

considerable sum to sterilize his economic activities, which would make it difficult for a court not to hold him to his bargain.

[71] In the present case, had it been necessary, I would have taken the following factors into consideration and would have regarded them as outweighing the public policy consideration of holding Mr Joubert to his contract:

(a) The proven inability of Mr Joubert to find alternate employment in another industry and the effect on his ability to earn any income having regard to the recessionary climate. While it may have been possible to prevent Mr Joubert from taking up employment with a competitor for a period shorter than one year, balancing the fairly tenuous link between the applicant's protectable interest and Mr Kruger's knowledge of or access to it, his constitutional right to be economically active in order to provide for his family is a significant public policy consideration.

(b) The scope of the restraint is indicative of very little thought going into the particular circumstances of the specific employee and the threat he or she might pose. It will be recalled that Mr Joubert signed the restraint while he was performing the more menial tasks of a car park manager at a very low salary and well before he was considered for the position of Operations Manager for a region.

I am alive to the considerations favouring extensive severing of overbroad restraints mentioned in *Den Bravin.* Nonetheless courts should be slow to indirectly sanction clear cases of over-reaching by reason of unequal bargaining strengths and where draftsmen demonstrate scant regard for rational provisions. The one size fits all approach may also expose the restraint as fundamentally flawed because no rational basis exists for the period, area or scope of the restraint being the same for both a key executive and for an administrative staff member.

In the present case, the period and scope of the restraint is extremely extensive and bears little relation to the interests that are sought to be protected. As indicated earlier, an essential annexure dealing with material provisions was omitted and at best, what is left, is the common law protection afforded to an employer in respect of protecting a proprietary right. That right has not been adequately demonstrated in the papers before me on an application of *Plascon-Evans*.

ORDER

[72] It is for these reasons that I dismiss the application with costs.

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B S SPILG
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

DATE OF HEARING:	6 November 2009
DATE OF JUDGMENT:	29 March 2010
HANDED DOWN:	30 April 2010
REVISED:	17 May 2010
FOR APPLICANT	Adv K HOPKINS
	DAVID KAHN & ASSOCIATES
FOR 1st RESPONDENT:	Adv M CHASKALSON
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