REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO:

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.

…28 Oct 2012….. **……(signed)………..**
DATE SIGNATURE

In the matter between:-

UNIPLATE GROUP (PTY) LTD Applicant

And

NEW NUMBER PLATE REQUISITES CC Defendant

J U D G M E N T

A J BESTER, AJ:

[1] In this matter the Applicant sought, in the main application, final, alternatively interim, interdict relief against the Respondent. The relief sought, is founded in an alleged unlawful competition. More specifically, the Applicant complains of an alleged unlawful and intentional interference with the contractual relationship created by the Applicant's standard customer rental agreement.

[2] In a counter application, the Respondent sought a stay of the main application pending a referral, in terms of section 65(2)(b) of the Competition Act, 1988 ("the Act"), to the Competition Tribunal ("the Tribunal") of an alleged issue regarding the Applicant's rental agreement. The issue sought to be referred is whether that agreement is lawful, alternatively whether he exclusivity provisions of that agreement are, prohibited and/or liable to be declared void, having regard to sections 5(1) and 8(1)(a), (c) and (d) of the Act.

[3] On behalf of the Respondent it was contended that a crucial issue in the determination of the application and counter-application is the enforceability of the Applicant's rental agreement and, in particular, the exclusivity provisions in terms of that agreement. The agreement, it is alleged, not only contravenes the mentioned sections of the Act, but is in any event *contra bonos mores* under the common law and is therefore unenforceable.

[4] Section 65(2)(b), on which the referral application is based, stipulates as follows :-

> "If, in any Action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, *that court must not consider that issue on its merits*, and … *the court must refer that issue to the (Competition) Tribunal to be considered on its merits*, if the court is satisfied that-
>
> (i) the issue has not been raised in a frivolous or vexatious manner; and
>
> (ii) the resolution of that issue is required to determine the final outcome of the Action." (my accentuation)

[5] There was no real dispute between the parties at the hearing that there is a substantial confluence between the principles underlying the mentioned sections of the Act and those of the common law for the purposes of deciding the lawfulness of the Applicant's contracts.

[6] The Respondent's overarching submission was, therefore, that a resolution of the competition issue is required in order to determine the final outcome of this application. Therefore, by virtue of the provisions of section 65(2)(b) of the Act, the issue must be referred to the Tribunal.

[7] At commencement of argument on the day of the hearing, I was informed by the Applicant's counsel that the Applicant would seek only interim relief. I was furthermore informed by the Applicant's counsel that the Applicant accepts that, where a party raises an issue concerning conduct that is allegedly prohibited in terms of this Act, a High Court is precluded from attempting to resolve the issue, but that the court may consider the issue only in order to establish whether or not the referral sought by the Respondent is frivolous or vexatious and whether the resolution of that issue by the Tribunal is required to determine the final outcome of this application. The Applicant, however, accepted that the issue must be referred to the Tribunal. That order will accordingly be made.

[8] Counsel for the Applicant submitted, rather strangely, in court (and in supplementary heads of argument) that *"… the Applicant has a clear right under s.65(1) as that section precludes a finding of voidness of Applicant's contracts with its customers … (t)his is what was decided in Bedford Square per Spilg, J, which is binding*".

[9] Counsel for the Applicant further submitted that, if Spilg J is not correct with his interpretation of section 65(1), then, because the Applicant "*has a clear right under s.65(1)*", the Applicant has by the same token "*a prima facie right although open to some doubt*" and therefore "*satisfies the first requirement for an interim interdict*".

[10] The full citation of the Spilg J judgement relied upon by counsel for the Applicant in its submissions is **Erf 179 Bedfordview (Pty) Ltd v Bedford Square Properties (Pty) Ltd** 2011 JOL 27160 (GSJ). In that

judgement Spilg J embarked, with his trademark analytical thoroughness, on an interpretational meander through the intricacies of the Act and held that a High Court may grant interim relief where a competition issue is in dispute.

[11] It is perhaps necessary to refer here, by way of introduction, to section 65(1), which stipulates as follows :-

> "Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void."

[12] If Spilg J had indeed made a finding such as that submitted by the Applicant's counsel, then I would, with deference to the learned judge, have disagreed with his interpretation. But he did not. What Spilg J held, paraphrased, is the following:-

a) In order to found its allegation that it has a clear right in common law for the purposes of interdict relief sought, the applicant (in that case) relied on a finding in that regard in its favour by Willis J in the first of the trio of judgement in the Bedford Square saga, namely, **Bedford Square Properties (Pty) Ltd v Liberty Group Ltd and Others** 2010 (4) SA 99 (GSJ. No Competition Act issue, however, served before that court. The applicant's clear right was therefore *res iudicata* when the matter served before Spilg J;

b) However, despite the finding by Willis, J., a Competition Act issue did serve before Spilg J Therefore, Spilg J held that an interdict of final effect could not be granted for the competition and common law issues overlapped. The granting of final relief would therefore constitute the making of a decision that directly or indirectly usurped the exclusive jurisdiction of the Tribunal to determine that issue;

c) Spilg J therefore held that section 65(1) must be read in a manner that would preserve the right of a party to approach a High Court in order to maintain a *status quo* by means of interim relief, and within the context of the inherent jurisdiction of a High Court to grant such relief in order to avoid an injustice;

d) Reliance on section 65(1) therefore does no more than to afford relief that is contingent on the outcome of proceedings before the Tribunal or the Competition Appeal Court and, consequently, only interim relief may be granted pending resolution of that issue by the Tribunal or that Appeal Court.

[13] Subsequent to the two above cited **Bedford Square** judgements by Spilg J and Willis J respectively, the Supreme Court of Appeal in **Bedford Square Properties (Pty) Ltd v Erf 179 Bedfordview (Pty) Ltd** 2011 (5) SA 306 (SCA) upheld Willis J's judgment.

[14] In **Bedford Square, SCA**, Harms DP held as follows :-

> "[7] The Respondent's first line of defence was that the case was brought in the wrong forum because it is a competition issue which belonged to the Competition Tribunal in terms of the Competition Act 89 of 1998. *Although this 'defence' was abandoned it is necessary to mention that the High Court and this court (when hearing an appeal from a High Court) do not have any jurisdiction to consider competition matters. This means that the question whether the restraint may have been in conflict with the Act cannot feature in this judgment*, one of the consequences of compartmentalising legal doctrines, and of divided jurisdiction. It cannot do the rule of law any good if different results may follow depending on which court system has to deal with the matter." (my accentuation)

[15] In the case before me, contrary to the case that served before Spilg J the alleged right of the Applicant is as yet to be determined. At face value, therefore, **Bedford Square, SCA** raises the question as to

whether, because of the conceded substantial confluence between the *ratio* for, and principles underlying the above mentioned common law wrong and the sections of the Act, I can decide the lawfulness of the Applicant's rental agreement in order to determine whether the Applicant has shown a *prima facie* right for the interim relief purposes without at the same time, directly or incidentally, resolving the issue as to whether or not that agreement is, or may be in conflict with the Act.

[16] Counsel for the Respondent agreed in debate (not without some apparent reluctance) that an interpretation of paragraph 7 of **Bedford Square, SCA** so as to exclude the jurisdiction of a High Court to consider even interim relief, would be too narrow.

[17] Of course, the Respondent submits in its heads of argument that the Applicant has not shown a clear, or a *prima facie* right, and it therefore seeks a dismissal of the main application with costs. If I am entitled to determine the existence or not of a *prima facie* right, irrespective of whether or not it overlaps with, or falls foursquare within the issue to be determined by the Tribunal, then I can dismiss the application or grant interim relief depending on what I find. However, if I am not permitted to consider even the question of a *prima facie* right, then I cannot dismiss the application; I can only refer the issue to the Tribunal and postpone the application *sine die* pending the determination of that issue.

[18] Therefore, with reference to the *dictum* in paragraph 10 of **Bedford Square, SCA**, counsel for the Respondents submitted that this court is not precluded from considering whether or not a *prima facie* right had been established under the common law. The relevant part of the *dictum* in paragraph 10 reads as follows :-

"These cases were also not concerned with the issue whether a servitutal restraint that is *contra bonos mores* can be lawful. I would have thought that something that is *contra bonos mores* and against public policy is by definition unlawful. I will assume for the sake of argument that it is also possible (although none was conceived by counsel) to envisage cases where a real right could in the course of time become invalid because its enforcement would be against public policy. Linvestment, too, has nothing to do with the case. It was not concerned with the possible invalidity of a servitude because of public policy considerations."

[19] I do not find in the above cited paragraphs unequivocal support for the submission made on behalf of the Respondent. The *dictum* in paragraph 10, although clearly weighty, is *obiter*. The SCA furthermore does not, in that paragraph, speak at all to a consideration of interim relief pending a referral in terms of the Act. It is therefore apposite here again to refer to Spilg J's judgement for, when read with the cited *dictum* the matter becomes less opaque :-

a) As pointed out above, Spilg J held, in paragraphs 56 to 59 of his judgement, that section 65(1) must be read in a way that preserves the right to approach a High Court for a remedy, for "*(w)here there is a right there is a remedy …* (*ubi ius ibi remedium*.

b) That truism, he held, is supported by **Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and others** 1986(2) SA 663 (A) at 676D, in which case the Appellate Division had held that a court retains the inherent jurisdiction to grant interim relief in order to avoid an injustice;

c) Therefore, he concluded that, because section 65(1) preserves the validity of an agreement until it is declared void or prohibited by the Tribunal or Competition Appeal Court, a party who seeks to uphold that agreement in the interim, must be entitled to approach a High Court for relief, and that court would therefore be competent to grant such interim relief to preserve the *status quo*.

[20] Spilg J's reasoning, with which I respectfully agree, is therefore not authority for the proposition that section 65(1) entitles the Applicant to contend that it has a clear right, as submitted by counsel for the Applicant. In fact, Spilg, J.'s judgement is not even authority for the proposition that the section entitles an applicant to claim a *prima facie* right based purely on that section. It is authority only for the proposition that a High Court may, irrespective of section 65(2), grant interim relief in order to maintain a *status quo*. Contrary therefore to the position in the case heard by Spilg J where the right was *res iudicata*, that right must in this case be proven; it cannot simply be assumed.

[21] But section 65(1), in my view, in effect, in any event clearly spells out that position. The section does not say that, pending a declaration of nullity by the Tribunal, an agreement shall be deemed *valid*; it simply says that an agreement that is prohibited or may be declared void in terms of the Act shall be void only when so declared. Therefore, for example, even a nominally void provision in an agreement will stand until struck out. But that does not mean that, for purposes of deciding a *prima facie* right, a nominally void provision *is deemed valid and enforceable*; if the provision cannot be shown to be *prima facie* valid, then there can be no *prima facie* right.

[22] If the judgment of Spilg J is therefore taken to its logical conclusion, then a High Court may, for the purposes of establishing a *prima facie* right for the purposes of interim relief, consider whether or not a provision is *prima facie* valid or not. But it cannot do more, for then it would infringe on the exclusive jurisdiction of the Competition Tribunal or the Competition Appeal Court by, in effect, resolving the issue. This interpretation accords with the *dictum* in **Platinum Holdings (Pty) Ltd v Victoria and Alfred Waterfront (Pty) Ltd** [2004] JOL 12746 (SCA), at paragraph 16, where it is held that the prohibition of section 65(2) does not mean that a court can give no consideration at all to the issue

as to whether a provision is in conflict with the Act; it merely means that a court *may not attempt to resolve the issue*.

[23] I am therefore of the view that the submissions on behalf of the Applicant in respect of the import and consequence of sections 65(1) and 65(2) of the Act have no merit and that the understanding of the judgement of Spilg J is flawed.

[24] Turning then to a consideration of the two applications before me within the context of what I have held above, the counter application requires but brief consideration :-

a) The Applicant says, in its answer to the Respondents submissions in support of the counter application, that it is "*neither desirable nor necessary for Applicant to respond to the allegations … at this stage, which … is in any event, not relevant to the relief sought*" (sic) in that application.

b) The Applicant furthermore suffices with the bald statement that "*the numerous pro-competitive, technological and efficiency gains which arise from its contractual relationships with its customers which far outweigh any anti-competitiveness*". (It is this kind of meaningless, techno-gobbledygook that apparently persuaded Cachalia AJA [as he then was] in **Automotive Tooling System (Pty) Ltd v Wilkens and Others** 2007 (2) SA 271 (SCA) to repeat, “*Graeca non leguntur*”.)

c) Quite correctly, therefore, it was submitted on behalf of the Respondent that the Applicant did not set out any particular basis for opposing the relief sought in the counter application; hence the above-mentioned concession by the Applicant regarding the referral relief sought.

[25] However, that is not the end of the road for the Applicant. Before it knew that the Respondent would raise a Competition Act defence, the Applicant adduced evidence which it alleges establishes at least a *prima facie* right under the common law for the interim relief sought. As pointed out above, the parties were in agreement that there is a substantial confluence between the common law and the Act in respect of the legality and therefore the enforceability of the Applicant's rental agreement. If I nevertheless find, upon the basis of the facts before me in the main application, that the Applicant has made out a case for interim interdict relief then the Applicant would, on my reading of the judgement by Spilg J in **Bedford Square**, be entitled to such relief.

[26] In order therefore to succeed with a cause of action based on the alleged interference with a contractual relationship, an applicant must show, in its founding affidavit, that a respondent, intentionally and without justification, induced or procured customers of the applicant to breach their contracts with the applicant. Of course, for interdict purposes, a real threat of such conduct would also suffice.

See: **Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd** 1981 (2) SA 173 (T) 200; **Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd** 1993 (4) SA 378 (D)

[27] The Respondent's defence to the main application is, among others, that the Applicant has not shown a *prima facie* right because:-

a) the Applicant's standard rental agreement is unenforceable for reasons of public policy and because it is in breach of the Act;

b) the Applicant has not shown that the Respondent had, intentionally and without lawful justification, induced the Applicant's customers to commit a breach of their agreements with the Applicant.

[28] What makes this case unusual is that the Respondent, who is not a contractor of the Applicant, but a competitor, raises, as a defence the validity of an agreement of which it is not a party. That, in circumstances where the parties to the agreement are themselves content that it is not invalid, for it has not been shown that that any customer of the Applicant complained about the alleged unfairness or unlawfulness of the contract.

[29] The facts in this matter are relatively straight forward :-

a) The Applicant and the Respondent, both so-called "*Blankers*", or then, blank number plate manufacturers and suppliers, are active in the same, fiercely competitive and apparently completely locked-in market and compete for the same customers. The latter, called "*Embossers*", emboss blank number plates with alphanumeric characters and on-sell them to dealers in motor vehicles and to the general public;

b) All Blankers and Embossers have to be registered with the SABS and the Gauteng Department of Transport and Roads;

c) Currently, there are only 5 registered Blankers and some 1,000 registered Embossers. The Respondent, as is the case with all Blankers, has a contact list of all of the registered Embossers;

d) All Blankers, including the Applicant and the Respondent, supply blank number plates and embossing equipment to Embossers contracted to them in terms of so-called *tie-in arrangements* (to which I return below);

e) The Applicant has contracted to it, a customer base of about 700 Embossers and therefore holds 70 per cent of the market. By contrast, the Respondent holds about 22 per cent of the market. The remaining market share of 8% is serviced by the three remaining Blankers. The Embosser market is therefore fully spoken for;

f) The Applicant alleges that during the course of March 2012, it came to its attention that the Respondent was approaching Blankers contracted to the Applicant and that it was inducing them to breach their agreements with the Applicant so as to enable them to purchase blank number plates from the Respondent;

g) Various cease-and-desist letters were sent out to the Respondent calling upon it to refrain from its alleged unlawful conduct and to furnish undertakings that it would do so;

h) However, the apparently stock answer in response to those demands was that there is nothing that precludes the Respondent from manufacturing, selling, marketing or distributing number plate blanks to any potential customer, including those contracted to the Applicant;

i) Further evidence thereafter gathered by the Applicant showed that, despite these demands, the Respondent had not only persisted with its alleged unlawful conduct, but had aggressively escalated its campaign.

j) Further cessation demands were therefore made by the Applicant. These demands solicited the response that the Applicant’s contractual relations with its customers were anti-competitive and thus unlawful and, accordingly, that the Respondent would not accede to such demands;

k) Yet further evidence gathered by the Applicant then showed that, when encountering customers contracted to the Applicant in the course of its canvassing campaign, the Respondent had allegedly sought to induce them to breach their agreements with the

Applicant and had even undertook to pay their legal costs should litigation follow. The Respondent allegedly also told these customers that the Applicant could not force them to purchase blanks from them under its rental agreement as the Applicant's agreements were illegal;

l) The Respondent's campaign allegedly further comprised of the offering of number plate blanks to such customers at a price that was approximately 30 per cent less than that ordinarily charged by the Applicant. The customers were allegedly also informed that the Respondent's blanks could be used on the embossing systems supplied to them by the Applicant;

m) The Applicant contends that the Respondent had so approached "*a multitude*" of the Applicants customers and, in support of that allegation listed, by way of example, some 34 customers by name;

[30] The Respondent disputes most of the averments made by the Applicant. However, the Respondent does concede the offering of blanks at a substantially reduced price, and does not deny that compatibility of embossing systems was communicated. The Respondent also admitted that it had sent, by way of "*bulk distribution*", certain marketing material to all Embossers, although it denies that the Applicant's clients were "*targeted specifically*";

[31] The Respondent denies, somewhat disingenuously, that it did not know, until an Embosser was canvassed, whether that Embosser was a customer of the Applicant or that it was under contract with the Applicant. However, it seems relatively obvious that the Respondent would have known which Embossers were contacted to it. No point would therefore have been served by canvassing for the business of such Embossers in order to extend the Respondent's customer base; they were already in the Respondent's stable. It seems equally

obvious that the by far the greatest majority of the remaining Embossers (over 90% of them) would inevitably be contracted customers of the Applicant in view of its admitted market share. Inevitably, therefore, it is absolutely improbable that the Respondent did not know that its campaign would, despite its protestation to the contrary, specifically target the Applicant's customers.

[32] The Respondent nevertheless denies that it has encouraged or induced any customer to breach their agreements with the Applicant.

[33] The Respondent does, however, admit that it had contact with one customer of the Applicant when leaving sample number plates with her. The Respondent admits that when she stated that she was bound to purchase number plates from the Applicant in terms of an agreement, the Respondent did express the view that the Applicant's agreement was unlawful and that the matter had been referred to the competition commission. The Respondent further admitted that she was told that the Respondent could assist her with an embossing system developed by the Respondent and that it could put her in contact with the Respondent's attorneys about the unlawfulness of the Applicant's agreement.

[34] Included in the Respondent's mentioned "*bulk distribution*" marketing material, was a circular forwarded Blankers in general. The circular is addressed "*Dear Embosser!*" and it is entitled "**GOOD NEWS!**" It reads as follows:-

"1. We have recently had occasion to consult legal representatives in regard to exclusive purchasing agreements between BLANKERS and EMBOSSERS and have been advised (sic) by our legal representatives as follows:

1.1. Section 5(1) of the Competitions Act … provides that agreements between parties in a vertical relationship is

prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect.

1.2. Exclusive purchasing agreements between BLANKERS and EMBOSSERS which force EMBOSSERS to purchase their blank number plates from one BLANKER and thereby prevent EMBOSSERS from purchasing blank number plates from other suppliers have the effect of substantially preventing or lessening competition in the blank number plate market and **we cannot see** that that can be justified on any pro-competitive grounds.

1.3. Such exclusive purchasing agreements will **not** be enforced by the civil courts if a party raises an issue concerning such agreements and the civil courts will have to refer the matter to the **COMPETITION TRIBUNAL** for it to decide whether the agreement is enforceable as provided for in section 65 of the Act.

2. You are therefore encouraged to consider your position and seek your own advice but in the light of the advice we have received we cannot see any reason why EMBOSSERS, even those with exclusive purchasing agreements with a particular BLANKER should not purchase blank number plates from **ANY BLANKER** as long as the price, product, service levels and other considerations are acceptable.

3. Please do not hesitate to contact us if you seek further information."

[35] The Applicant contends that this circular constitutes clear evidence of intent on the part of the Respondent to induce the Applicant's customers to breach their agreements with the Applicant and to purchase blank number plates from the Respondent.

[36] In answer, the Respondent contends, among others, that the circular :-

a) was intended merely to convey to Embossers legal advice received by the Respondent in regard to the legality of exclusivity agreements in general;

b) does not refer to the Applicant's rental agreements specifically, but to exclusivity agreements in general;

c) does not suggest that Embossers who had concluded such agreements should ignore them and purchase blank number plates from any other Blanker; it suggests only that they should take legal advice in regard to their position;

d) does not encourage the Applicant's customers to breach their agreements;

e) only furnishes advice that was conveyed to the marketplace in general; etc.

[37] Ironically, the Applicant points out that the Respondent itself employs a tie-in agreement that has exclusivity provisions that are in effect more onerous than those in the Applicant's agreement. But that fact, the Respondent contends, is irrelevant because it is the Applicant's agreement that is in issue; not the Respondent's.

[38] In the context of the substantial market share held by the Applicant, the Respondent could, by virtue of the captive and already locked-in Embosser market, only increase their own market share by diverting customers from other Blankers. Therefore, I have no hesitation whatsoever to find that the circular was but one component of a carefully crafted ploy by the Respondent to increase its market share by capturing a substantial share of Applicant's market. And that the

Respondent could only do by inducing the Applicant's customers to breach their agreements and to do business with the Respondent.

[39] On the inherent probabilities, the circular was therefore aimed primarily, if not specifically, at the Applicant's customers and it was intended to achieve exactly what it encourages those customers to do, namely to reconsider and to renege on their agreements with the Applicant in order to release them to do business with the Respondent, all on the pretext that their agreements with the Applicant are unlawful and therefore not binding. I emphasise here that, whatever euphemistic spin the Respondent attempts to put on the circular, its general tenor is *not* that the Applicant's agreement should be considered to be valid until it is found to be invalid; the tenor is that the agreement *is unlawful and thus invalid*. The circular was also clearly crafted upon the basis that the advice of the Respondent's legal counsel was that the agreement is in fact unlawful and thus invalid. Hence the unequivocal declaration by the Respondent in the circular that, "*in the light of the advice we have received we cannot see any reason why EMBOSSERS, even those with exclusive purchasing agreements with a particular BLANKER should not purchase blank number plates from ANY BLANKER*".

[40] The Respondent's contention that the circular was innocuous and well-intended legal advice to the general market is therefore not supported by the contents of the circular. On the contrary, the proffered justification is so extra-ordinary and so contrary to ordinary human expectation that it is simply improbable. The contents of the circular in the peculiar circumstances of this case rather speak to a fierce, no holds barred struggle for a greater market share by the Respondent and of an attempt to veil a deliberate act of subterfuge under a cloak of altruistic philanthropy in order to avoid the consequences of its unlawful conduct. The Respondent's tale is so far-fetched and clearly untenable

that it can in my view be rejected without further ado. (See: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634H – 635C).

[41] I therefore find that the Respondent, intentionally and without justification, sought to induce or procure customers of the Applicant to breach their contracts with the Applicant. Moreover, because of the Respondent's persistent denials of its direct or, at the very least, indirect intent to induce such breaches, and because of its tenacious insistence the Applicant's agreements are in fact unlawful, I also find that the Respondent, unless interdicted, will simply persist with its conduct.

[42] Having decided those jurisdictional requisites for the wrong relied upon by the Applicant, what remains to be considered, other than the residual interim interdict requirements, is the Respondent's argument that the Applicant has not shown that it has a *proprietary interest* deserving of protection under the delict of unlawful competition. Unfortunately, this aspect of the Respondent's case, which demanded closer analysis, was accorded scant attention in the Applicant's Heads of Argument and argument on its behalf in court.

[43] I would have thought that, once established that a trader has a contractual relationship with a customer, it stands to reason that the relationship itself, as a component of the goodwill of the business of the trader, would constitute a protectable proprietary interest for the purposes of the relief sought by the Applicant. (See, for example: **Botha and Another v Carapax Shadeports (Pty) Ltd.** 1992 (1) SA 202 (A) at 211 to 214; **Slims (Pty) Ltd and Another v Morris NO** 1988 (1) SA 715 (A) at 740A-B; J**acobs v Minister of Agriculture** 1972 (4) SA 608 (W) at 624 to 625; **Caterham Car Sales & Coachworks ltd v Birkin Cars (Pty) Ltd. and Another** 1998 (3) SA 938 (SCA) paragraphs 15-16)

[44] Not so, submits the Respondent. It contends that the exclusivity provisions in the Applicant's agreements, which are in my view perhaps best characterised as vertical tie-in arrangements, are "*considered to be agreements in restraint of trade*" which "*may be held to be unenforceable on grounds of public policy and in particular whether… (they are) reasonable or not*".

[45] Having simply proceed direct to the conclusion that the exclusivity provisions are tantamount to agreements in restraint of trade, the Respondent then submits, relying on **Basson v Chilwan & Others** 1993(3) SA 742 (A) at 767G-H (that *locus classicus* on restraints of trade), that the point of departure in the determination of the Applicant's alleged *prima facie* right, is therefore to determine whether the Applicant has shown that it has an interest deserving of protection. It is then submitted that, on the application of the principles of law applicable to covenants in restraint of trade, the Applicant does not, for the goodwill that it has, was acquired "*solely as a result of illegal or impermissible activities*" and "*by means of inter alia the unlawful exclusivity provisions in the … agreements*". Therefore, the Applicant did not "*acquire a right to its alleged goodwill*". Furthermore, the exclusivity provisions, "*designed solely to stifle competition*" and to "*secure … (an) effective monopoly … in the market*" for the Applicant are unreasonable and contrary to public policy.

[46] In support of these submissions, counsel for the Respondent relied on **Boiler Efficiency Services CC v Coalcor (Cape) (Pty) Ltd** 1989 (3) SA 460 (C) at 465, where the court held as follows :-

"In regard to the present point appellant's counsel relied upon the decision in Unity Longhauls (Edms) Bpk v Grindrod Transport (Pty) Ltd and Others 1978 (2) SA 77 (D) at 79F, and the views of Van Heerden and Neethling Onregmatige Mededinging at 158 n 40. The learned authors' proposition is clearly correct that an Applicant trader who seeks to interdict competition must show that his clear right is based, inter alia, on the fact that his own trading is lawful. And their reference to the Unity Longhauls case in this connection is certainly appropriate."

[47] Captivating thought the Respondent's argument might at face value be, it is, in my view, founded in the false premise that the exclusivity provisions in the Applicants agreement are or can, without further ado, be equated with a covenant in restraint of trade and, in particular, with a restraint that is unreasonable and contrary to public policy. The argument is furthermore founded on the further false premise that a court will interfere in a commercial contract at the instance of non-contract party simply upon the basis that the contract contains vertical tie-in, exclusivity provisions.

[48] Contractual arrangements such as the Applicant's standard tie-in customer rental agreement, which contractually tie customers in to purchase all related products and/or services together from the same supplier, have been described as "*enigmatic economic devices*". Scholars, both legal and economic, have propounded competing and even mutually exclusive theories on such relationships running into thousands of pages of opinion and academic literature. Suffice it for present purposes to say that, at the one end of the scope, the thesis is that such tying arrangements suppress competition and should therefore be prohibited. On the other hand, the antithesis proclaims that such arrangements cannot extend market power from one market to another; do not suppress competition; and should therefore not be condemned. And such antitheses, or a variation of the same theme, are readily to be found in our case law: see, e.g., **Matthews and Others v Young** 1922 AD 492; **Roberts Construction Co Ltd v Verhoef** 1952 (2) SA 300 (W); **Nel v Drilec (Pty) Ltd.** 1976 (3) SA 79 (D); **Sibex Engineering Services (Pty) Ltd v Van Wyk** 1991 (2) SA 482 (T) 1991 (2) SA at 501; **Troskie en 'n ander v Van der Walt** 1994 (3) SA 545 (O);

[49] Counsel for the Respondent submitted in argument that the following features of the Applicant's rental agreement are covenants in restraint of trade that are *contra bonos mores* because they "*secure … (an) effective monopoly … in the market*" for the Applicant :-

a) Embossers are tied in to an exclusive purchasing arrangement with the Applicant for a duration of 10 years;

b) The rental payable by Embossers for number plate equipment supplied, is payable over the period of 10 years;

c) Embossers never acquire ownership of the equipment;

d) Embossers may, for as long as the agreement subsists, purchase, among others, blank number plates and related equipment only from the Applicant;

e) Embossers may sell such equipment only in accordance with the Applicant's prevailing price list, which shall be subject to periodic increases;

f) Embossers are restricted to a designated geographical area in which they can operate their businesses;

g) Upon termination of the agreement, it may be renewed for a further period of 10 years;

h) The equipment supplied to Embossers is warranted only for a period of six months from the date of its delivery and installation;

i) Embossers have the option, during the currency of the agreement, to purchase the equipment rented for R39,950.00, but irrespective of such a purchase, Embossers are still obliged to purchase all their equipment and supplies from the Applicant;

j) Embossers who purchase and/or rent embossing equipment from the Applicant are tied-in also to purchase number plate blanks from the Applicant.

[50] These features of the Applicant's agreement, however, simply serve to show that the agreement hardly differs in any major respect from a run-of-the-mill franchise agreement, which is in effect also a vertical tie-in agreement. Furthermore, various indicators in the agreement that point to the fact that it is not a restraint, have apparently escaped the Respondent's attention: all of the covenants by the Embosser in the Applicant's standard agreement are *positive commercial covenants*. And whatever negative covenants may arguably be implied in the agreement, are purely incidental and normal to the positive commercial arrangements at which the agreement is aimed. Moreover, and also contrary to a covenant in restraint of trade, those positive covenants are directed at what is to happen *during the currency of the agreement; not thereafter*.

[51] At face value, therefore, the Applicant's agreement is not a restrain as alleged on behalf of the Respondent and there is therefore no room for the application of the doctrine of restraint of trade and the principles of law that govern it.

[52] Nevertheless, as a point of departure in the determination of whether a tie-in agreement such as that of the Applicant could conceivably be said to be a covenant in restraint of trade, or even that it is unreasonable and therefore unlawful, reference should be made to **Roberts Construction**, *supra*, at 304. Although the case was decided in the employer/employee context, which by nature could lend itself to characterisation as a restraint, the principles applied by the court equally apply here. In that case it was held that a positive restrictive provision in an agreement that was operative only during the currency of the agreement and not thereafter does not render the agreement a

covenant in restraint of trade and unreasonable. The court held as follows :-

"In **William Robinson & Co., Ltd v Heuer**, 1898 (2) Ch.D. 451, a covenant indistinguishable from the present one was considered. The covenant ran:

> 'Heuer shall not during this engagement, without the previous consent in writing of the said W. Robinson & Co., Ltd. . . . carry on or be engaged either directly or indirectly as principal, agent, servant, or otherwise, in any trade, business, or calling, either relating to goods of any description sold or manufactured by the said W. Robinson G & Co. Ltd. . . . or in any other business whatsoever.'

Of this covenant LINDLEY, M.R., says:

> 'There is no authority whatever to show that that is an illegal agreement - that is to say, that it is unreasonable, and goes further than is reasonably necessary for the protection of the plaintiffs. It is confined to the period of the engagement, and means simply this - 'So long as you are in our employ you shall not work for anybody else or engage in any other business'. There is nothing unreasonable in that at all.'

I respectfully associate myself with that view."

[53] The court in **Roberts Construction**, *supra*, at 306, furthermore referred with approval to **Warner Bros Pictures Inc v Nelson** [1936] 3 All ER 160, at 163, in which it was held that *"(w)here, as in the present contract, the covenants are all concerned with what is to happen whilst the defendant is employed by the plaintiffs and not thereafter, there is no room for the application of the doctrine of restraint of trade.*"

[54] These cases were in turn referred to with approval by Franklin, AJ., (as he then was) in **Tension Envelope Corporation (SA) (Pty) Ltd v Zeller and Another** 1970 (2) SA 333 (W) in which the learned judge held, at 339B, that *"(a) perusal of the authorities appears to me to*

indicate quite clearly that in no circumstances will the Court grant an interdict … unless the defendant has entered into an independent negative stipulation by which he expressly precludes himself from acting inconsistently with his positive contract."

[55] Thereafter, in **Nel v Drilec (Pty) Ltd.** 1976 (3) SA 79 (D), the court was also called upon to consider whether or not an agreement with a positive restrictive covenant constituted a restraint of trade. In this case the applicant claimed an interdict to restrain the respondent from selling clothes driers manufactured by the respondent to any party other than the applicant. The applicant alleged that it had concluded an oral agreement with the respondent in terms of which it had been given the sole right to sell driers. The respondent in turn contended that the agreement was subject to the condition that the applicant would purchase 200 driers per month. However, as the applicant had breached that condition, the respondent was entitled to cancel the agreement and to sell driers direct to the public. The applicant's reply was it had merely agreed to order 200 units at a time, as and when it had sold all of those driers purchased. Commenting on the nature of that agreement, the court held, at 81C-G, as follows :-

> "I do not think that the agreement alleged by the respondent is one which falls within the ambit of the doctrine regarding agreements in restraint of trade. If it does fall within the ambit of that doctrine then it is *prima facie* reasonable. Cf **Shell Company of SA Ltd. v Gerrans Garage (Pty.) Ltd.,** 1954 (4) SA 752 (GW) at p. 756C - D, and see Cheshire and Fifoot, Law of Contract, 7th ed: at p. 343, where the following passage appears:
>
> 'if, for instance, a manufacturer agrees that X shall be the sole agent for the sale of his output, the scope of his liberty of disposition is no doubt fettered, but the object of the arrangement is to increase his trade, and it has become a normal incident of commercial practice'."

[56] I respectfully agree with these conclusions. A vertical tie-in agreement such as that of the Applicant with positive restrictive covenants that operate only for the duration of the agreement cannot be said to be a covenant in restraint of trade. Neither can it be said to be unreasonable simply because it ties the Applicant's customers in to do business with it only – such agreements are, as opined by Cheshire and Fifoot, a normal incidence of commercial practice.

[57] Because the Respondent's defence to the main application is balanced solely on the erroneous assumption that the Applicant's agreement is a restraint and that the principles of law applicable to restraints therefore apply, that defence must fail when it is found, as I do, that it is not a restraint. That conclusion, in my view, should generally forestall the necessity further to consider the facts in this case in order to determine whether or not they would show that an enforcement of the Applicant's agreement would be unreasonable.

[58] However, there is another wrinkle in this case. There can be no doubt that a court will not enforce a covenant in restraint of trade that places an unreasonable restraint on freedom to trade upon the basis that such restraints are unenforceable for reasons of public policy. But it has also been held that the collision between the two ideas of freedom of trade and the sanctity of contracts that presents itself in the case of covenants in restraint of trade does not necessarily arise in commercial agreements. The Applicant's agreement is not a covenant; it is a commercial agreement and the question as to its validity *ought* therefore to boil down to the simple proposition that the sanctity of a commercial, vertical tie-in agreement should generally take precedence over the idea of freedom of trade.

Atlas Organic Fertilizers, *supra*, 192-3; **National Chemsearch (SA) (Pty) Ltd v Borrowman and Another** 1979 (3) SA 1092 (T) at 1099;

Roffey v Catterall, Edwards & Goudré (Pty) Ltd 1977 (4) SA 494 (N) at 503 - 504

[59] Therefore, in **Roffey**, *supra*, approved in **National Chemsearch**, *supra*, the court held that "*there is a tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the ideal of freedom of trade … (i)t is the sanctity of contracts*". The court then, with approval, referred to the judgement in **Printing and Numerical Registering Co. v Sampson,** (1875) L.R. 19 Eq. 462, at 465, where that court held as follows :-

> "(I)f there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.
>
> The "inviolability" of contracts was described by LINDLEY, M.R. in E. Underwood and Son Ltd. v Barker, (1899) 1 Ch. 300 (C.A.) at p. 305, as essential to trade and commerce."

[60] However, irrespective of whether or the Applicant's agreements are or should be regarded as agreements in restraint of trade, the law is not stagnant. It is conceivable that even vertical tie-in agreements, the validity of which the parties to it accepted without demur, and which are otherwise valid in form, *could* be held to be *contra bonos mores* and therefore unenforceable. But I would surmise that no court would readily do so and then certainly not without very good reasons. It is therefore necessary to consider whether, in the final fall-back, the Respondent could argue that even if the Applicant's agreement is not a restraint, then it is still invalid for public policy reasons such as, for example, the stifling of competition by the creation of a monopoly.

[61] In **African Dawn Property Finance 2 (Pty) Ltd. v Dreams Travel and Tours CC and Others** 2011 (3) SA 511 (SCA) the court had to consider whether or not an apparently ordinary commercial lending transaction between litigants, secured by suretyship, was usurious, therefore *contra bonos mores* and thus unenforceable. As things are wont to be in the often murky world of financial dealings with the not so creditworthy, the cash-strapped debtor, eager for a loan and content to accept it subject to whatever conditions the lender might set, swiftly morphed into recalcitrance when settlement became due, and what was at first accepted as fair, with alacrity transformed into the usurious, the *contra bonos mores*, and thus the unlawful.

[62] Not overly impressed with that defence, the court pointed out that, as far back as in **Merry v Natal Society of Accountants** 1937 AD 331, at 336, the Appeal Court had affirmed that, under common law, the position has always been that, in order to render a transaction usurious, it must be shown to be tainted with oppression, extortion, or something akin to fraud. However, the debtor in **African Dawn** did not contend anything of the sort; the case was that the rate of interest charged by the lender was excessive, unconscionable and against public interest. That, the SCA held, "*one would have thought, would have been the end of the enquiry*" (unwittingly echoing **Shell Company of South Africa**, *supra*, at 757E) because if there was no extortion or fraud, then the public interest does not come into play. But, quite creatively, if not adventurously, the final fall-back by the debtor was, as is the position in far too many cases, that "*king's cure-all*"; namely the Constitution. It was argued that the common-law rule is inconsistent with the Constitution; that the court was consequently under a duty to develop the common law to reflect the changing social, moral and economic fabric of the country; etc.; etc.

[63] The SCA reaffirmed, with reference to **Roffey**, *supra*, that "*contracts valid in form are prima facie enforceable in South African law and effect will be given to them unless grounds for their avoidance are proved*". However, as confirmed in **Napier v Barkhuizen** 2006 (4) SA 1 (SCA), paragraph 13, the court held that the Constitution requires of the courts "*to employ its values to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit individuals the dignity and autonomy of regulating their own lives*". When **Napier**, *supra*, went on appeal to the Constitutional Court, the latter court held (in **Barkhuizen v Napier** 2007 (5) SA 323 (CC) paragraph 57 and 87) that,

> "*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*.' …
>
> '*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 which violate public policy*. As indicated above, courts have recognised this and our Constitution re-enforces it.'" (my accentuation)

[64] Of course, the *dictum* that the extent to which the contract was freely and voluntarily concluded should be a vital factor in the determination of the weight that ought to be accorded to the values of freedom and dignity is not entirely new, and can be found in cases decided as far back as **Van der Pol v Silbermann and Another** 1952 (2) SA 561 AD

at 574. In that case the court considered the kind of evidence adduced and the considerations that have in the past served to displace the "*probability of reasonableness arising from the free assent of the parties*". The court held that the fact that parties had agreed on certain terms might not be conclusive evidence that such terms are in fact reasonable as between them. However, once that agreement is established, it is "*weighty evidence*" that points to the conclusion that the agreed restraints imposed on their contractual freedom was no more than that necessary to protect the interests of the parties concerned and as such it was reasonable *inter partes*.

[65] As well, In **Shell Company of South Africa**, *supra*, cited with approval in **Drilec**, *supra*, the court not only found no wrong in commercial, vertical tie-in arrangements; it also held, at 756H to 758A, that the fact that the parties to the dispute had negotiated with one another *on an equal footing* is vital in the determination of the validity of such an agreement. The court then held that from "*this fact alone there arises a presumption that the restraint was reasonable as between the parties*".

[66] The court in **Shell Company**, *supra*, further referred with approval to **North Western Salt Co., Ltd v Electrolytic Alkali Co., Ltd.,** 1914 A.C. 461, in which case the court distinguished between controversies relating to the validity of an employment and commercial agreements. In the former, the court considered the fact that an employee would have little opportunity of choice to preclude himself from earning his living by the exercise of his calling after the period of service is over; therefore the law would look "*jealously at the bargain*". However, in the case of commercial agreements, "*the law adopts a somewhat different attitude - it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves*".

[67] Of course, the main difficulty that faced the Respondent in this case was that, generally it would bear a very substantial onus to show that an agreement that is apparently reasonable as between the parties is injurious to the public (see: **Shell Company of South Africa**, *supra*, at 757F, citing with approval **A.G. of the Commonwealth of Australia v Adelaide S.S. Co. Ltd.**, 1913 A.C. 781). That onus, the court held, "*is not a light one … and consequently cases in which such agreements have been held void, are rare*".

[68] In this case the Applicant not only relied on a commercial arrangement between consenting parties, but also on an agreement comprising only of positive covenants effective for the duration of the relationship. The Applicant furthermore adduced evidence that such agreements are the norm in the industry. By contrast, the Respondent has put up no evidence whatsoever to show, for example, that the Applicant and its customers had not negotiated and contracted on an equal footing; that any of those customers regard the agreement as *contra bonos mores*; that the positive covenants in the Applicant's agreement differ in any manner from what is considered to be acceptable in the industry; that the agreements are regarded as unfair in the industry; etc. In essence, what the respondent relied upon to advance its case is therefore not evidence, but argumentative submissions and contentions on the validity of the agreement. The latter, of course, cannot serve to displace or refute the presumption of validity that arises by virtue of the Applicant's evidence that the parties themselves did not consider the agreements as unlawful. Neither can these submissions and contentions serve to cast serious doubt on the validity of the Applicant's agreement.

[69] Turning to the remaining requirements for an interim interdict and costs, I am of the view that these require but cursory consideration. If the Respondent is not interdicted, and if its unlawful acts succeed, the

harm to the Applicant is self-evident. Moreover, the loss that would follow in the wake of such unlawful conduct would be very difficult, if not impossible accurately to quantify. The most appropriate remedy to restrain and to prevent a continuation of such unlawful conduct, and to mitigate the accumulation of further potential damages to the Applicant, is undeniably, therefore, an interdict. The balance of convenience also clearly favours the Applicant - the further potential harm that will be suffered by the Applicant if the Respondent is not interdicted, is far greater than the harm that will be suffered by the Respondent if it is interdicted. All that the Respondent needs to do in its competitive struggle for a greater market share is to keep its marketing activities within lawful bounds.

[70] The Applicant sought, in a draft order handed up at hearing of this application, costs against the Respondent. Where interim relief is sought, the appropriate order is generally to direct that the costs of the application in the application for final relief or, where an action will be launched, pending the final resolution of that action. I see no reason to differ from that approach in this case.

Therefore, I make the following order:-

(a) The issue as to whether the Applicant's standard agreement concluded with its customers, an example of which is attached to the Applicant's founding affidavit as Annexure "NPC–2", alternatively the issue as to whether the exclusivity provisions in that agreement is prohibited or declared void in terms of the Competition Act, 1998 ("the Act") is referred to the Competition Tribunal to be considered on the merits in terms of section 65 of the Act;

(b) Pending the final determination of the issue so referred :-

i. the Respondent is interdicted and restrained from unlawfully and intentionally interfering with the Applicant's contractual relationship with its customers by soliciting, inducing and persuading and by attempting to solicit, induce or persuade any of such customers to sever and/or in any manner whatsoever to breach their agreements with the Applicant;

ii. the Applicant's main application for final interdict relief under case number 25718/2012 is postponed *sine die*;

(c) The costs of this application will stand over for final determination when the Applicant's main application for final relief is heard.

A J BESTER

ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT,

JOHANNESBURG

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DATES OF HEARING :	15 OCTOBER 2012
DATE OF JUDGMENT:	31 OCTOBER 2012