IN THE REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 3852/2013

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

3/05/2013
DATE

SIGNATURE

In the matter between:

THE HEAVEN GROUP (PTY) LTD Applicant

and

WOLMAN, LAWRENCE First Respondent

CANDYLICIOUS RETAIL (PTY) LTD Second Respondent

JUDGMENT

D T v R DU PLESSIS AJ:

1 This is an application for interim relief to restrain the first respondent from breaching an agreement in restraint of trade with the applicant to which he is a party. Mr Maselle, who appeared for the first respondent, submitted that there was no reason why the court should not decide the matter on the basis of final interdictory relief. It is common cause between the parties that the restraint of trade provision in the agreement between them, expires on 8 October 2013. Mr Maselle argued that the interim order would run for the unexpired term, and therefore the matter should be approached on the basis that final relief was being sought.

2 However, there is more than enough time in terms of the practice in this court for the relief in part B of the notice of motion to be disposed of before the expiry of the restraint. For that reason I will determine the matter on the basis of interim relief.

3 The requirements to be satisfied in order to obtain an interim interdict are that:

3.1 the applicant must have a *prima facie* right to the relief sought in the main proceedings;

3.2 the applicant must show that it will suffer irreparable harm if the interim interdict is not granted but the relief sought in the main proceedings is granted;

3.3 the balance of convenience must favour the applicant; and

3.4 the applicant must have no alternative available remedy.[1]

4 The approach to determine whether the applicant has established a *prima facie* right to relief

"is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on these facts obtain final relief at the trial of the main action."[2]

5 The application for interim relief is to be decided on the applicant's version, unless the respondent raises facts that throw serious doubt on the applicant's case.[3]

6 The background facts to the application are the following:

6.1 The formal relationship between the applicant and the first respondent began in 2003 when the applicant purchased the first respondent's company, Cosmic Candy;

6.2 At that stage, the first respondent became a shareholder of the applicant;

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1 *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 (2) SA 685 (A); *LF Bosoff* (supra) at 267

2 *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 267E-F; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others* 1994 (2) SA 172 (C) at 182C-D; *Diepsloot Residents' and Landowners Association and Others v Administrator, Transvaal and Others* 1993 (1) SA 577 (T) at 585C-E

3 *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189

6.3 In December 2007, Nedbank bought a significant share of the applicant. Pursuant to that transaction, the first respondent received approximately R18 750 000.00, of which R12 825 000.00 was paid in cash.

6.4 In terms of the agreement with Nedbank, all of the directors of the applicant, including the first respondent, were required to sign agreements in restraint of trade.

6.5 On 25 April 2008, the first respondent entered into an employment contract with the applicant which included provisions containing the agreement in restraint of trade.

7 The important aspects of the employment agreement are the following:

7.1 The first respondent was obliged to devote all of his time and attention during working hours to the responsibilities assigned to him in terms of his job description;[4]

7.2 The first respondent was prohibited from being involved directly or indirectly and from being concerned or interested in any other business without *full disclosure* to the board of the applicant;[5]

7.3 In terms of the restraint of trade provisions in the agreement, the first respondent agreed not to do the following directly or indirectly whether or not for reward, either alone or together with or as agent for any person, firm, company or association:

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4 Clause 1.2.3

5 Clause 1.3, emphasis added.

7.3.1 carry on or enter into – as proprietor, partner, shareholder, financier, advisor, employee, consultant or otherwise – any business carried on in the territory, operating in competition with the applicant;

7.3.2 be engaged in or concerned with any business carried on in the territory, operating in competition with the applicant; and

7.3.3 grant financial assistance or loans of money to any business carried on in the territory, operating in competition with the applicant;[6]

7.4 the term "the territory" is defined to mean South Africa and the United Kingdom;

7.5 the agreement provides that the restraint provisions would immediately cease to operate if the first respondent was dismissed for reasons relating to his incapacity, the applicant's operational requirements or if he was unlawfully dismissed;[7]

7.6 the agreement also contained the following prohibitions:

7.6.1 The first respondent was prohibited from using, directly or indirectly, for his own benefit or the benefit of any other person

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6 Clause 11.2

7 Clause 11.2.2.2

the trade secrets or any confidential information of the applicant;[8]

7.6.2 The first respondent was precluded, for his own account or as a representative or agent of any third party from persuading, inducing, encouraging or procuring any employee of the applicant to, amongst other things:

7.6.2.1 become employed by, or interested directly or indirectly in any manner whatsoever, in any business which is in competition with the applicant;

7.6.2.2 terminate his employment with the applicant.[9]

7.6.3 The first respondent was prohibited, either for his own account or as an agent or representative of any third party, from persuading, inducing, encouraging or procuring any licenser or supplier or customer of the company:

7.6.3.1 to terminate its licence and/or supply agreement with the applicant;

7.6.3.2 enter into or negotiate a licence and/or supply agreement with the applicant on terms and conditions less advantageous to the applicant than those previously in force;

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8 Clause 11.3

9 Clause 11.4

7.6.3.3 purchase any product or service sold and/or manufactured by the applicant or any product of similar application from a third party supplier;[10]

7.7 the agreement provides that the restraint will apply in all parts of the territory (ie, South African and the United Kingdom). It provides, however, that if it is determined that the restraints should not apply throughout the territory, the restraints would not be invalid and would apply in such parts of the territory as may be reasonable in the circumstances;[11]

7.8 the agreement provides that, subject to the clause which lists the types of dismissal, such as an unlawful dismissal, that immediately bring the restraint obligations to an end, the restraint obligations will endure until the third anniversary of the date of the termination of the first respondent's employment with the applicant.[12]

8 The first respondent does not seriously dispute the conduct complained of by the applicant, but denies that he is bound by the restraint agreement. In particular, he alleges that he was unlawfully dismissed. He also alleges that the failure of the applicant to pay amounts due to him in terms of the employment agreement constituted a repudiation of the agreement. He allegedly accepted the repudiation and cancelled the agreement. Lastly the first respondent relies on a waiver of its rights in terms of the agreement on the part of the applicant.

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10 Clause 11.5

11 Clause 11.6.1

12 Clause 11.6.2

9 Although Mr Maselle did not rely on an unlawful dismissal during argument, the defence was raised on the papers and in his heads of argument. It is therefore necessary for me to discuss this issue. The following facts are relevant in this regard:

9.1 the papers show that the first respondent, in 2010, disclosed by email an interest in two new businesses which he claimed did not conflict with the business of the applicant;

9.2 Mr Ginsberg and Mr Davidoff, the deponents to the two main affidavits of the applicant in this matter, were not satisfied with the fullness of the first respondent's disclosure and made certain enquiries. The enquiries revealed serious misconduct on the part of the first respondent, which constituted a breach of his employment agreement with the applicant. Clear evidence of the misconduct was contained in a detailed forensic report commissioned by the applicant;

9.3 the investigations revealed that the first respondent had lied in his disclosure email and had mischaracterised the nature of his relationship with the two companies described in his email;

9.4 after the investigations confirmed the extent of the first respondent's misconduct, he was given the opportunity to defend himself in a disciplinary enquiry chaired by a senior counsel at the Johannesburg Bar. Despite the enquiry being postponed to provide the first respondent more time to prepare, he failed to attend the enquiry on the date which had been agreed with his attorney. It is not denied by the first

respondent that he was given the evidence on which the applicant planned to rely in the disciplinary enquiry approximately two weeks before the rescheduled hearing;

9.5 The first respondent thereafter referred a claim of unfair dismissal to the CCMA. However, when the matter did not settle at the conciliation phase, the first respondent failed to proceed with the arbitration of his dispute. He therefore failed to take the opportunity to deal with the merits of his dismissal. This is not denied by the first respondent;

9.6 the inference is inescapable that, when the first respondent saw the evidence against him contained in the voluminous forensic report, he realised that he had no defence whatsoever to the charges of misconduct levelled against him.

10 Based on these facts, I find that the applicant has shown, at least *prima facie*, that the first respondent was lawfully dismissed. The first respondent has failed to show that he was unlawfully dismissed and has failed to make use of the opportunities to prove an unlawful dismissal.

11 As far as the alleged unpaid amounts are concerned, the applicant has shown that the amounts have in fact been paid. In any event, for the reasons that follow, whether or not the applicant paid to the first respondent the sums claimed is irrelevant to the assessment of whether he is bound by the restraint.

12 In the first respondent's answering affidavit, and also in argument before me, the first respondent relied on a cancellation of the employment agreement for

his submission that the restraint no longer applies. On his version the applicant repudiated the agreement by dismissing him and therefore he was entitled to cancel it and escape the consequences of the restraint. Mr Maselle sought to distinguish between a termination of the employment and a termination of the employment agreement. He argued that a termination of the employment does not necessarily mean that the agreement is also terminated. Once the agreement is however terminated, no provisions thereof survive and an employer cannot rely on, for example, a restraint provision in terms thereof.

11. Mr Subel SC, who appeared with Mr Friedman for the applicant, submitted that this argument is flawed. Of course, if the first respondent was unlawfully dismissed, he would no longer be bound by the restraint provisions. The agreement says as much. Once it is accepted that the first respondent was lawfully dismissed, there can be no doubt that the restraint provisions continue to apply for three years from the date of dismissal.

12. The following emerges from the decision of *Reeves and another v Marfield Insurance Brokers CC and another*:[13]

    12.1. if a restraint clause provides that it will apply on the termination of the employee's employment "for any reason whatsoever", it will be held to be binding on the employee even if he or she was unlawfully dismissed by the company;[14]

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13 1996 (3) SA 766 (A)

14 *Reeves* (supra) at 771D-E

12.2. it is often the case that restraint provisions are said to apply for a certain period of time after the employee "ceases to be employed". Such clauses disclose an intention on the part of the parties that the restraint will operate even once there is no longer an employment relationship between them;[15]

12.3. the phrase "for any reason whatsoever" makes it clear that the circumstances in which the employment relationship comes to an end or the underlying cause of its termination are irrelevant to the operation of the restraint provision;[16]

12.4. importantly,

"[t]he legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end. The need for the protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs in consequence of a breach by the employer. Such a breach may, of course, take many forms. It may be committed by the employer in good faith and be of a technical nature only. There may be fault on both sides. It is difficult to imagine that in such circumstances it would be against good morals to recognise the restraint and that the employer should have to forfeit the protection which the parties have agreed he should have regardless of how the employment relationship is ended. Even where the breach on the part of the employer is less innocent, it must be remembered that the employee is always free to pursue his contractual or statutory remedies against the employer."

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15 *Reeves* (supra) at 771J

16 *Reeves* (supra) at 772A-B

12.5. unlike in the case of *Reeves* (supra), the agreement between the applicant and the first respondent provides that the restraint will not apply if the first respondent was unlawfully dismissed. However, *Reeves* (supra) makes clear that:

12.5.1. the starting point is that the restraint provisions of an employment agreement will endure beyond the termination of the employment relationship;

12.5.2. the correct approach is to look simply at the words of the restraint clause to determine the scope of its operation;

12.5.3. once its operation has been determined, effect must be given to it, regardless whether the agreement was otherwise breached by the employer (for which ordinary contractual damages will be available);

12.6. therefore, the sole question which arises in this case – in so far as the applicability of the restraint provisions is concerned – is whether the first respondent was unlawfully dismissed. If he was not, then the restraint provisions of the agreement are clearly applicable. Issues such as non-payment by the applicant of certain remuneration and the like are wholly irrelevant.

13. Mr Subel submitted that the distinction which Mr Maselle sought to draw between a termination of employment and a cancellation of the agreement, was a 'distinction without a difference'. I agree therewith. The clause in the

agreement that deals with the duration of the restraint after 'date of the termination of your employment', must also mean a termination of the agreement.

14. The applicant has made out a *prima facie* case (supported by the first respondent's own affidavit) that the first respondent is breaching the terms of his common cause restraint undertaking:

14.1. The first respondent plays an active role in the business of the second respondent (it is common cause that the second respondent is a competitor of the applicant). With his assistance, the second respondent opened a shop close to and very similar to the shop operated by the applicant at Montecasino. He also confirms his intention to become a shareholder of the second respondent. The first respondent's opposition is based essentially on his (unfounded) contention that he "cancelled" the restraint agreement which therefore does not bind him. In addition he seeks to rely on alleged "waiver" or alleged unlawful dismissal as provided for in clause 11.2.2.2 of the restraint. The facts do not support this. This has already been discussed above, and will be discussed again below;

14.2. The first respondent disclosed confidential financial information or at least commercially valuable information about the applicant to a third party;

14.3. The first respondent has assisted the second respondent to participate in tenders for lucrative airport sites, which are very valuable to the

applicant's model, with the intention of opening Candylicious stores in the relevant airports;

14.4. The first respondent has contacted suppliers of the applicant in an attempt to encourage them to supply products to his Candylicious stores;

14.5. The first respondent has attempted to induce a senior employee of the applicant to resign and join Candylicious.

15. The applicant has, therefore, made out at least a *prima facie* case that the terms of the restraint agreement are binding on the first respondent and are being breached by him.

16. Part of the enquiry into whether a restraint of trade clause is reasonable focuses on the protectable interest which the applicant or plaintiff seeks to protect. In this regard, the following principles are applicable:

16.1. generally contractual undertakings should be honoured (*pacta sunt servanda);*[17]

16.2. the need to protect trade connections is a recognised protectable interest.[18] It is part of the recognised protectable goodwill of the covenantee;

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17 *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)

18 *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D) at para 6

16.3. it is open to purchasers of businesses to prevent the sellers from making a profit on the sale of the business and then diminishing the value of the business by acting in competition with it.[19] This is recognised at common law even without the need for a contractual restraint;[20]

16.4. goodwill has been described as the good name of a business, which distinguishes an old business from a new one;[21]

16.5. information with the following attributes is to be treated as protectable information:

16.5.1. it must be capable of application in trade or industry;

16.5.2. it must not be in the public knowledge; and

16.5.3. it must be of economic value to the person seeking to protect it;[22]

16.6. information which is received by an employee about business opportunities available to an employer is protectable under a restraint of trade.[23]

17. The following facts demonstrate the applicant's protectable interests:

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19 *Den Braven* (supra) at para 35; *A Becker & Co v Becker* 1981 (3) SA 406 (A) at 414-5

20 *A Becker & Co (Pty) Ltd v Becker* 1981 (3) SA 406 (A)

21 *CIR v Möller & Co's Margarine (Pty) Ltd* [1901] AC 217 (HL) at 234-5; Saner *Agreements in Restraint of Trade in South African Law* at pg 7-6

22 *Aranda Textile Mills (Pty) Ltd v Hurn and another* [2000] 4 All SA 183 (E) at para 29

23 *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg* 1967 (1) SA 686 (W) at 689-691

17.1. the goodwill in the brand as evidenced by the fact that franchisees will pay up to R500 000.00 for the franchise rights. In particular, the layout, uniqueness of stock and method of merchandising make the stores well-recognised by the public. The success of the franchise model used by the applicant is dependent on the applicant protecting its concept. This is particularly important because the barriers to entry into the retail confectionary market are low and the franchise therefore depends on its goodwill to entice new franchisees;

17.2. the sale of the applicant to Nedbank, and the consequent cash payment to the first respondent of approximately R12.5 million would not have been possible without the restraint;

17.3. The first respondent has enticed employees of the applicant to leave the applicant and work with him and it is reasonably apprehended that he will continue to do so;

17.4. The first respondent has acquired specialist knowledge on how to run an integrated wholesale and retail business of the scale of the applicant;

17.5. The first respondent has intimate knowledge of when leases currently held by the applicant will expire, giving him an unfair opportunity to secure those sites for his competing Candylicious stores;

17.6. it has been shown that the applicant has a protectable merchandising concept which is used in its stores.

18. It is well-accepted that restraint of trade agreements are enforceable unless they are found to be contrary to public policy.[24] The onus of showing that the restraint is unreasonable rests on the former employee.[25] The restraint in this application must be viewed with reference to the first respondent's position not only as employee but also as the recipient of significant payment for his interest (i.e. as a "vendor" restraint).

19. The first respondent has not, in these proceedings, adduced any evidence to show that the restraint is unreasonable.

20. The restraint is, in any event, reasonable on the facts of this case:

    20.1. it was necessary for the restraint to cover the whole country not only to prevent competition with existing stores but to prevent the first respondent from taking over sites currently held by the applicant, such as airports;

    20.2. Nedbank would not have paid R75 000 000.00 to acquire a stake in the applicant unless the restraint agreement was concluded. The first respondent, in turn, would not have received the R12.5 million cash payment from Nedbank unless he signed the restraint. In particular, the whole idea of the restraint was to protect the future value of the applicant in circumstances in which the sale price was calculated on a price/earnings multiple. The agreement was designed to prevent

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24 *De Braven* (supra) at para 3; *Magna Alloys and Research SA (Pty) Ltd* 1984 (4) SA 874 (A) at 891B-C.

25 *Den Braven* (supra) at para 3; *Magna Alloys* (supra)

directors from profiting from the sale to Nedbank and then undermining the value of the company by acting in unfair competition with it;

20.3. there was equality of bargaining power when the restraint was concluded;

20.4. The first respondent has other business interests, unaffected by this application, which enable him to earn a livelihood.

21. In the alternative to the restraint in respect of the whole country, and in the event of the Court finding that it is unreasonable to restrain conduct throughout the country, the applicant seeks the enforcement of the clause only within 15 km radius of existing applicant stores. The agreement explicitly envisages this sort of partial enforcement. As the first respondent has failed to adduce any evidence to show that the restraint is unreasonable in any respect, I do not think it is necessary to only grant this alternative relief.

22. The last defence is that the applicant has waived its entitlement to rely on the restraint provisions of the employment agreement.

23. There is a presumption in our law against finding that contractual rights have been waived.[26] The effect of this presumption is twofold:

23.1. the party alleging a waiver must show that the conduct in question is clear and unequivocal and can bear no other reasonable interpretation than that it constitutes a waiver;[27] and

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26 *Hiddingh's Executors v Hiddingh's Trustee* (1886) 4 SC 200 at 204 where de Villiers CJ held that 'it is clear that, by our law at all events, no one can be presumed to have abandoned his rights unless his intention to do so is manifest from his words or acts'.

23.2. where conduct is vague or ambiguous, our courts will tend to adopt an interpretation against finding that rights have been waived.[28]

24. The first respondent alleges as follows:

24.1. he makes reference to the fact that, according to him, the applicant has known of his involvement in the confectionary industry since 2010 but has done nothing to enforce the restraint of trade;

24.2. he quotes an extract from a letter in which the applicant explained that it "has tolerated you [ie, the first respondent] engaging in a limited sweet wholesaling business on the basis that such business was limited to the Wonka sweet brand";

24.3. he then alleges that no reasons have been furnished by the applicant for its decision to allow him to carry on business in the confectionary industry, despite the existence of the agreement in restraint of trade;

24.4. he concludes by contending that the failure of the applicant to act for a period of 16 months is a clear indication that it has waived its right to rely on the restraint provisions of the agreement.

25. However, it has been explained on behalf of the applicant that:

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27 *Laws v Rutherfurd* 1924 AD 261 at 263; *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A) at 778 D – F.

28 *Ellis and Others v Laubscher* 1956 (4) SA 692 (A) 702 E – F; *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 468 I – 469 E

25.1. it had, at all times, been labouring under the impression that the first respondent had been conducting a limited wholesale business, focusing mainly on Nestle's Wonka brand;

25.2. the applicant was prepared to permit the first respondent to continue with this limited business because:

25.2.1. it had sufficient quantities of its own stock of Wonka products;

25.2.2. it wanted to allow the first respondent to earn a living; and

25.2.3. the first respondent's limited wholesale activities did not impact on the applicant's business. This is because, after the first respondent's dismissal, the applicant reverted to its original business model and only wholesaled to its franchisees and company-owned stores;

25.3. it has now learned the extent of the first respondent's wholesaling activities and the fact that they are linked to the retail operations of the second respondent;

25.4. in no sense, therefore, can the applicant be said to have waived its rights to enforce the agreement.

26. The first respondent has not, therefore, demonstrated an unequivocal waiver by the applicant. The first respondent has failed to discharge the onus that reliance on the restraint provisions has been waived, even on the test for final relief in motion proceedings.

27. It follows that none of the first respondent's defences is sustainable. It is clear from the above that the restraint provisions of the employment agreement are binding and enforceable. The first respondent was lawfully dismissed and the applicant has not waived its entitlement to rely on the restraint of trade agreement.

28. In the light of the above, the applicant has made out at least a *prima facie* right (indeed a clear right) to the relief sought.

29. The following facts reveal that the balance of convenience favours the applicant and that the applicant will suffer irreparable harm if interim relief is not granted:

    29.1. The first respondent has conveyed an intention to open additional Candylicious outlets. On his own version he has breached the restraint. He also makes plain his intention to breach it further;

    29.2. despite claiming, through his attorneys, that he had no involvement whatsoever with the Candylicious store, The first respondent refused to give an undertaking that he would not breach the terms of his agreement. On the contrary he has indicated a clear intention to continue to act contrary to the restraint provisions;

    29.3. if the first respondent's version is that he is not involved in Candylicious, then he will suffer no prejudice if the interim relief is granted;

    29.4. The first respondent, in any event, has ample means to earn a livelihood while this dispute is being finalised. He has failed to set out

factually any need to disregard the restraint prior to its termination date, 8 October 2013;

29.5. on the other hand, the applicant will suffer incalculable prejudice if interim relief is not granted. The next few months are crucial because of the leases in crucial locations which are due to be renewed. If the first respondent is able to breach this agreement and procure those sites, then the harm will endure for several years at least. This will render any subsequent relief obtained by the applicant ineffective.

30. It has been shown that the applicant has no remedy available to it, other than to seek the interim relief that it seeks in these proceedings.

31. On the applicable test for interim relief, the applicant should be granted the relief sought in Part A of the notice of motion.

32. When it comes to the granting of final relief in motion proceedings, the Supreme Court of Appeal has said the following:

"an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."[29]

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29 *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 12; referring with approval to *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C and *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A - 153C

33. I am of the view that even on this applicable test to determine whether final relief should be granted in motion proceedings, the applicant would have been entitled to relief. This is because the first respondent has admitted, or failed seriously to deny, the core facts which form the basis of the applicant's claim.

34. As set out before, the following components of the applicant's case are either common cause or have not been adequately disputed:

    34.1. the fact that the restraint provisions are binding and presently in force;

    34.2. the fact that the first respondent has breached and is intending to breach the terms of the restraint agreement; and

    34.3. the fact that the restraint provisions protect a protectable interest.

35. Therefore the applicant is entitled to the relief set out in Part A of the notice of motion.

36. As far as costs are concerned, I am satisfied that the matter was sufficiently complex and important for the parties involved that it warranted the employment of two counsel on the part of the applicant. For that reason the applicant should be entitled to such costs.

37. In the premises I make an order in the following terms:

    1. Pending the finalisation of part B of the notice of motion, but only until 8 October 2013, the first respondent is interdicted and restrained from:

1.1. Competing directly or indirectly anywhere in the Republic and whether or not for reward, with any retail business carried on by the applicant including in any capacity as proprietary shareholder, financier, employee, advisor or consultant;

1.2. Granting any financial assistance or loans to any competing business;

1.3. Divulging any trade secrets or confidential information of any business carried on by the applicant;

1.4. Persuading, inducing, encouraging or procuring any employee of the applicant to:

1.4.1. Become employed by, or interested directly or indirectly in any manner whatsoever, in any business which is in competition with the applicant;

1.4.2. Terminate his or her employment with the applicant;

1.4.3. Engage in any industrial or other action against the applicant;

1.4.4. Attempt to vary or modify his ir her terms of employment by the applicant;

1.4.5. Furnish any information or advice, acquired by that employee as a result of his employment by the applicant, to any unauthorised person;

1.5. Persuading, inducing, encouraging or procuring any licenser or supplier or customer of the applicant:

1.5.1. To terminate its licence and/or supply agreement with the applicant;

1.5.2. Enter into and/or negotiate a licence and/or supply agreement with the applicant on terms and conditions less advantageous to the applicant than those previously in force; or

1.5.3. Purchase any product or service sold and/or manufactured by the applicant or any product of similar application from a third party supplier.

2. The first respondent is ordered to pay the applicant's costs, including the costs of two counsel.

DTvR DU PLESSIS: AJ
ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant: Adv. Subel 011 263 9000 / 082 450 4055

Adv. Friedman 083 308 5354

Instructed by:

On behalf of the Respondent: Adv. Masélle 082 454 8880

Instructed by:

Dates of Hearing: 26 April 2013

Date of Judgment: 03 May 2013