

In the matter between:

**Kopano Copier Co (Pty) Ltd t/a
Nashua Kopano**

Applicant

and

**Adrian Cowan Gibson
CBC Office Equipment Johannesburg
t/a Canon Business Centre Johannesburg**

1st Respondent

2nd Respondent

SUMMARY

MADIMA AJ:

It is trite that a party seeking to enforce a contract in restraint of trade must invoke the contract and prove the breach thereof. The onus is on a respondent who seeks to avoid the restraint to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable. Equally trite is that an applicant must set out its case in its founding affidavit and not in the reply.

In *casu*, the applicant seeks to interdict the 1st respondent from acting in breach of a restraint of trade agreement by taking up employment with the 2nd respondent.

The applicant and 2nd respondent are competitors in the IT trade. The 1st respondent first worked with the applicant in the position of Corporate Sales Manager before his resignation. In that position he was responsible for managing the applicant's corporate accounts and identified and targeted new business and key clients. He had access to the applicant's top clients. Upon his resignation, he took up employment with the 2nd respondent. In his current position he is

responsible for the management of sales representatives, who market and sell products offered by the 2nd respondent.

The applicant's concern is that the 1st respondent acquired significant knowledge of the business and proprietary and confidential information during his tenure with the applicant, albeit this was raised in its replying affidavit. In opposing the application, 1st respondent argues he will not be responsible for sourcing clients. Further, he argues he would not be in a position to influence any of the applicant's current customers to sever ties with the applicant and move them over to the 2nd respondent. He has further given the applicant an undertaking not to approach any of its clients.

An applicant must prove a recognisable proprietary interest in the confidential information possessed by a respondent ex employee. This, an applicant must raise in its founding papers. The fact that the 1st respondent had taken up employment with the 2nd respondent does not itself entitle the applicant to any relief if all he will be doing is applying his skills and knowledge acquired while in the employ of the applicant. It is only if the restriction on his activities serve to protect a recognisable proprietary interest relied on by the applicant that the 1st respondent would be in breach of his contractual obligation. Likewise, a restraint that does not protect a legally recognisable interest of the employer but merely seeks to eliminate competition is unreasonable and contrary to public policy and therefore unenforceable.

The court found the rejection of the 1st respondent's undertaking not to approach any of its clients irrational and unreasonable. Further, the applicant's attempt to prevent the 1st respondent from using his skills and knowledge is an attempt to eliminate competition. The court also found that the applicant's customer connection was protected since most of its customers were tied in long term contracts with it.

The court then found that this application could have been averted had the applicant accepted the 1st respondent's undertaking. The application was dismissed and costs awarded in the respondents' favour.