

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 10944/2014

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

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DATE

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SIGNATURE

In the matter between:

TURBO VENT AFRICA (PTY) LIMITED

Applicant

And

CHRISTOPHER J TOOMEY

First Respondent

SEELEY INTERNATIONAL AFRICA (PTY) LIMITED

Second Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This opposed application raises the question whether the restraint of trade which the applicant seeks to enforce against the respondents is reasonable and therefore enforceable.

[2] The applicant seeks a final interdict and a restraining order against the first respondent from:

- 2.1 taking up employment with and/or remaining in the employ of the second respondent with immediate effect;
- 2.2 making available any protectable interest of the applicant to any persons outside the applicant, using the professional interest or allowing it to be used by any person for the advancement of his/her own personal interest or the interest of any competitor of the applicant for a period of 12 (twelve) months from 2 April 2014, directly or indirectly;
- 2.3 carrying on alone or jointly, or being interested in any way as director, proprietor, partner, shareholder, financier, advisor, consultant, member of a close corporation or otherwise; or grant financial assistance or loans of any money to; or to be employed by a business, or any part of the business of the applicant within the area or which deals within the area in any services the same as or substantially similar to those dealt with as at 2 April 2014;
- 2.4 offering employment to or employing or causing employment to be offered to or causing to be employed or solicit or assist in the employment of any employees of the applicant who were in the employ of the applicant for any length of time during the course

of the period of 24 months preceding 2 April 2014 and/or during the period of 12 (twelve) months from 2 April 2014; and/or

- 2.5 approaching any of the applicant's clients/customers/dealers, for the purpose of soliciting business, whether for himself or on behalf of any other party (whether he has an interest in such other party or not) for a period of 12 months from 2 April 2014. Soliciting in this interest shall not only mean an active or passive attempt by the applicant to procure custom (whether for himself or for any other person) but where the clients/customers/dealers contact the first respondent, unsolicited or uninvited by the first respondent;
- 2.6 doing business, whether as principal or employee, with the applicant's clients/customers/dealers during the aforesaid 12 month period;
- 2.7 entering into any agreement, arrangement or associate with any employee of the applicant who was employed by the applicant for any length of time during the period of 24 months preceding 2 April 2014 and/or during the said period of 24 months from 2 April 2014;
- 2.8 the applicant contends that the area referred to in the relief sought mean the area in which it conducts business, which is

Southern Africa. The protectable interest sought to be protected include, client/customer/dealerships; know-how and training on evaporative coolers and turbine ventilators in the HVAC heating, ventilation and air-conditioning industry, specific project information, including that which was obtained from the process involving the research from databases and analysis of such research; and trade secrets, confidential information, processes, techniques, manuals, designs, business models, domestic information, client/customer/dealership connections, and the like.

[3] At the hearing of the matter the relief claimed in paragraph 2.1 above, was amended to a period of 12 months. The words “*professional interests*” were also amended to read “*protectable interest*”.

[4] In the founding papers, the essence of the nature of the applicant’s business is set out in the following terms:

- “9. *The applicant is a wholesale distributor of premium products such as evaporative coolers, air-conditioners and turbine ventilators that improves the air quality in buildings. The applicant also sells and distributes other products such as heaters, accessories and spares of all products it sells and distributes.*
10. *The business carried on by the applicant consists of importing a range of evaporative coolers, air-conditioners and turbine ventilators for industrial, commercial, agricultural and residential use, which is then sold and distributed to dealers or re-sellers who in turn sell the products to end-users. Accessories and spares are both imported and sourced locally.*

11. *The applicant carries on its business throughout Southern Africa and has key operations and warehouses with administrative persons and sale representatives and distribution centres, in Johannesburg (Tulisa Park), Durban North and Cape Town (Brackenfell) from where products are sold and distributed throughout Southern Africa.*
12. *One of the products so sold and distributed by the applicant is a range of Breezair evaporative air-conditioners imported from Seeley International (Pty) Ltd, a company registered as such in Australia. The applicant and Seeley International (Pty) Ltd (hereinafter referred to as 'Seeley' previously had a formal exclusive distribution agreement which expired approximately a year or two ago, whereafter the applicant continued to be the sole agent for this product range in Southern Africa on the same terms and conditions as those contained in the exclusive distribution agreement."*

The applicant continues in paragraphs 16, 17 and 21 of the founding papers, respectively, to allege as follows:

"A large part of the key to the success of applicant's business is the emphasis placed by the applicant on customer relationships. The applicant's employees and in particular the first respondent, service a number of customers with whom they build longstanding relationships so that they are able to understand and anticipate the individual needs of each of the applicant's customers. The applicant operates its business within a very competitive environment and therefore service delivery and customer relationships are of paramount importance. It is for this reason that the applicant's employees are restricted from taking up employment with a direct competitor for a 24 month period following the termination of their employment with the applicant, in order to give the applicant's replacement employees a fair opportunity to establish a similar relationship with the applicant's customers that the first respondent established during and by virtue of his employment with the applicant. It is only once the playing field has been levelled that the applicant will have a fair opportunity to compete for customers against the first respondent. In addition to the customer relations, the applicant also has a protectable interest in confidential information which also warrants protection for at least 24 months."

SOME COMMON CAUSE FACTS

[5] It is not in dispute that the first respondent commenced employment with the applicant in the course of 1992. However, on 3 March 2014 the first respondent resigned with 30 days notice at the time when he occupied the position of Technical and Project Manager of the applicant. In the founding papers the applicant contends that in the latter position the first respondent's duties covered several key positions. These included, *inter alia*, establishing and maintaining customer/client/dealer relations; providing training and know-how to dealers (both new and existing professional and employees of the applicant); researching and analysing information and keeping a database of potential projects and engineers included in such projects; assisting with finding tenders and preparing documents in tendering or projects; being responsible for the management of key projects involving extremely large values; providing quotes to customers and selling the applicant's products; discussing and strategising with applicant's management; serving and advising applicant's network of dealers throughout South Africa; gaining intimate knowledge of all aspects of the applicant's business, including customers, dealers, suppliers, applicant's financial position, and new projects; and the applicant's relationship with the second respondent. I shall later below deal in more detail with the second respondent's involvement in this matter. The first respondent, however, in the answering papers somewhat downplays his key duties as described above.

[6] It is equally not in dispute that after having been in the applicant's employ for about 20 years, and on 24 April 2012, the applicant and the respondent concluded the Restraint of Trade Agreement ("*the restraint*") forming the subject matter of the present application. The applicant wishes to enforce the restraint.

THE SALIENT CLAUSES OF THE RESTRAINT

[7] The restraint is rather extensive. However, the salient clauses thereof provide as follows:

- "7. *The employee acknowledges that he has entered into this agreement freely and voluntarily and after giving the same careful and prudent consideration and that the restraint is enforceable by a Court of law. It is agreed that the signed restraint will be deemed prima facie enforceable in the event of litigation on the enforceability of the restraint ...*
- 11. *In the course of his employment with the Employer, the Employee has, alternatively will, acquire knowledge relating to the Employer's protectable interests ... The Employee acknowledges that the knowledge and information that he has, alternatively will acquire relating to the Employer's protectable interests, is of great value to the Employer and will be of great value to the Employer's competitors too and the Employee, and accordingly it is out of the utmost of importance to the Employer that such protectable interests shall not be made available to any person outside the Employer, or used by any person for the advancement of his/her own personal interests, or the interests of any competitor of the Employer ... The Employee undertakes in favour of the Employer, that he will not whilst employed by the Employer and for a period of 24 (twenty four) months after the termination of his contract with the Employer (irrespective as to the manner and circumstances in which such termination came about, and whether as a result of the Employer's motivation of his own motivation or for any reason whatsoever), directly or indirectly:*

13. (1) *carry on alone or jointly; or be interested in any way as director, proprietor, partner, shareholder, financier, advisor, consultant member of a close corporation or otherwise; or grant financial assistance or loans of any money to or be employed by any person or concern which operates directly or indirectly with the business or any part of the business of the Employer within the area or which deals with the area in any services the same as or substantially similar to those dealt with in by the Employer as at the termination date;*
- 13.(2)-(3) *offer employment to or employ or cause employment to be offered to or cause to be employed or solicit or assist in employment of any employees of the Employer who was in the employ of the employer for any length of time during the cause of the period of 24 (twenty four) months preceding the termination date and/or during the period of 24 (twenty four) months from the termination date; and/or approach any of the Employer's clients/customers/dealers, for the purposes of soliciting business, whether for himself or on behalf of any other party (whether he has an interest in such other party or not) for a period of 24 (twenty four) months from the date of termination of his contract with the Employer. Solicit in this contextual not only mean an active or passive attempt by the Employee to procure custom (whether for himself or for any other person) but where the clients/customers/dealers contacts the Employee, unsolicited or uninvited by the employee;*
13. (4) *to do business whether as principal or Employee with the Employee's clients/customers/dealers during the aforesaid 24 (twenty four) month period;*
13. (5) *enter into any agreement, arrangement or associates with any employee of the Employer who was employed by the Employer for any length of time during the period 24 (twenty four) months preceding the termination date and/or during the said period of 24 (twenty four) months from the termination date pursuant to which the Employee and/or such employee shall:*
- 13.3.1 *carry on jointly or alone; or be interested in any way as directors, proprietors, partners, shareholders, members of a close corporation,*

advisors, consultants or otherwise; or grant financial assistance of loans of money to or being employed by any other person or concern which competes directly or indirectly with the business (whether directly or indirectly) with the Employer within the area, or which deals within the area, in services the same as or substantially similar to those dealt within by the Employer as at the termination of such Employee's contract by the Employer ...

14. *the provisions of the clauses under this heading shall be applicable and of full force and effect regardless of the reason and for any reason whatsoever for the termination of the Employee's contract by the Employer or for any other reason whatsoever, why such contract was terminated ..."*

THE SECOND RESPONDENT

[8] I deal with the involvement of the second respondent. It is Seeley International Africa (Pty) Ltd (*"now the second respondent"*) registered both in Australia and now in South Africa. The second respondent's main place of business in South Africa is at Founder's View South, Modderfontein.

[9] It is also so that one of the products sold and distributed by the applicant is a range of Breezair evaporative air-conditioners imported from the second respondent – until about February 2014. Prior to that, and towards the end of 2009, the applicant and the second respondent entered into a Distributor Agreement. In the latter agreement, the second respondent appointed the applicant as sole distributor in South Africa, Botswana, Lesotho, Namibia, Swaziland, and Zimbabwe, for the promotion and selling of the Breezair and cool air range of direct evaporative air-conditioning appliances.

The Distributor Agreement was for a period of three years from about October/November 2009. Several other clauses of the Distributor Agreement were significant. For example, clause 10.6 provided that:

“Seeley shall visit TVA approximately quarterly to review progress, deal with outstanding issues, negotiate new arrangements, discuss new sales targets, develop business plans, address weaknesses, etc.”

Clause 13 provided as follows:

“TVA shall have the right to use Seeley’s trademark ‘Breezair’ in connection with the advertising and promotion of the products but shall not acquire any proprietary rights in the trademark as a result of such use. TVA acknowledges Seeley as the sole owner of the ‘Breezair’ trademark. TVA agrees that it shall discontinue all use of the marks after termination of the agreement ...”

“TVA” refers to the applicant, of course.

[10] There was yet another significant development in the relationship between the applicant and the second respondent between end of 2013 and March 2014. These were that, during or about October 2013, Seeley (now the second respondent) expressed its interest in purchasing the applicant’s business. Pursuant to negotiations between the parties, the second respondent made an offer to purchase. Heads of Agreement were entered into. Several of the provisions of the Heads of Agreement were significant. These included that the second respondent was entitled to carry out a due diligence into the applicant’s business. The due diligence included, *“financial statements; working capital; aged debtor and creditor profile; trading term; details of all storage, freight, leases, rental and other agreements; details of*

all employees and workers compensation history; stock profile; all claims and all customer complaints; intellectual property; information system; tooling and plant and equipment, including, but not limited to all books and records of history of performance and maintenance; agreements with customers and suppliers; the premises from which the business is conducted; any charges, debentures, mortgages, guarantees or other securities granted or given by the Company over or in connection with the business, including loans made to the Company, and including all finance facilities of the Company; and other environmental, licensing, commercial or financial information reasonably required by the Acquirer and its advisers". The applicant later rejected the offer to purchase. The reasons for rejection are partly in dispute, but of limited relevance for present purposes. What is, however, of relevance, is that subsequent to the failed sale agreement negotiations, the second respondent announced that it would open a branch in South Africa. This occurred on or about 1 March 2014.

[11] It is not in dispute that the second respondent, already in February 2014, announced to the industry and market-place that the applicant would no longer be distributing the second respondent's products. It is also not in dispute that at the same time, the first respondent was in discussions with the second respondent about the first respondent being employed as a Technical Manager by the second respondent in South Africa. The second respondent made an offer to the first respondent, which offer he subsequently accepted. In his letter addressed to the applicant on 3 March 2014, the first respondent said:

“As discussed telephonically on Saturday, I have received an offer of employment from Seeley International. I am accepting that offer and therefore will be resigning from Turbo Vent, from today with 30 days notice. I have attached my resignation letter. I acknowledge that this may be a surprise to you but as mentioned to you before, I need to do what is best for myself and my family ...”

[12] The above developments culminated in numerous correspondence being exchanged between the parties and their respective legal representatives regarding the enforcement of the restraint. It also led to the urgent application launched by the applicant against the respondents. In the urgent proceedings, the applicant contended, *inter alia*, that it has protectable proprietary interests, confidential information, and a client connection database, all of which could be used by the first respondent if employed by the second respondent. Further, that the second respondent is also in the business of importing products from its Australia business, and distributing evaporative air-conditioning units for industrial, commercial and residential use. These products are then sold and distributed to dealers or re-sellers who in turn sell the products to end-users. The applicant also contended in the urgent application that the second respondent is a direct competitor of the applicant in business, and that by employing the first respondent, the second respondent will derive a competitive advantage over the applicant.¹

[13] Although the second respondent does not oppose the present application, and abide the outcome, it has filed an affidavit in order, “*to have all the material facts placed before this Court*”. The affidavit is intended to

¹ See paras 9 to 12 of the founding affidavit.

explain the historic relationship between Seeley International and the second respondent; the nature of the relationship between the applicant and Seeley International whilst it lasted when the applicant distributed Seeley International's products exclusively; to explain why the relationship between the applicant and Seeley International ended; and to explain why Seeley International wanted to purchase the applicant's business and its decision to set up operations in South Africa through the vehicle of the second respondent, and to employ the first respondent.² I shall revert later below to the contents of this affidavit.

THE RESPONDENTS' CONTENTIONS

[14] As stated above, the first respondent opposed strenuously the urgent application. This was mainly on the basis that the matter did not merit urgent adjudication. Prior to the hearing of the urgent application, the first respondent made attempts to resolve the matter amicably with the applicant. He also gave an undertaking not to take up employment with the second respondent until final judgment was granted in the matter.

[15] The first respondent's defence to the merits of the application, as later mirrored and articulated in the heads of argument, first appeared fully in a letter, annexure "JS16", addressed by his attorneys to the applicant's attorneys on 20 March 2014. In the letter, the first respondent, although admitting to entering into the restraint, went on to state further as follows:

² See para 5 of the affidavit – paginated papers 155.

“ ...

4.2 *Insofar as it is alleged that Mr Toomey's intention to take up employment with Seeley may constitute a breach of the restraint of trade (which is denied), we submit that the restraint of trade against Mr Toomey is not enforceable for, inter alia, the following reasons:*

1. *Mr Toomey was actively encouraged by Mr Jonathan Snow of your client to take up employment with Seeley both at a time when our respective clients were engaging each other with the aim of Seeley acquiring your client, or the business thereof, and after such discussions had terminated. Mr Toomey, in taking up employment, acted in accordance with Mr Snow's representations, which are wholly inconsistent with an intention to enforce the restraint. Such representations were made with your client's knowledge and permission. In this regard we are instructed that numerous options were placed on the table in respect of Mr Toomey's future, including working for Seeley; continuing to work for your client on a half-day/half pay basis; Mr Toomey becoming a dealer; and/or your client retrenching Mr Toomey. In taking up employment with Seeley, Mr Toomey has acted on the strength of the representations that the restraint would not be enforced against him at Seeley and has done so to his detriment. In the circumstances, your client is estopped from enforcing the restraint against Mr Toomey so as to preclude his working for Seeley.*
2. *Mr Toomey is in any event currently employed by your client as a Technical Manager. In such role, Mr Toomey's tasks involve the assembly of products and field and technical help queries, approximately 70% of which queries relate to Seeley. He will not therefore be infringing any protectable proprietary interests which your client may have.*
3. *Moreover, insofar as Mr Toomey taking up employment with Seeley, he would not be infringing any proprietary information of your client that may be worthy of protection nor would he be providing Seeley with any competitive advantage that would be proportionate, in all the circumstances, to the enforcement of the restraint.*

4.3 *Insofar as any of your client's customers transfer to Seeley, this will purely be by virtue of the fact that such customers would be following the Seeley product which will happen whether or not Mr Toomey is employed there. In those circumstances, enforcement of the restraint undertakings would secure no*

advantage to Seeley and would merely operate to sterilise Mr Toomey's economic activity. That is contrary to public policy.

4.4 *In the interests of addressing your client's concerns as to prejudice, so as to avoid unnecessary and expensive litigation, to the extent that your client is of the view that Mr Toomey knows your client's products, customers and prices, we advise the following:*

(1) *Mr Toomey's knowledge of the Seeley products is by virtue of the training provided to him by Seeley over the years of his employment with your client. Such knowledge is either in the public domain, and consequently not protectable in your clients' hands, or else already within the knowledge of Seeley, with the result that the enforcement of the restraint secures no interests on the part of your client whilst sterilising Mr Toomey's economic activity;*

(2) *Insofar as you may allege that Mr Toomey has had dealings with your client's customers, we again reiterate that such customers would be linked to Seeley's products and if you are no longer selling Seeley products then there is no protectable interest to be secured by enforcing the restraint against Mr Toomey.*

(3) *Insofar as you may allege that Mr Toomey has knowledge of your client's prices, we advise that the pricing regime has changed by virtue of the termination of the previous distribution agreement between Seeley and your client, with the result that Mr Toomey's knowledge of the historical prices will not place Seeley at a relatively advantage in competing in the post-termination regime.*

5. *It is specifically disputed that Mr Toomey has divulged any confidential/sensitive information to Seeley. Mr Toomey has been employed for his skills and experience in the public domain, which are not protectable by enforcement of any restraint undertakings.*

6. *In the circumstances, we dispute that your client has a protectable interest worthy of being protected and any legal action taken by your client to allegedly enforce the restraint of trade provisions would be misguided and, in consequence, defended by our clients."*

[16] The allegations were repeated in the answering affidavit, supplemented, and dealt with in the first respondent's heads of argument. As matters currently stand, although the first respondent left the employ of the applicant on 3 March 2014, he has not yet joined the second respondent. The undertaking he gave at the urgent proceedings is extant.

THE ISSUE FOR DETERMINATION AND SOME APPLICABLE LEGAL PRINCIPLES

[17] The essential issues for determination are whether the applicant has protectable interests, confidential information or clients' database, which are adequately deserving of any protection to make the enforcement of a restraint reasonable based on the facts of this matter. See *Den Braven SA (Pty) Limited v Pillay and Another*³. The first respondent contends that the enforcement of the restraint will be entirely unreasonable. In this regard it is trite that the first respondent, in order to succeed, is expected to "*discharge the onus of proving that, at the time the enforcement is sought, the restraint is directed solely at the restriction of fair competition with the covenantee and that the restraint is not, at the time, reasonably necessary for the legitimate protection of the covenantee's protectable proprietary interests (goodwill or trade secrets)*"⁴. In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*⁵, the substantive law was laid down to the effect that a restraint is enforceable unless it is demonstrated to be unreasonable, which necessarily puts an *onus* on the person who seeks to avoid it.

³ [2008] 3 All SA 518 (D).

⁴ See *Amler's Precedence of Pleadings* 7ed at 344.

⁵ 1984 (4) SA 874 (A) at 893-894.

[18] In *Basson v Chilwan and Others*⁶, in upholding an appeal against the enforcement of an unreasonable restraint, which was in conflict with public policy, the Court raised four questions to be considered, which were as follows:

- “(a) *Is there an interest of the one party which is deserving of protection at the termination of the agreement?*
- (b) *Is such interest being prejudiced by the other party?*
- (c) *If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?*
- (d) *Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?*

Insofar as the interest in (c) surpasses the interest in (d), the restraint would as a rule be unreasonable and accordingly unenforceable.”

[19] With the above legal principles and others mentioned below in mind, the facts of the present matter require close assessment. In so doing, the clear observation is that the applicant seeks final relief with extreme consequences for the first respondent and his family – and also to an extent – the second respondent – as demonstrated below. Also, to the extent that there are factual disputes between the versions of the applicant, on the one hand, and those of the first respondent and the second respondent, on the other hand, the matter necessitates adjudication on the approach in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁷.

⁶ 1993 (3) SA 742 (A).

⁷ 1984 (3) SA 623 (A) at 634E-I.

[20] In my view, upon a proper assessment of the credible evidence, there are indeed several factors which militate rather strongly against the enforcement of the restraint against the respondents. This is so even without the consideration of the relevant provisions of the Constitution⁸. These factors are articulated meritoriously in the respondents' heads of argument, and need no complete recitation. These factors include the close trade relationship between the applicant and Seeley (now second respondent) of some years, during which the applicant sold the second respondent's products. This lasted until 2013. The applicant was the sole distributor of the second respondent's overseas products as evinced in the Distributor Agreement⁹; the impact of the aborted sale agreement negotiations between the applicant and Seeley; the now changed nature of the applicant's business since the first respondent's resignation in March 2014, coupled with the overlapping businesses of the applicant and the second respondent; the negative impact on the interest of the first respondent's entitlement to use his know-how and skills elsewhere after he resigned; and finally, to a limited extent, the lateness of the signing of the restraint after the first respondent commenced employment with the applicant, as well as the applicant's possible motives for wanting to enforce the restraint.

[21] The first respondent's contentions of the long and intimate association between the applicant and Seeley (now second respondent) are well corroborated by the affidavit of Mr Jonathan Philip Seeley of the second

⁸ Act 108 of 1996.

⁹ See pp 169-175 of the founding affidavit.

respondent¹⁰. In the affidavit, Mr Seeley confirms that during the subsistence of the relationship Seeley worked hand in glove with the applicant. As a result, the second respondent became intimately aware of, and involved in, the applicant's business. Seeley was, and is *au fait* with the terms on which it sold its products to the applicant, as well as the terms on which the applicant sold these products to its customers. Seeley also became aware of the buying trends of its products in South Africa as well as the strengths and/or weaknesses of its products as perceived by the market-place. Seeley, also on occasions trained the applicant's staff and built a close relationship with the applicant's customers. In those circumstances, it can safely be accepted that, based on the long and intimate business relationship, especially the sole Distributor Agreement and the failed sale agreement negotiations, Seeley must have gained significant information of the applicant's proprietary interests and business trade information. It also came to know the applicant's customers. In this regard, the affidavit alleges that the applicant's major customers also met and came to know Seeley's founder and chairman, Mr Frank Seeley, its managing director, Mr Paul Proctor, and its sales manager for Europe and Africa, Mr Sam Peli, who, as recently as October 2013, attended a conference at which most of the applicant's customers were present. The confirmatory affidavits of the last-mentioned persons are attached to Seeley's affidavit. These allegations are not specifically denied in the replying papers. Seeley had also concluded a due diligence search on the applicant during the sale agreement negotiations, and to which the first

¹⁰ See pp 154-168 of the answering affidavit.

respondent was not privy. The applicant's allegations that no due diligence search was conducted by Seeley are therefore without merit at all.

[22] The applicant, however, denies that Seeley conducted a due diligence, and that Seeley has intimate and current knowledge of the applicant's business. I have already found that the applicant's contentions in this regard are without any merit. The applicant however, admits that its business was intended to be sold at Net Tangible Asset Value, which the applicant significantly overstated. On this dispute the probabilities favour the respondents. This on the basis of the *Plascon-Evans Paints, supra*, approach the respondents' version is to be accepted since the applicant seeks final relief.

[23] The other important factor militating against the enforcement of the restraint, is the fact that the applicant's business has changed significantly since the resignation of the first respondent. In para 57.1 of the replying affidavit, it is stated that:

"Save to admit that the applicant's business has transformed recently, the contents of this paragraph are denied."

This admission is again made in para 67.1 of the replying affidavit. In this regard, it is argued, correctly so in my view, by the first respondent that the admission by the applicant fully undermines its assertion of a legitimate protectable interest in its confidential information, but rather reveals that the true motivation for seeking to enforce the terms of the restraint, is not that it

has proprietary interests recognisable in law, but the perception that the first respondent will solicit its customers.

[24] As matters stand, it appears that the applicant and the second respondent share common knowledge and information about customers' connection. It begs the question, what trade secrets and connection is the applicant seeking to protect. In *Townsend Productions (Pty) Ltd v Leech and Others*¹¹, it is stated that:

"In order to qualify as confidential information, the information concerned must comply with three requirements:

'First of all, and this is really self-evident, the information must not only relate to, but also be capable of application in, trade or industry. Secondly, the information must be secret or confidential. The information must accordingly – objectively determined – only be available, and thus known, to a restricted number of people or to a closed circle; or, as it is usually expressed by the Courts, the information "must be something which is not public property or public knowledge". Thirdly, the information must, likewise objectively viewed, be of economic (business) value to the plaintiff.'

In the present matter, the trade connections, trade secrets and confidential information contended for by the applicant do not meet these requirements as well as the guidelines set out in *Basson v Chilwan, supra*. These are clearly either non-existent or are in the public domain.

[25] The motives of the applicant to seek to enforce the restraint at this stage, whatever it may be, is highly or are highly questionable. However, the probability is that due to the downturn in business, the applicant, having lost both the sole Distributor Agreement and the abortive sale agreement

¹¹ 2001 (4) SA 33 (CPD) at 53I-J.

negotiations to Seeley (now second respondent), and unable to continue selling the second respondent's products, now want to blame and punish the first respondent. The applicant is clearly unable to continue to service its clients. The restraint agreement was signed on 24 April 2012 only, after the first respondent had been employed by the applicant for some 20 years. This is also questionable. Viewed objectively, I conclude that the applicant has not succeeded in proving that it has protectable proprietary interests, confidential information and client connection sufficiently deserving of protection to render the enforcement of the restraint reasonable. The only relevant information that the second respondent was not privy to was the applicant's potential new business and product portfolios, as well as the weaknesses and selling points of the applicant's new products, as correctly pointed out by the respondents.

[26] Finally, I deal with the question whether the enforcement of the restraint against the first respondent will be wholly unreasonable in the circumstances of this matter. This raises the question whether the first respondent should be interdicted from making use of his own stock of knowledge and know-how.

[27] The obvious starting-point is the provisions of sec 22 in the Bill of Rights in our Constitution which provide that:

“Every citizen has the right to choose their trade, occupation or profession freely. The parties of a trade, occupation or profession may be regulated by law.”

It is also trite that the public interest requires that parties should comply with their contractual obligations. In *Reddy v Siemen's Telecommunications (Pty) Ltd*¹², at para [15], the Court said:

"A court must make a value judgment with two principle policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim pacta servanda sunt. The second is that all persons should in the interest of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom in forming the constitutional value of dignity, and it is by entering into contracts that an individual takes part in an economic life. In this sense, freedom to contract is an integral part of the fundamental right referred to in sec 22." (footnotes omitted)

See also *John Louw and Co (Pty) Ltd v Richter and Others*¹³.

[28] In the instant matter, it is more than plain that there is no information known by the first respondent which is not already known by the second respondent, and which would be useful to the second respondent. Simply put, there will be no legitimate purpose to be served by preventing the first respondent from taking up employment with the second respondent. The applicant has made heavy weather about the first respondent's conduct in secretly negotiating with the second respondent about an employment offer and his intention to join the second respondent. Whilst this conduct may have been seen as suspicious, it is perfectly understandable in the light of the background. This includes that during the period when the applicant's business was under financial stress, there were discussions between the

¹²

¹³ 1987 (2) SA 237 (N) at 243B-C.

parties of the possibility of retrenching staff at the applicant, and the possibility of putting some staff on half-day, half pay. The first respondent was not excluded from this process. In the answering papers, the first respondent, in referring to the relevant discussions with Mr Jonathan Snow of the applicant during December 2013, puts the matter thus:

“... The impression which he created was that I was facing imminent retrenchment and that I should consider any offer made by the second respondent.”

The applicant also did not take appropriate action against one Mr Hennie Verster, who was previously employed by the applicant in a sales/dealer/relationship manager position, who later left the applicant and joined another company. The first respondent argues that the applicant's insistence in enforcing the restraint now is inconsistent with its previous conduct in this regard. In any event, the first respondent later played open cards with the applicant by making clear his intention to join the second respondent. He has currently undertaken not to do so until this matter is finalised. Surely, his conduct cannot be criticised in these circumstances.

[29] The first respondent had been employed by the applicant for over 20 years. He says he invested almost half of his life in the Seeley (now second respondent) brand of products. He did a huge amount of research and self-learning in respect of Seeley's products. He does not know anything else. He received extensive technical training from Seeley. He is married, aged 52, with family responsibilities. He needs to earn a living, and will find it difficult to change industries at this stage. These are all compelling considerations in

evaluating the balance between the competing interests, and constitutional values. The first respondent cannot be restrained from utilising his skills that he has acquired as a result of years of experience. See for example, *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007 (2) SA 271 (SCA). See also *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronje and Another*¹⁴. In *Aranda Textiles Mills (Pty) Ltd v Hurn and Another*¹⁵, Kroon J said:

“... A man’s skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-how or skills. Such know-how and skills in the public domain become attributes of the workman himself, do not belong in any way to the employer and use thereof cannot be subjected to restriction by way of restraint of trade provisions. Such a restriction, impinging as it would on the workman’s ability to complete freely and fairly in the market-place, is unreasonable and contrary to public policy (Recycling Industries (Pty) Ltd v Mohammed and Another 1981 (3) SA 250 (SE) at 259D-F; Magna-Alloys (supra) at 904I; Sibex Engineering Services (supra) at 507D-H; Basson (supra) at 771C-F, 778D; Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SECL) at 442F-G.)”

These principles are of particular application and relevance in the present matter.

¹⁴ [2011] 32 ILJ 601 (LC) at paras [17] to [26].

¹⁵ [2004] 4 All SA 183 (E) at para [33].

CONCLUSION

[30] The first respondent has, correctly in my view, shown and argued that the enforcement of the restraint will confer no proportionate benefit upon the applicant, whilst seriously affecting his ability to be economically productive. For all the foregoing reasons, I conclude that the enforcement of the restraint will be unreasonable in the circumstances of this matter. The applicant has simply failed to establish the requisites for final interdictory relief. The application must fail.

COSTS

[31] I deal briefly with the issue of costs. There is no reason why the costs should not follow the result, which determination is a discretionary matter. The matter is sufficiently voluminous and complex to warrant the employment of two counsel. In addition, when the matter served before the urgent court, the first respondent gave an undertaking as indicated earlier in this judgment. The application was postponed to this Court. In the circumstances, the costs associated with the postponement ought to follow the result as well. The undertaking given by the first respondent should fall away in following the result herein below.

ORDER

[32] In the result the following order is made:

1. The application is dismissed with costs, including the costs occasioned by the postponement on 8 April 2014.
2. The costs in order 1 above, shall include the costs consequent upon the employment of two counsel.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	14 MAY 2014
DATE OF JUDGMENT	13 JUNE 2014