

**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR571/2013

In the matter between:-

**CCI CALL CENTRES (PTY) LTD**

Appellant

and

**LARON-SHAUN SEQUEIRA**

First Respondent

**CORACALL (PTY) LTD**

Second Respondent

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**JUDGMENT**

Delivered on 01 April 2014

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**Vahed J:**

[1] In this appeal the appellant applied, in motion proceedings, unsuccessfully before Lopes J in the Court *a quo* to enforce a covenant in restraint of trade concluded between it and the first respondent, which, if enforced, *inter alia*, would have precluded the first respondent from becoming employed by the second respondent, a competitor of the appellant. The appeal serves before us with the leave of the court *a quo*.

[2] The application initially served before Lopes J as an urgent application on 31 July 2013. On that date he granted an Order fixing dates for the exchange of further affidavits, recording certain undertakings made by the respondents, and adjourned the application to 20 August 2013 for the hearing of the opposed application. On that date he heard the opposed application and in a reserved judgment handed down on 13 September 2013 he dismissed the application with costs. On 27 September 2013 he granted the application for leave to appeal to this court.

[3] The respondents' heads of argument were delivered on 18 March 2014. Although on that date their delivery was already a few days out of time the appellant makes no issue of this and to the extent that condonation is necessary for their late delivery, it is granted. However, with the delivery of those heads of argument we noted, for the first time, that:

“[t]he Appellant subsequently instituted further proceedings, an application for interim relief pending the determination of this appeal but that application was not proceeded with after the Judge President instructed that the present appeal was to be enrolled and heard as one of urgency during the course of March 2014. The costs of that application for interim relief were, by agreement between the parties, reserved for the decision of this Court.”

[4] We have not been furnished with the papers in those “further proceedings”, have no appreciation of what was said therein, and have not been appraised of the basis upon which we are to reach a decision on those reserved costs. It may be contended that the record is defective in that regard and I shall have something to say about the preparation of the record in this appeal later in this judgment.

[5] My reason for referring to the above extract from the introductory paragraph to the respondents' heads of argument is to demonstrate that this appeal serves before us as a matter of urgency. It is self-evidently urgent because the covenant which the appellant seeks to enforce expires at midnight on 30 June 2014 and it is manifestly just that the parties know where they stand in relation to its enforceability sooner rather than later.

[6] At the conclusion of argument on 28 March 2014 we indicated that this judgment would be delivered on 02 April 2014. We did so because the matter is urgent, as I have noted, but we also do so for, amongst others, the reason that a delayed judgment would present certain difficulties which would impact on further delay.

[7] We have been greatly assisted by the detailed heads of argument delivered by both sides; so detailed that they approximate full written argument as opposed to being mere skeletons. We record our appreciation of counsels' efforts.

[8] The essence of the case, but for a few errors which I will revert to later in this judgment, is more than adequately captured in the introductory paragraphs of the judgment of the court *a quo*. I repeat those here:

'[1] The [appellant], CCI Call Centres (Pty) Ltd seeks an order interdicting and restraining the first respondent for a period of twelve months calculated from the 1<sup>st</sup> July 2013 from being employed by the second respondent and from carrying on business in the call centre industry, together with certain other relief.

[2] The relief is sought pursuant to a restraint of trade agreement which was contained in an employment contract signed by the [appellant] and the first respondent. The relevant history of the relationship between the parties is as follows:

- (a) the [appellant] is part of an international call centre business registered in Mauritius. It has been incorporated in South Africa since September 2009, operates only from Durban, and has 2 000 employees;
- (b) the [appellant] provides what are referred to as 'Inbound Services' and 'Outbound Services' to its clients. 'Inbound Services' involve call centre operators fielding queries from the [appellant's] clients' customers relating to those clients' products. 'Outbound Services' involve call centre operators calling prospective customers of the [appellant's] clients to persuade them to part with information about themselves to be used for marketing purposes, or to sell them the [appellant's] clients' products;
- (c) the first respondent was employed by the second largest client of the [appellant] from March 2004 to March 2007 as a district sales manager;
- (d) from April 2007 to January 2012 he was employed by the [appellant's] largest client ('TT') as an account manager;
- (e) in 2010 the first respondent was seconded to work at the [appellant] where his function was to manage the [appellant's] 'inbound sales campaign' for TT;
- (f) having been made redundant by TT in 2012, the first respondent was thereafter employed by the [appellant] as campaign manager for the 'outbound campaign' for TT. He was later put in charge of the TT 'Web Chat' campaign whereby customers could have a live feed with sales agents. He also worked on a campaign called 'Correspondence' where customer queries are dealt with through email correspondence;
- (g) on the 15th March 2013, after the first respondent had been working for the [appellant] for approximately fourteen and a half months, he was asked to sign an employment contract. In the employment contract, at paragraph 18, is what is commonly referred to as a restraint of trade clause. The clause is headed 'Confidentiality Non-Solicitation and Restraint' and covers some ten typewritten pages. It is common cause that the first respondent was asked to sign the

employment contract 'for audit purposes'. The first respondent avers, and it is not disputed, that he did not read the document;

- (h) on the 1st April 2013, some two weeks after he had signed that document, the first respondent resigned from his employment with the [appellant];
- (i) he left the employment of the [appellant] on the 1st July 2013;
- (j) thereafter the first respondent was employed by the second respondent;
- (k) the second respondent, Coracall (Pty) Ltd, against whom the [appellant] seeks no relief, is a competitor of the [appellant] and is also engaged in the call centre industry.

[3] On the 31st July 2013 I granted an order by consent between the parties setting dates for the delivery of affidavits and heads of argument, and recording an undertaking that the first respondent would not be employed by the second respondent pending the outcome of this application, and that the [appellant] would continue to pay the first respondent's salary during that period. The matter was then heard as an opposed application on the 20th August 2013.

[4] Mr *Pammenter* SC who appeared for the applicant submitted that I was to apply the test for final relief in motion proceedings as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) – i.e. I was to grant an order only if the facts as stated by the respondent together with the admitted facts in the [appellant's] affidavit justify the order, unless I am of the view that a denial by the first respondent of a fact alleged by the [appellant] may not be such as to raise a real, genuine or bona fide dispute of fact because it is clearly untenable.

[5] Mr *Pammenter* submitted that once that test in *Plascon-Evans* was satisfied I should then consider whether the restraint imposed was reasonable. He referred to the tension which is always evident in these cases between the right of the first respondent to be allowed to carry on his employment, and the right of the [appellant] to protect its relationship with its customers and its confidential information.

[6] With regard to the question of onus and the approach of the courts generally to restraint of trade agreements, I have been referred to, and have considered *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA); *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375 (C); *Dickinson*

*Holdings (Group) (Pty) Ltd and Others v Du Plessis and Another* 2008 (4) SA 214 (N); *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D); *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) and *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ).

[7] The [appellant's] case is set out in a wordy affidavit filled with phrases which are typical of the marketing industry. The result is a very confusing affidavit and it is necessary to sift through these phrases in order to be able to summarise the [appellant's] complaints as follows:

- (a) the first respondent is one of the [appellant's] 'longest standing high-ranking officials';
- (b) during his employment with the [appellant], the first respondent has had access to, and used, 'state of the art telephony and information technology systems and programmes and a mix of local and UK based management structures';
- (c) these 'sophisticated IT systems and programmes' are unique to the [appellant's] business;
- (d) the [appellant] has 'developed specific and valued relationships with identified suppliers and human resources, telephony and IT industries' and 'the [appellant] has been able to develop practical methodologies (sic) for maintaining data and other clients lists for statistical reporting to our clients on their customers' requirements and for gathering information relating to potential customers.';
- (e) 'the names and requirements and capabilities of these suppliers and clients is confidential in that the [appellant] has retained confidential relationships with them since the suppliers provide services to the [appellant] at negotiated rates and also provide highly confidential (and prized) programmes. These programmes are developed for us and are not freely available. They are both trade secrets and confidential information'
- (f) 'A competitor armed with the negotiated rates of these suppliers may be able to bring pressure to bear on such supplier thereby achieving a preferred rate for itself, to the detriment of the [appellant's] profitability and competitive edge.'

[8] The first respondent disputes much of what the [appellant] alleges both in relation to his standing and position in the company, the degree to which he has access to confidential information, and the extent to which knowledge of the [appellant's] customer base and the processes used by the [appellant] are confidential or constitute trade secrets.

[9] As far as the first respondent himself is concerned, he records that:

- (a) he is 31 years of age having matriculated in 1999 without a university entrance pass;
- (b) he was thereafter employed in positions as a waiter, a barman, and then a clerk in a micro-lending company, whereafter he worked as a driver delivering motor vehicle parts and progressed to the position of a counter assistant in the parts department at a Volkswagen dealership in Boksburg;
- (c) in 2004 he went to the United Kingdom where he began working in the cellphone industry as a call centre operator;
- (d) he was eventually promoted to the position of an 'assistant team manager' i.e. a person who helps others to man the telephones, and he was subsequently promoted to a management position in Carphone Warehouse where he supervised twelve members of staff as an account manager;
- (e) at the time he left the [appellant's] employ, he supervised approximately 110 people in the [appellant's] call centre;
- (f) since 2004 the first respondent has only worked in call centres and it is only in this field that he has the expertise to maintain his lifestyle.'

[9] The issue on appeal is whether Lopes J was correct in concluding that the appellant did not prove that any protectable interests covered by the covenant existed and for that central basis the restraint was unenforceable.

[10] The extract from Lopes J's judgment setting out the synopsis of the case and quoted above contains a recordal to this effect: "It is common cause that the first

respondent was asked to sign the employment contract 'for audit purposes'. The first respondent avers, and it is not disputed, that he did not read the document". With respect to the learned judge *a quo*, that does not accord with my reading of the affidavits.

[11] I have considered the affidavits closely. It is not correct that the first respondent said that he did not read the document. At best it can be said that he paid it scant attention.

[12] While the first respondent said in his answering affidavit that he was asked to sign the contract "for audit purposes", this aspect was clarified by the appellant in reply when it said that when an audit of employee documentation was carried out it was discovered that he had not signed an employment contract and he was then asked to sign one. In a further affidavit delivered by the first respondent in response to the reply he maintained that he was asked to sign "for audit purposes" and then went on to assert that it was common cause that the "...signature to the restraint of trade agreement was for '**audit purposes**'...".

[13] That aspect of the case is relevant because, although nothing was made of it on the affidavits, the respondents' heads of argument contend that the unequal bargaining relationship that existed and that fact that some two weeks before the first respondent announced his resignation he was asked to sign the contract suggest that it cannot be that there was ever a serious intention that the parties be bound thereby. The mere stating of that proposition carries within it the suggestion that it is untenable. The fact of the matter remains that it is common cause that the



employment contract was signed before the appellant had any inkling of the first respondent's intended resignation. It is improbable to suggest that parties sign documents of this nature without any intention of being bound by contents thereof.

[14] I am fortified in some respects by the fact that although the replying affidavits contained some "new material", the respondents were invited to and did avail themselves of the opportunity of delivering a fourth set of affidavits to deal therewith. A full opportunity was thus afforded to the respondents to deal with everything. Against that background I am then in a position to give meaning to the following submission made in the respondents' heads of argument. There they say:

'From a purely factual point of view, the First Respondent is not actually employed by the Second Respondent. However, the Respondents have already stipulated that they are not going to contend that the restraint contended for by the Appellant would not be binding upon the First and Second Respondents if this Court found that what the First Respondent was doing was an activity which the Appellant could lawfully prevent the First Respondent from doing in terms of the restraint agreement.'

[15] As I understand that submission the respondents are, quite correctly, confining the appeal to the real issues in the case.

[16] The respondents submit that it is inappropriate to refer to an onus in these proceedings purely because they are motion proceedings. For that submission they rely upon the now well-known dictum of Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) where he said:

'[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they

cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[17] However the rule in *Plascon Evans* has nothing to do with the incidence of an onus. It however, when employed in resolving disputes of fact in motion proceedings, may assist in determining when and how an onus is discharged.

[18] In *Digicore Fleet Management v Steyn* [2009] 1 All SA 442 (SCA) the question of the onus in restraint cases was restated thus:

'[7] It is now trite that provisions in restraint of trade are enforceable unless shown by the person wishing to escape an undertaking to be unreasonable and hence contrary to public policy. It is not necessary to rehearse the principles that have been set out by this and other courts governing agreements in restraint of trade. Suffice it to say that Steyn, in order to escape her contractual undertaking, must show that Digicore has no proprietary interest that is threatened by her working for a competitor of Digicore.'

[19] The appellant submits that it is difficult to postulate a clearer directive on the law on this score. I agree.

[20] To a large degree I must make common cause with the learned judge *a quo* when he made the following observations about the appellant's affidavits:

'[18] Santana explains in some detail the functions performed by the [appellant]. The

references, however, to the fact that the equipment used is 'state of the art', a 'mix of local and UK based management structures' and that 'All of this has been developed over time at great cost' is vague and most unhelpful in enabling this court to understand what it is that is so special about these matters that they warrant protection.

[19] The vague and generalised nature of the allegations with regard to the information to which the first respondent had access makes it impossible for me to conclude that this was information which the first respondent not only had access to, but could have fully understood and conveyed to others. There is no suggestion whatsoever that the first respondent could have, or has, memorised any confidential information.

[20] I have no doubt that any well-run call centre relies on the latest technology and the best management systems they are able to provide, using 'highly trained professionals'. The underlying technology is, however, in the main provided by telephonic and computer systems providers available to those who are prepared to pay for them. Even the fact that the [appellant] has created 'a customised program that will handle a realistically projected call volume' and that they use 'sophisticated IT systems and programs unique to our business' does not of itself create a protectable interest. It is necessary for a court to be able to understand why these systems are so special that they warrant protection. These are not in the same category as, for example, a chemical formula, which a chemist could understand and memorise, and pass on to a competitor.'

[21] This has been described as being "puffery" and "jargon" in the respondents' papers and that theme is carried through with much force in their heads of argument.

[22] That said, however, it is necessary to have regard to all the papers to establish whether a case has been made out. This entails close scrutiny of the founding and replying affidavits for the appellant and the answering and further affidavits for the respondents. Once that exercise has been performed, with due regard with what has to be established in cases involving the enforcement of a

covenant in restraint of trade, only then can one have resort to the rule in *Plascon Evans* to resolve disputes of fact that realistically survive that scrutiny.

[23] But first I need to return briefly to the law. I quote *in extenso* from some of the authorities firstly as an aid in setting out the law far more eloquently than I could, and secondly to facilitate a more convenient discussion of the issues which would be dispositive of the appeal.

[24] In *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) the following was said (footnotes omitted):

[10] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984 (4) SA 874 (A)], described as a landmark decision, introduced a significant change to the approach of the courts to agreements in restraint of trade by declining to follow earlier decisions based on English precedent that an agreement in restraint of trade is *prima facie* invalid and unenforceable. In English law a party seeking to enforce such agreement has to show that the restraint is reasonable as between the parties while the burden of proving that it is contrary to public policy is incumbent on the party alleging it. *Magna Alloys* reversed this approach and held that agreements in restraint of trade were valid and enforceable unless they are unreasonable and thus contrary to public policy, which necessarily as a consequence of their common-law validity has the effect that a party who challenges the enforceability of the agreement bears the burden of alleging and proving that it is unreasonable. The effect of the judgment is summarised in *J Louw and Co (Pty) Ltd v Richter and others* [1987 (2) SA 237 (N)]:

“Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor’s freedom to trade or to work. In so far as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought.”

...and...

[13] It was submitted on behalf of Reddy that the rule that was laid down in *Magna Alloys* - which has the effect of casting the *onus* upon a party seeking to avoid a restraint to allege and prove that the restraint is unreasonable – is in conflict with s 22 of the Constitution which guarantees every citizen the right to choose his or her trade, occupation or profession freely. The effect of that provision, it was submitted, was that a restraint limits that right, and is enforceable only if it is alleged and proved by the person seeking to enforce it that the limitation is reasonable. What was not contested, however, is that a restraint that is found to be reasonably required for the protection of the party who seeks to enforce it, in accordance with the test that has been laid down in the cases, is constitutionally permitted. The constitutional challenge was restricted to where the *onus* lies.

[14] In the present case we are not called upon to decide that issue. Where the *onus* lies in a particular case is a consequence of the substantive law on the issue. I have pointed out that the substantive law as laid down in *Magna Alloys* is that a restraint is enforceable unless it is shown to be unreasonable, which necessarily casts an *onus* on the person who seeks to escape it. But if the rule were to be reversed – to provide that a restraint is not enforceable unless it is shown that it is reasonable – which would necessarily cast an *onus* on the person seeking to enforce it to allege and prove that the restraint is reasonable the result in the present case would be the same. For in the present case the facts concerning the reasonableness or otherwise of the restraint have been fully explored in the evidence, and to the extent that any of those facts are in dispute that must be resolved in favour of Reddy (these being motion proceedings for final relief). If the facts disclosed in the affidavits, assessed in the manner that I have described, disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the *onus* accordingly plays no role.'

...and...

[20] However, all the facts must be considered. Siemens and Ericsson are competitors providing services to telecommunication network operators. Although Vodacom and Cell C

are customers of Siemens Ericsson does some business with them. Siemens still has to acquire any of MTN's business. Reddy is in possession of trade secrets and confidential information of Siemens. Moreover, shortly before his resignation from Siemens he attended a training course updating his knowledge of the processes, methodologies and systems architecture developed by Siemens. Information of this kind, if disclosed, could be used to the disadvantage of Siemens. This is not a case such as *Basson v Chilwan* [1993 (3) SA 742 (A)] where an employer's application to assert a protectable interest in respect of customer connections against an ex-employee who had no such connections was dismissed. Reddy is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively, is obvious. It is not that the mere possession of knowledge is sufficient, and this is not what was suggested by Marais J in *BHT Water [Treatment (PTY) Ltd v Leslie & Ano* 1993 (1) SA 47 (W)]: Reddy will be employed by Ericsson, a 'concern which carries on the same business as [Siemens]' in a position similar to the one he occupied with Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist. The restraint was intended to relieve Siemens precisely of this risk of disclosure. In these circumstances the restraint is neither unreasonable nor contrary to public policy. I agree with the remarks of Marais J in *BHT Water*.

"In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the *bona fides* or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very *ratio* underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given. ... In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant. Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the services of a competitor."

[25] In paragraph 21 of his judgment the learned judge *a quo* found as follows:

'[21] With regard to the apparently confidential information which was found on the first respondent's computer, there is no dispute on the papers that the information was given to him so that he could work out the basis of his compensation. The fact that he then kept it, can hardly be conclusive of an intention to behave in a mala fide manner in conveying that

information to the second respondent or any other person. That information in any event only related to the applicant's operations in June of 2013, and appears to have no use thereafter. The first respondent kept that information in order to be able to determine precisely what compensation would be due to him. The need for him to do so was demonstrated by the fact that the applicant has refused to pay the first respondent the bonuses to which he claims to be entitled. Once again, however, there is no demonstration in the founding affidavit of what this information, is save for the vague and confusing generalisations referred to above.'

[26] With respect to Lopes J, that finding is not correct, both in fact and in law.

[27] It is very clear from a reading the affidavits that the June 2013 forecast was sent to the first respondent for urgent comment as to its overall content, and not, as the first respondent suggests, for him to calculate his bonus entitlement. The document contains information as to the appellant's clients, forecasts as to the probable earnings from those clients, projections as to billable hours expected in respect of such clients, billing rates and the appellant's costs in providing services to its clients.

[28] That document was sent to the appellant at his work email address. He then forwarded it from there to his personal private email address to keep as his personal record, so he says, for the purpose of an anticipated dispute over the payment of his bonus. The fact that that anticipated dispute may have materialised is of no moment. It remains an undeniable fact that he took the document, a fact which he baldly denied in his answering affidavit, prompting the appellant to introduce this "new material" in its reply.

[29] That fact, coupled with a reading in all the affidavits of the prolix and turgid assertions for and against the importance and value of the position occupied by the first respondent while in the appellant's employ prompts me to have regard to what was said in paragraph 20 in *Reddy* and by Wallis AJ in *Den Braven SA (Pty) Ltd v Pillay & Ano* 2008 (6) SA 229 (D):

[11] The Court must avoid the subconscious temptation in cases such as these to think that the former employee is "just a salesman" and to treat the attempt to enforce the restraint as a case of the employer taking a sledge-hammer to crack a nut. Obviously each case depends on its own facts. A highly successful tele-marketer selling to the public at large on a "cold calling" basis will probably not establish a distinctive customer connection. However, in any business dependent for its profits on the sale of its products, the sales function is of fundamental importance and the salesperson's ability to damage the business of the employer may be very considerable or even fatal, notwithstanding the fact that the salesperson may seem to stand fairly low in the staff hierarchy. This case provides a good illustration of this. The Applicant's branch in Durban, which services the province of KwaZulu-Natal, had only four employees. Two of these were sales representatives, namely Mr. Pillay and one other; one was an internal sales/administrative employee and one was both in charge of the warehouse and a driver for the purpose of making deliveries. In essence the only activity of the business in KwaZulu-Natal was sales and in that area its annual turnover in the last financial year was approximately R12 million to which Mr. Pillay contributed some R5 million. In this context, notwithstanding his ostensibly humble designation, he was a key employee. He had obviously played a significant role during the eight years of his employment in building up the business and establishing and maintaining its relationships with its customers. It is significant that if one looks at the minutes of the Durban sales meetings that are annexed to the replying affidavit that Mr. Pillay and his dealings with clients always formed the most substantial component of the meetings. It must also be borne in mind that what is referred to in the cases as a customer connection is often constituted by intangibles such as the relationship on personal issues between salesperson and purchaser; the reputation of the salesperson for dealing with complaints and problems and his or her all-round willingness to "go the extra mile" in order to secure a sale.'



[30] The respondents in their heads of argument point correctly to the nature of the enquiry in *restraint* cases as set out in *Bason*. These are firstly, whether there is an interest of one party which warrants protection, secondly, whether that interest is being threatened by the other party, thirdly, if there is, does that interest, if weighed qualitatively and quantitatively against the interest of the other party warrant that he be rendered economically inactive and unproductive, and fourthly, the existence of another aspect of public policy which, although not pertaining to the relationship between the parties, require that the restraint not be enforced.

[31] The respondents also correctly point out that it is widely accepted that *Kwik Copy (SA) (Pty) Ltd v Van Heerden & Ano* 1999 (1) SA 472 (W) added a fifth enquiry: does the restraint go further than is necessary to protect the interest?.

[32] The references to authorities above, read in the context of the first respondent's appropriation of the June 2013 forecast document are sufficient, in my view, to answer those propositions. His taking of that document is at a bare minimum, sufficient in my view to warrant the appellant's fears and justify their entitlement to enforce the restraint against him.

[33] In *Reddy*, although on the facts of that case it was held that the incidence of the onus was of no moment, the challenge to the question of the onus in restraint cases failed. On the common cause facts of this matter, particularly relating to the retention of the appellant's June 2013 forecast by the first respondent, the picture is entirely different.

[34] Although not strictly necessary I had better say something about the geographical ambit of the restraint. The respondents contend that its application to the whole of South Africa is to cast the net of its effectiveness unreasonably wide. However it is the respondents' own case that call centres, like the appellant and the second respondent, compete in the international arena. In my view, it is not unreasonable, in that context, for it to operate country-wide.

[35] I alluded earlier in this judgment to fact that I would need to say something more about the preparation of the appeal record. When the papers in this appeal were originally delivered to us they consisted of nothing more than copies of the two volumes of application papers that served before Lopes J, together with, separately, a copy of the Special Power of Attorney delivered on 28 November 2013, a copy of a Notice of Set Down delivered on 06 January 2014 and the Notice of Appeal delivered on 24 January 2014. That was self-evidently *not* an appeal record. We were not, at that stage, favoured with a copy of the judgment of the court *a quo* nor with the Order or judgment granting leave to appeal.

[36] We then directed that a proper appeal record be prepared and delivered. A manageable record was subsequently delivered on or shortly after 14 February 2014 with the judgment and other missing documents being contained in a third volume and a reworked index being appended to the original two volumes. However, given what I have said about the subsequent proceedings earlier in this judgment it may still be contended that we have not been furnished with a full and proper appeal record. This is a clearly unsatisfactory state of affairs. I intend to mark my

displeasure by depriving the appellant of a portion of the costs relating to the preparation of the record.

[37] I accordingly make the following Order:

- a. The appeal succeeds with costs, such costs to include those consequent upon the employment by the appellant of two counsel and those relating to the application for leave to appeal, but, insofar as the costs relating to the preparation of the appeal record are concerned, the appellant shall be limited in that regard to 50% of those costs;
- b. The Order of the court *a quo* is set aside and replaced with final Orders in the terms set out in paragraphs 2.1, 2.2 and 2.3 of the Notice of Motion, with the Order for costs in terms of paragraph 2.3 being expressed so as to include those costs reserved on 31 July 2013.

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Vahed J

I agree:

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Mokgohloa J

I agree:

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Marks AJ

Case Information

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For the respondent:  
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Ref: Mr R Stuart-Hill

Date of Hearing  
Date of Judgment

28 March 2014  
01 April 2014