REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 3302/19P

In the matter between:

MONTEAGLE CONSUMER GROUP LIMITED	Applicant
and	
STUART BASIL BALCOMB	First Respondent
STEVEN O'CONNOR	Second Respondent
BIANCA JOY RIDGEWAY	Third Respondent
OMNIGSS (PTY) LTD	Fourth Respondent

Coram : Seegobin J

ORDER

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1. The First and Third Respondents are interdicted from continuing with their employment with the Fourth Respondent for a period of 9 months, as calculated from 9 March 2019 in respect of the First Respondent and 9 February 2019 in respect of the Third Respondent, and an interdict restraining the Fourth Respondent from employing them for those respective periods;
2. The Second and Third Respondents are directed, within 24 hours of the granting of an Order, to deliver their laptop computers taken by them when

they left the employ of the Applicant to the Applicant in order to permit an expert to analyse the hard drives of the respective laptops for confidential and proprietary information belonging to the Applicant;

3. The First, Second and Third Respondents are to deliver a list to the Applicant of all and any confidential information and/or proprietary information of the Applicant that they have disseminated and to whom it was disseminated;
4. The respondents are to pay the Applicant's costs, such costs to include the costs of senior counsel.

JUDGMENT

Seegobin J

Introduction

[1] This is an application for an interdict and the enforcement of a restraint of trade agreement. The application was launched in the normal course on 15 May 2019. It was duly opposed by the respondents and subsequently adjourned for argument to the opposed motion roll on 23 August 2019. When the matter served before me on that date the applicant was represented by Mr Mossop SC and the respondents by Mr Phillips SC. I am indebted to both counsel for their assistance herein.

Nature of relief

[2] The applicant seeks final relief in the following form:

'1.1 an interdict restraining the First and Third Respondents from continuing with their employment with the Fourth Respondent for a period of 12 months, as calculated from 9 March 2019 in respect of the First Respondent and 9 February 2019 in respect of the Third Respondent, and an interdict restraining the Fourth Respondent from employing them for those respective periods;

1.2 an Order directing the Second and Third Respondents, within 24 hours of the granting of an Order, to deliver their laptop computers taken by them when they left the employ of the Applicant to the Applicant in order to permit an

expert to analyse the hard drives of the respective laptops for confidential and proprietary information belonging to the Applicant;

1.3 an Order that the First, Second and Third Respondents deliver a list to the Applicant of all and any confidential information and/or proprietary information of the Applicant that they have disseminated and to whom it was disseminated; and

1.4 costs of suit.'

The parties

[3] The applicant is a public company which conducts the business of an importer and distribution of fast-moving consumer goods at La Lucia on the KwaZulu-Natal North Coast. The applicant is part of the Monteagle Group of Companies. Although the applicant is based and headquartered in Durban, South Africa, it conducts business all over the world, including South Africa. The only markets in which the applicant is not involved are the Chinese, American and Canadian ones. The significance of this will become apparent in due course.

[4] The first, second and third respondents were previously employed by the applicant. The second respondent left his employment on 30 September 2018. The third respondent left her employment on 8 February 2019 while the first respondent left the applicant on 8 March 2019. In view of the fact that some time has passed between the second respondent's leaving and now, the applicant does not seek to enforce the restraint of trade agreement against him. However, it does persist for certain other interdictory relief against him as set out above.

[5] The fourth respondent is a private company which has its principal place of business at 265 Sydney Road, Congella, Durban, KwaZulu-Natal. The fourth respondent conducts business as a fast-moving consumer goods global procurement service provider. The fourth respondent is part of the Omnigss Group of Companies which operate internationally. The fourth respondent is the South African based arm of this business.

Employment contracts

[6] At the commencement of their respective employment with the applicant the first, second and third respondents each signed an employment contract with the applicant. These employment contracts are largely identical in their terms and conditions. For purposes of this application only clauses 20 and 21 are relevant. They are set out here below:

6.1 Clause 20 deals with the protection of confidential information and provides as follows:

'PROTECTION OF CONFIDENTIAL INFORMATION

20.1 For the purposes of this agreement, all information relating to the employer and which is disclosed to or becomes known to the employee in any way is "Confidential Information" except information which is in the public domain or is public knowledge.

20.2 For clarity, examples of Confidential information include:

20.2.1 information relating to the employer's products, services and prices;

20.2.2 information relating to the supply of the employer's products and services;

20.2.3 information relating to tenders and tender prices;

20.2.4 names, credit records and other details of current and prospective customers, suppliers and trade connections;

20.2.5 personnel records of employees;

20.2.6 financial information such as operating results, budgets, financial reports and financial statements;

20.2.7 business and financial strategies and strategic plans;

20.2.8 management and administration systems, including accounting systems, purchasing and selling systems, service systems, inventory control systems and personnel management systems;

20.2.9 contact details of professional advisers and all opinions, advice and documentation supplied by such advisers;

20.2.10 details of computer systems and software;

20.2.11 marketing and advertising material strategies.

20.3 The employee acknowledges that the disclosure of the employer's Confidential Information will prejudice the employer.

20.4 The employee must:

20.4.1 keep all confidential information in the strictest confidence;

20.4.2 not utilise the confidential information for any purpose other than to perform his employment obligations for, and in accordance with the instructions of, the employer; and

20.4.3 not disclose the confidential information to any third party without the prior written consent of the employer, which may require that such third party signs a confidentiality undertaking on terms substantially similar to those set out in this agreement before I gives its consent.

20.5 The employer may request, at any time, and without notice that all documents, manuals and/or reports containing its Confidential Information, together with all copies, be returned to it immediately.

20.6 The employee is ever legally compelled to disclose any of the employer's Confidential Information, he must immediately notify the employer of that compulsion and cooperate fully with the employer in contesting or otherwise dealing with that compulsion.'

6.2 Clause 21 deals with a restraint and reads as follows:

'**RESTRAINT**

21.1 In order to protect the Confidential Information and proprietary interests of the employer, the employee must not, for the duration of his employment and for a period of one (1) year thereafter:

21.1.1 be engaged in or concerned with any trade or business whether as principle, agent, partner, representative, director, member, employee, consultant, advisor, financier or officer of any business or any company or close corporation or trust, which competes with the business of the employer in the region of Durban;

21.1.2 be employed by a customer of the employer with whom he was directly involved in the course and scope of his employment with the employer;

21.1.3 either for himself, or as the agents of anyone else, persuade, induce, solicit, encourage or procure any employee of the employer to become employed by, or interested, in any manner whatsoever, in any business, firm, undertaking, entity, trust, close corporation or company, directly or indirectly, in competition with the business carried on by the employer;

21.1.4 in any way whatsoever approach, persuade, induce, solicit, encourage or procure any such existing customer or supplier of the

employer to become a customer or supplier of, or to do business with, any business, firm or undertaking which carries on, or intends carrying on, business in competition with the employer.

21.2 Notwithstanding the above, the employee may be engaged as a holder of shares, debentures or any other form of indebtedness in a public company or building society.

21.3 The employee has considered the restraints set out in this agreement and acknowledges that those restraints:

21.3.1 are reasonable as to their subject matter, area and duration;

21.3.2 go no further than is reasonably necessary to protect the Confidential Information and proprietary interests of the employer, and

21.3.3 are reasonably required by the employer to protect its Confidential Information and proprietary interests.'

[7] It is common cause that on leaving the applicant, the first, second and third respondents took up employment with the fourth respondent. It is here that they are currently employed.

The papers

[8] The applicant's founding affidavit was deposed to by Deborah Vivienne Mylrea who describes herself as a financial director of the applicant. The answering affidavit delivered on behalf of the respondents was deposed to by the third respondent. The third respondent purports to speak on behalf of all the respondents. The first and second respondents have put up confirmatory affidavits in the usual form. Neither one of them has sought to deal pertinently with certain important allegations made against them by the applicant.

[9] I point out at the outset that the manner in which the answering affidavit was drawn has created some serious difficulties for the respondents especially the first and second respondents. Of the 207 paragraphs that comprise the founding affidavit, 80 of them have simply not been answered at all. As correctly pointed out by Mr Mossop this does not include those paragraphs where the third respondent avoids dealing with 'WhatsApp' conversations on the basis that these are *sub judice*. If one

also has regard to these paragraphs the total number of unanswered paragraphs rises to 145.

[10] Whilst no fault can be laid at the door of Mr Phillips in this regard as he was not the one involved in preparing the answering papers, I consider that the failure of a party not to deal pertinently with allegations made against him or her must carry serious consequences when one assesses the issue of prospects in a matter. It is trite that if the respondent's affidavit, in answer to an applicant's, fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit, the court will, for purposes of the application; accept the applicant's allegations as correct.[1] A statement of lack of knowledge coupled with a challenge to the applicant to prove part of his or her case does not amount to a denial of the averments by the applicant.[2]

[11] Rather than attempting to answer the complaints made against them by the applicant in its founding papers, the respondents' approach has been to simply avoid dealing with such complaints altogether. Instead they resorted to raising certain points *in limine* which not surprisingly were not really persisted with by Mr Phillips in argument.

Nature of applicant's business

[12] According to the applicant 'fast-moving consumer goods' (in which it trades), comprise both food products as well as non-food products. Food products are those packaged in tins and bags such as canned tuna, canned pulses, pasta and frozen vegetables. Non-food products are those that comprise baby and facial wipes, shaving gel and canned pet food.

[13] In addition to its business involving fast-moving consumer goods the applicant is also an importer of bulk ingredients for the manufacturing sector. It imports and sells to certain local producers products such as bulk tapioca starch, modified starch,

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[1] *Moosa v Knox* 1949 (3) SA 327 (N) at 331; also *Ebrahim v Georgoulas* 1992 (2) SA 151 (BG) at 152H – 153D.

[2] *Saflec Security Systems (Pty) Ltd v Group Five Building (East Cape) (Pty) Ltd* 1990 (4) SA 626 (E) at 631B-E.

soya protein isolate as well as bulk frozen vegetables and non-food products such as bulk talc powder.

[14] The applicant avers that the Monteagle Group of Companies is also involved in property ownership and the supply of coffee and tools. It also has a share portfolio. The market in which the applicant trades is said to be extremely competitive as there are a number of entities all vying for a market share especially in the international market. According to the applicant any advantage that one competitor gains over its fellow competitors can be exploited by it to improve its position at the expense of its fellow competitors.

[15] Two of the applicant's major customers are Spar and Shoprite. Due to the large volume of sales done with these two customers, the applicant has also gone to the extent of affording them warehousing and distribution solutions to their main distribution centres. For Spar, for instance, the applicant carries an average of about R90 million worth of stock per month at the various warehouses. For Shoprite it carries an average amount of R8 million worth of stock per month at its warehouse. The combined turnover of Spar and Shoprite's business in the last financial year with the applicant is said to be in the region of R840 million. Considering that the applicant did business in the same financial year with 35 other customers for a total value of less than R100 million, it becomes apparent just how important Spar and Shoprite are to the applicant. Approximately eighty five per cent of the applicant's turnover emanates from these two entities.

Other role-players

[16] Given the nature of the complaints being made by the applicant against the respondents this picture would not be complete without a mention of two other parties, who though not cited in these proceedings, seemed to have played a significant role insofar as the conduct of the first, second and third respondents are concerned. One of them is Anthony Dumas ('Dumas') who for many years was not only employed by the applicant but was also a director of at least four other companies in the Monteagle Group of Companies. Dumas left the applicant on 5 February 2019 and resigned from his positions in the other companies at various other times at the beginning of 2019.

[17] While Dumas was still associated with the applicant, he proposed in about 2018 that the applicant should venture into the Chinese, American and Canadian markets. The applicant, however, declined to do so. Dumas then resolved to leave the applicant with the sole purpose of penetrating these markets through the fourth respondent. Since his departure from the applicant was based strictly on this understanding the separation was consensual and achieved on good terms.

[18] By agreement with the applicant and strictly on the understanding that Dumas would be operating in the Chinese, American and Canadian markets, the applicant allowed him to recruit the second and third respondents to be employed by him at the fourth respondent. Dumas later also recruited the first respondent to join him.

[19] As it turned out, Dumas's foray into the Chinese, American and Canadian markets was unsuccessful and the fourth respondent began trading in competition with the applicant in a market in which the applicant was already active. The applicant claims that it and the fourth respondent are now direct competitors in the same markets, both locally and internationally.

[20] The other person who features strongly in the applicant's complaints against the first, second and third respondents is Bridget Baker ('Baker'). Baker was previously employed by the applicant at its Durban Office. She was subsequently transferred by the applicant to work in a company in the United Kingdom known as Monteagle International ('MUK'). MUK is said to be a fully integrated global procurement shipping, supply-chain and risk management business. On 1 October 2018 Baker became a statutory director of MUK. On Tuesday 5 March 2019, however, she unexpectedly resigned from her position with MUK.

[21] The applicant claims that Baker had a strong bond with Dumas and that upon leaving her employment with the applicant she immediately took up employment with Omnigss Ltd in London. As mentioned already, the fourth respondent is the South African arm of that group. How Dumas and Baker were involved in the conduct of the first, second and third respondents thereby necessitating the present proceedings is dealt with here below.

Applicant's case against first, second and third respondents

[22] The applicant's case against the first and third respondents is that they have conducted themselves in flagrant breach of the terms of their employment contracts, in that not only do they have access to, or are in possession of confidential information belonging to the applicant, but that they have also attempted and/or succeeded in soliciting some of the applicant's suppliers/customers to the detriment of the applicant. In short, the two forms of proprietary interests which the applicant contends are deserving of protection by the restraint herein concerns, *first*, its confidential information or trade secrets and *second*, its trade or customer connections. I start with the case against the first respondent.

[23] The first respondent commenced his employment with the applicant on 17 January 2017 as a junior trader. Prior to this he was a deckhand on a yacht. Whatever skills and contacts he developed were all acquired while employed with the applicant. As a junior trader he acquired knowledge and understanding of global market trends and external factors that affect prices and products. By the time he terminated his employment with the applicant he was a divisional trader managing specific categories of products in various regions such as India, the Middle East and Eastern Europe.

[24] The applicant alleges that in performing his job, the first respondent had direct relationships with customers, including certain customers with whom the applicant had previously not had any relationships with. In this time the first respondent helped to establish relationships with about five customers. In this regard he had prolonged and repeated contact with applicant's customers and suppliers. The first respondent rose to middle management and in doing so he was required to make strategic decisions with suppliers and customers in conjunction with the applicant's sales department.

[25] According to the applicant the first respondent had access to the following confidential information which in terms of the applicant's normal practice was stored on his laptop:

25.1 product costings that would show gross profit, container packing, duties and tariff headings, and freight rates for projects that he was working on;

25.2 product feasibilities that would have been emailed to clients;

25.3 the cost price and selling prices for products forming part of projects that he was working on;

25.4 orders when they were emailed to factories required to manufacture those orders;

25.5 all factories and customer contact details for projects that he was working on;

25.6 supplier agreements;

25.7 a supplier agreement summary showing which suppliers had not bound themselves to the applicant's terms and conditions of sale;

25.8 the full supplier base for all products showing the packaging type, country of origin, cases per container, minimum print run, and shelf life;

25.9 stock on hand for warehoused products and their expiry dates;

25.10 freight rates of products supplied;

25.11 documentation identifying the rate of sale of products;

25.12 credit limits and payment terms for customers;

25.13 which customers the applicant credit insured; and

25.14 the divisional accounts for the division that the first respondent ran.

[26] It is common cause that on the termination of his employment the first respondent returned his laptop to the applicant. It was not clear, however, whether the proprietary information had been copied on another storage device or not.

[27] The applicant goes on to catalogue a series of communication that took place between the first respondent and Baker in London. Baker was at that stage still employed by MUK. The communications took place via the WhatsApp social network commonly utilised on cellular phones. For purposes of this judgment I do not intend setting out every piece of communication between the first respondent and Baker. A few examples will suffice to illustrate the concerns raised by the applicant herein.

27.1 On 11 March 2019, for instance, and 3 days after leaving the applicant, the first respondent was in contact with Baker. In a message from Baker she requested the first respondent to provide her with his OMNI email address as

she wanted to copy him in on her email to ‘Hitesh’ regarding coffee. Hitesh was said to be Hitesh Mahajan who previously worked for the Monteagle group in the Middle East and North African areas. According to the applicant the reference by Baker to ‘coffee’ was a reference to a project to manufacture cappuccino sticks that was being explored by the applicant at the time. Hitesh was no longer working for Monteagle and was now aligned to Omnigss. It seems that Baker now wished to include the first respondent in her dealings with Hitesh.

27.2 In a separate conversation later on the same day the first respondent requested Baker to provide him with a list of ‘active products’ that were being supplied to Shoprite out of Eastern Europe, China, India and Mauritius. He asked Baker whether she was able to send him the information from her personal mail to his new address. Baker undertook to do so on the following day.

27.3 This list of ‘active products’, according to the applicant, could only mean those products that the Monteagle Group was purchasing out of those areas for supply to Shoprite being one of its major customers in South Africa. The applicant’s fear was that the first respondent could target those suppliers and take over the relationship.

27.4 In a conversation with Baker on 12 March 2019 the first respondent indicated that he was due to meet with ‘Renaldo’. Baker had informed the first respondent that she needed more time regarding the list he wanted. The reference to ‘Renaldo’, according to the applicant, was a reference to Renaldo Nadesan Phillips who was the head buyer of the ‘Private Lines’ brand of Shoprite. Phillips is a powerful figure at Shoprite and the entire buying office reports to him.

27.5 On 13 March 2019 a series of conversations took place between the first respondent and Baker. Again there is clear reference to the Shoprite list regarding the goods being supplied to it by Monteagle.

27.6 From a chain of emails starting on 25 February 2019 the applicant demonstrates how the first respondent continued to divert business away from it to the fourth respondent. For purposes of this judgment I merely refer to two of the applicant’s loyal and long-standing suppliers from India namely ‘Mrs Bectors’ and ‘Mother Nutri’. The contents of an email from Dumas to a sales

director of the applicant on 25 March 2019 which was copied to first respondent and Phillips confirm conclusively that the above suppliers from India were now opting to trade with Omni. The email reads as follows:

> 'Mrs Bectors & Mother Nutri have opted to trade exclusively through Omni and have notified Shoprite as such, the notification has been acknowledged c/o Renaldo who has asked us to advise you.
>
> It would be 100% our intention to complete your orders currently in the system and manage an amicable hand over in the best interest and wishes of our mutual client Shoprite.'

[28] As far as the second respondent is concerned the applicant contends that he too, like the first respondent, is in possession of confidential information stored on his laptop which is proprietary to the applicant. While the applicant had agreed that the second respondent could take the laptop with him when he left it was expected that he would honour the terms of his employment contract and that he would delete all confidential or proprietary information from his laptop. Like with the first respondent, the applicant has put up a series of 'WhatsApp' discussions that took place between the second respondent and Baker in which information was openly shared and solicited not only about suppliers but also about poaching employees away from the applicant to work for the fourth respondent. One such employee was Vivek Rampersad who was previously employed by the applicant. Vivek had experience both in the applicant's internal systems and clearance processes as well as shipping. It seems that on Baker's recommendation Vivek was approached by the second respondent because in mid-April 2019 Vivek handed in his notice of resignation to the applicant.

[29] The conversations between the second respondent and Baker show that they were working together concertedly so as to extract information about the applicant's operations and where possible members of the applicant's staff as happened with Vivek. The applicant contends that when the second respondent left it was at a time when the fourth respondent was going to concentrate strictly on the Chinese, American and Canadian markets. There was no talk whatsoever of any intention to compete with the applicant as the conduct of the applicant's ex-employees and the fourth respondent now show.

[30] The applicant's server shows a constant flow of emails from the second respondent to various people resulting in applicant's confidential information being utilised for the benefit of the fourth respondent. On 4 January 2019 for instance Melanie Kelly (Kelly) sent an email to the second respondent on his Monteagle email address. Kelly indicated that she was looking for an email from 'Ant' meaning Dumas in which Dumas had enclosed 'Walters' shareholder's agreement with 'AVI' being a factory from which the applicant purchased pet food. 'Walter' is said to be Walter Frey, a shareholder in AVI and also the fourth respondent's chairperson. Kelly indicated that she was unable to locate the email. On Saturday 12 January 2019 the second respondent, utilising his previous Monteagle email address extracted the document Kelly was seeking and sent it to his new email address. This, according to the applicant, shows that the second respondent who had terminated his employment in September 2018 was quite brazenly infiltrating the applicant's server for the benefit of the fourth respondent. Similar conduct from the second respondent followed again on 15 February 2019.

[31] As far as the third respondent is concerned, she had commenced her employment with the applicant on 7 April 2015. She was employed as a professional assistant and worked exclusively for Dumas. It is common cause that she is currently employed by the fourth respondent. It is common cause that she is currently in possession of a laptop that belongs to the applicant.

[32] Whilst performing her duties for Dumas the third respondent was tasked by the applicant to administer and store all its trademark applications and records and other matters ancillary to the applicant's trademark. On her laptop the following information was stored: copies of divisional agreements that show the base salary and percentage shareholding for each region; a confidentiality agreement with at least one customer; power point presentations to customers; minutes of monthly management and board meetings with Monteagle Logistics and the applicant's sales data.

[33] The applicant contends that the above constitutes proprietary information specific to the applicant. One of the terms of the contract of employment was that the

third respondent was prevented from approaching any of the applicant's clients with a view to obtaining the custom of that client.

[34] Whilst it is common cause that the third respondent's termination of employment with the applicant was consensual, it is her conduct subsequently which the applicant finds offensive and in breach of the restraint provisions found in her employment contract. The applicant has produced evidence to show that the third respondent, like the first and second respondents, was engaged in 'WhatsApp' conversations with Baker barely a month after leaving the applicant. On 13 March 2019, for instance, the third respondent contacted Baker and sought the email address of one 'Carlos' from Tottus. According to the applicant the said Carlos is in fact Carlos Florez who is employed by Tottus which is a chain of Chilean owned hypermarkets that trade in Peru and Chile. Tottus has been a long-standing client of the applicant.

[35] The list of conversations put by the applicant shows that not even thirty five minutes after receiving the requisite information from Baker, the first respondent attempted to contact Carlos Florez albeit unsuccessfully due to the email address being incorrect. Baker was contacted again and so informed. Unfortunately Baker was unable to assist. The third respondent, however, was able to figure out the mistake in the email address on her own and she informed Baker accordingly.

[36] Based on the third respondent's conduct since leaving the applicant, the applicant avers that she is in the process of compiling a data base of customer connections utilising the details of applicant's customers for the benefit of the fourth respondent.

[37] In setting out the applicant's complaints against the first, second and third respondents, I have merely outlined the salient aspects thereof having regard to the nature of the relief sought herein. I consider that it would be an exhaustive and unnecessary exercise to set out such allegations in the minutest of detail as has been done by the applicant. I intend dealing with the respondents' case and their responses to the applicant's allegations when I make my findings in due course.

Before I do so, however, it is perhaps convenient at this stage to outline some of the established legal principles pertaining to matters of this nature.

Final relief

[38] The applicant seeks final relief. The test for final relief in motion proceedings is well-established: an applicant is required to establish a clear right, a reasonable apprehension of immediate harm if the relief sought is not granted, and a lack of a suitable alternative remedy. The availability of an alternative remedy is a factor that may be taken into account in considering whether and to what extent the restraint should be enforced.[3]

[39] It is also well established that motion proceedings are only appropriate for the resolution of legal issues based on common cause facts and not designed to determine probabilities. Any disputes of fact that arise on the papers must be approached in light of the test formulated by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd.*[4] The test is well known and bears no repetition herein.

Restraint of trade – legal foundation

[40] From such decisions as in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,[5] *Basson v Chilwan & others*[6] and *Reddy v Siemens Telecommunications (Pty) Ltd*,[7] our courts have consistently held that covenants in restraint of trade agreements are enforceable unless and to the extent that they are contrary to public policy, because they impose an unreasonable restriction on a person's freedom to trade or to work.

[41] In deciding whether a restraint of trade is contrary to public policy regard must be had to two principal considerations: the *first* is that agreements freely concluded should be honoured, and the *second* is that each person should be free to enter into a business, a profession or a trade in the manner in which they deem fit.[8] It is for this reason that unreasonable restraint of trade clauses are considered to be contrary to public policy.

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[3] *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C) at 82C-D.
[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd*1984 (3) SA 623 (A).
[5] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*1984 (1) SA 874 (A).
[6] *Basson v Chilwan & others*1993 (3) SA 742 (A).
[7] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA).
[8] *Sunshine Records (Pty) Ltd v Frohling & others* 1990 (4) SA 782 at 794C-E.

[42] In *Basson v Chilwan*[9] Nienaber JA identified the following four questions that should be asked when considering the reasonableness of restraint (listed here for ease of reference):

> '(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 one party not to 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. It is a matter of judgment which can vary from case to case.'

[43] The *onus* to establish that a restraint is unreasonable and that it should not as a matter of public policy be enforced ordinarily falls on the party affected by such a clause. An applicant on the other hand bears the *onus* of establishing the remaining requirements to justify the relief sought.

Applicant's protectable interests

[44] The nature of the protectable interests contended for by the applicant relate firstly to confidential information and secondly to customer connections.

Confidential information

44.1 What is confidential information can perhaps be understood from what was said by Marais J in *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg & another* where Marais J said:[10]

> 'It is a matter of common knowledge that, under a system of free private enterprise and therefore of competition, it is to the advantage of a trader to obtain as much information as possible concerning the business of his rivals and to let them know as little as possible of his own . . . He is of course aware of the fact that his employees collectively know a great deal if not all of his

[9] *Basson v Chilwan & others* fn6 at 743G-I of the headnote.
[10] *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg & another* 1967 (1) SA 686 (W) at 689.

> business affairs. Whilst in his employ, or even after leaving it, it is in their power to disclose to competitors information capable of use adverse to him. The information may be a trade secret, e.g. a method of production not protected by a parent, or a business secret, such as the financial arrangements of the undertaking, or a piece of domestic information, like the salary scale of a clerk, or the efficiency of the firm's filing system.
>
> Some of this information would be of a highly confidential nature, as being potentially damaging if a competitor should obtain it, some would be less so, and much would be worthless to a rival organisation.
>
> . . .
>
> The difficult question in each case would be to decide what information gleaned by an employee is to be regarded as disclosable as being harmless or general knowledge and what items are confidential or secret. The dividing line may move from case to case, according to what is the general practice or convention in the category of trade or manufacture in which the plaintiff falls, with particular reference to existing or potential competitors of his. If, however, it is objectively established that a particular item of information could reasonably be useful to a competitor as such, i.e. to gain an advantage over the plaintiff, it would seem that such knowledge is *prima facie* confidential as between an employee and third parties and that disclosure would be a breach of the service contract.'

44.2 In *Walter McNaughton (Pty) Ltd v Schwartz & others*,[11] van Reenen J outlined the basis of the inquiry relating to confidential information or trade secrets as follows:

> 'Whether the information constitutes trade secrets is a factual question… For information to be confidential it must (a) be capable of application in trade or industry, that is, it must be useful; not be public knowledge or property; (b) it must be known only to a restricted number of people or a closed circle; and (c) be of economic value to the person seeking to protect it…'

Customer or trade connections

44.3 The principles applicable to the issue of protectable trade connections were carefully considered by Nestadt JA in *Rawlins and Another v Caravantruck (Pty)*[12] *Ltd* as follows:

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[11] *Walter McNaughton (Pty) Ltd v Schwartz & others* 2004 (3) SA 381 (C) at 388J – 339B.
[12] *Rawlins & another v Caravantruck (Pty) Ltd* 1993 (1) DS 537 (A) at 541C-I.

'The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business (Joubert *General Principles of the Law of Contract* at 149). Heydon *The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that the 'customer contract' doctrine depends on the notion that:

> 'the employee, by contract with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket.'

In *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires

> 'such personal knowledge of and influence over the customer of his employer … as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection …'

This statement has been applied in our Courts (for example, by Eksteen J in *Recycling Industries (Pty) Ltd v Mahammed and Another* 1981 (3) SA 250 (E) at 256C-F.). Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left (*Heydon* (*op cit* at 108-120); and see also *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (c) at 307 G-H and 314C and G).'

44.4 At page 542 of the judgment at G-H, Nestadt JA went on to state that:

'Even though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense 'his customers', he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before. Where this occurs, what I call the customer goodwill which is created or enhanced, is at least in part an asset of the employer. As such it becomes a

> trade connection of the employer which is capable of protection by means of a restraint of trade clause.'

Applicability of legal principles to facts

[45] Given the nature of the legal principle enunciated in *Plascon-Evans*, Davis J in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff*[13] cautions that the *ipse dixit* of the applicant cannot suffice on its own to establish these proprietary interests. In this regard Davis J was referring to what was stated by Olivier AJ in the unreported judgment of *Viamedia (Pty) Ltd v Sessa*[14] in which the learned acting Judge had this to say:

> 'Information does not become confidential and a process or practice does not become secret merely because Viamedia contends that they do – or, perhaps, even if Mr Sessa subjectively belied them to be so. It does not suffice for Viamedia to say that it has confidential information or trade secrets. It must set out what they are and when and how Mr Sessa was exposed to them. It must set up the facts from which the conclusion could be drawn that something is indeed confidential or secret.'

Assessment of evidence and findings

[46] In order to assess whether the applicant has discharged the *onus* resting on it, it becomes necessary to examine its complaints against the versions of the respondents as dealt with by the third respondent in the answering affidavit. The applicant's case is fairly straight-forward: it sets out in some detail the manner in which the first to third respondents have conducted themselves after terminating their employment with the applicant and joining the fourth respondent. The number of 'WhatsApp' discussions between the respondents, Baker and Dumas relating, *inter alia*, to the kind of products being supplied by the applicant for instance to Shoprite, one of the applicant's major customers; information relating to the suppliers themselves; the manner in which employees of the applicant's customers were approached directly such as Phillips who is the head buyer for Shoprite; the manner in which suppliers such as 'Mrs Bectors' and 'Mother Nutri' from India were approached and persuaded to advise Shoprite to place orders for such products through the fourth respondent; the manner in which certain experienced and skilled

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[13] *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (CPD) at 87A-B.
[14] *Viamedia (Pty) Ltd v Sessa* unreported, CPD case No 8679/2008.

employees of the applicant were targeted and enticed to leave the applicant as happened with Vivek Rampersad; evidence of the first to third respondent having direct access to applicant's confidential information still stored on their laptops and infiltrating the applicant's server and retrieving confidential documents and emails from it as happened with Walter Frey's shareholder's agreement with AVI, all point, in my view to a deliberate and concerted effort on the part of the respondents to divert business and customers away from the applicant.

[47] The respondents for their part, have done very little to dispel the notion that their conduct was wrongful and prejudicial to the applicant. As I pointed out at the beginning of this judgment, the respondents have simply failed to deal with a number of allegations made against them by the applicant. The only conclusion that one can draw from this is that the allegations are true and the respondents are just not in a position to dispute any of them. This becomes patently obvious when one has regard, for instance, to the manner in which the first respondent has sought to respond to the allegations concerning the nature of the confidential information which the applicant avers he had access to as outlined in paragraph 25 above: he admits that product costings are confidential;[15] he does not deal with any of the items referred to in sub- paragraph 66.2 – 66.4 of the founding affidavit; he denies that factory and customer contact details for projects he was working on are confidential;[16] he fails to deal with any of the items referred to in sub-paragraphs 66.1 – 66.9; he denies that the freight rates paid by the applicant are confidential; [17] he admits that information not within the public domain is confidential but asserts, only in respect of Spar, that such information is on the shelves in the stores holding such products.

[48] The first respondent has not denied that the confidential information referred to by the applicant was digitally stored on his laptop. The first to third respondents have not denied that the laptops are the property of the applicant. There is no dispute about the fact that the first respondent returned his laptop to the applicant when he left. There is also no dispute that the laptops contained information

[15] Sub-para 66.1 of the founding affidavit.
[16] Sub-para 66.5 of the founding affidavit.
[17] Sub-para 66.10 of the founding affidavit.

belonging to the applicant which information was to be used by the respondents in the course of their employment with the applicant and only for the benefit of the applicant. The first respondent has not said anything about the applicant's insinuation that proprietary information stored on his device could have been copied to another storage device prior to the laptop being returned to the applicant.

[49] The applicant has quite clearly and concisely identified itself in the Monteagle Group of Companies; it has stated precisely what its business is, who its customers are and in which markets it trades. The respondents do not deny any of this. In my view, information relating to the applicant's product costs, supplier details, tariff and freight rates, payment terms etc. are all confidential and subject to protection under the covenant. The first respondent's silence on these matters must count against him on the enforcement of the restraint.

[50] Given the positions which the first and second respondents occupied with the applicant, both of them had complete access to the applicant's customer base and suppliers. Both of them were in a position to establish strong business relationships with them for the benefit of the applicant. The conduct of the first and second respondent as demonstrated by the brazen manner in which they solicited and shared information relating to applicants customers and suppliers with Baker, establishes conclusively, in my view, that they were bent on furthering the business of the fourth respondent.

[51] The same conclusion can be drawn insofar the conduct of the third respondent is concerned. She had access to and was responsible for the applicant's trademarks. This, in my view, constitutes information which was privy to the applicant only and proprietary to it. The third respondent has not sought to deny this. Nor has she sought to deny the applicant's version as to how she went about soliciting information from Baker in London about a supplier in Chile.

[52] The submission advanced on behalf of the respondents that once information leaves the applicants front door to be shared by one or more of the other companies in the Monteagle Group, such information and secrets then fall into the public

domain, is, in my view, untenable. Such information would only be deemed to be in the public domain if it is accessible to the general public.

[53] One of the points raised by the respondents in their answering affidavit is that the first and second respondents were not employed by the applicant when they resigned. They contend that their employment contracts were not extant at the time of their resignations and were substituted by so-called divisional shareholders agreements concluded by Monteagle International Limited and that the applicant was not part of these agreements. This is a preposterous suggestion if ever there was one. The signed contracts of employment, the pay-slips of the first to third respondents and their respective IRP5 documents put up by the applicant all evidence proof that the first and second respondents were indeed employed by the applicant at the time. In my view, this point is nothing more than a red-herring which does not assist the respondents at all.

[54] The roles of Dumas and Baker in the conduct of the first to third respondents cannot escape scrutiny. The evidence procured by the applicant shows convincingly that they both acted with a common design to solicit and divert customers and suppliers away from the applicant. Dumas clearly had intimate knowledge of the way in which the applicant operated, who were its customers, which markets it operated in and who were its main suppliers. This information was also known to Baker. Armed with this kind of information and knowledge it became easy for Dumas and Baker to use the first to third respondents as conduits to serve the needs of the fourth respondent. It would have been quite easy for Dumas and Baker to put up affidavits herein in order to explain their roles insofar as the first to third respondents are concerned. Their failure to do so can only mean that they each have something to hide. It would seem to me that Dumas' undertaking to the applicant that the fourth respondent would only operate in the Chinese, American and Canadian markets was nothing but a ruse cleverly designed to divert attention away from his true intentions, namely, to compete directly with the applicant in the applicant's well-established and lucrative markets.

[55] It goes without saying that the applicant operates in a highly competitive and demanding market. Any use of its confidential information and customer connections

can prove to be highly prejudicial to it. The overall evidence satisfies me that the first to third respondents have acted in material breach of the confidentiality and restraint clauses contained in their employment contracts referred to above. I am accordingly of the view that the applicant has discharged its *onus* insofar as the matters referred to in paragraphs (a) and (b) of *Basson v Chilwan*[18] are concerned. What follows is whether the requirements set out in paragraphs (c) and (d) are met.

Reasonableness of restraint

[56] As the authorities show, various difficulties arise when a court has to consider whether a restraint clause is reasonable or not and whether it offends against public policy. In the *Magna Alloys* judgment[19] it was held that a contractual restraint curtailing the freedom of a former employee to work in the field for which he was qualified would be enforced unless the ex-employee proved that enforcement would be unreasonable. However, as pointed out by Stegmann J in *Sibex Engineering Services (Pty) Ltd v Van Wyk & another*,[20] the judgment in *Magna* Alloys did not go on to indicate expressly how he could do so. As Stegmann J points out that perhaps the answer lies in the proposition appearing at page 898A of the *Magna* Alloys judgment which is to the effect that the public interest requires that generally speaking the freedom of each individual to work and compete in the field in which he or she is qualified should not be curtailed. The learned judge goes on to state the following:

> 'The individual may use his freedom of contract to curtail his freedom to work. To hold him to such a contractual obligation remains reasonable for as long as, and to the extent that, such a contractual obligation remains reasonable for as long as, and to the extent that, such curtailment is necessary for the legitimate protection of the trade connection and trade secrets of a former employer. Beyond that, it is detrimental to the public interest and therefore unreasonable to enforce such a contractual provision.
>
> I accordingly reach the conclusion that, in order to prove that the enforcement of a contractual obligation by which he has curtailed his freedom to work would be unreasonable and contrary to public policy, a former employee has to do nothing more than to prove that his former employer, seeking to enforce the restraint, has no

[18] *Basson v Chilwan & others* 1993 (3) SA 742 (A) at 743G-I of the headnote (see 42 of this judgment)
[19] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*1984 (1) SA 874 (A).
[20] *Sibex Engineering Services (Pty) Ltd v Van Wyk & another* 1991 (2) SA 482 (T) at 505H – 506B.

> trade connection and no trade secrets to protect; or, if he has, that the restraint is such that its enforcement would not serve to protect him. Alternatively he may show, if he can, that the restraint is wider than is reasonably necessary for the protection of the former employer's trade connection and trade secrets. There are no other relevant aspects of the matter that need to be addressed for the purpose of arriving at a conclusion on the question whether enforcement of such a restrain should be refused, or allowed in part only, on the grounds of unreasonableness and public policy.'

[57] There are two considerations that apply here: the *first* is that it is a matter of great public interest and concern that agreements concluded by the parties thereto with serious contractual and binding intent, should be enforced, unless there is a more compelling public interest which overrides the legal maxim of *pacta sunt servanda*;[21] and *second*, in a society where promotion of the principle of commercial competition is believed to be in the interests of society, any attempt to restrict unreasonably, or reduce healthy competition and therefore a person's right to participate freely in a trade or business will be regarded as harmful and tending to lessen the performance of participants in business and the economy.[22]

[58] Turning to the position of the first and third respondents against whom the restraint is sought to be affected, I consider that they have failed dismally to provide any evidence to show why they feel that the terms of the restraint are unreasonable and highly prejudicial to them. Apart from the first respondent saying that she and her husband have two children to support and that the family is dependent on her income, she provides no other information. On behalf of the first and second respondents all she mentions is that their employment with the fourth respondent is their only source of income.

[59] I have already concluded that the applicant has proved that it has proprietary interests in the form of confidential information and customer connection or trade secrets which are worthy of protection by the restraint. The respondents have not

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[21] J Saner, *Agreements in Restrains of Trade in SA*, (March 2019 – Service Issue 4) at 1-8 and the authorities in footnote 29.
[22] *Forwarding African Transport Services CC t/a Fats v Manica Africa (Pty) Ltd* [2004] 4 All SA 527 (D) 530i- 531c.

shown that it does not. It seems to me that the period of restraint sought to be implemented by the applicant is very relevant to its protection of the trade connections and whatever confidential information it has with regard to its dealings with its two major customers, namely, Spar and Shoprite. There can be no dispute whatsoever that the fourth respondent is now a competitor of the applicant in this market. The question that arises is whether a restraint against the employment of the first and third respondents with the fourth respondent is reasonably necessary for the protection of the appellant's trade connection and in particular the protection of such 'goodwill' as the applicant enjoys from Spar and Shoprite.

[60] The term 'goodwill' was described by Stegmann J in *Sibex Engineering*[23] as being:

> 'a somewhat volatile commodity and one which the appellants must constantly work to maintain. This they can only do by providing an efficient service which continues to satisfy their customers. Preventing the first respondent from working for a competitor for a limited period can be of some practical assistance in protecting the applicants' goodwill from being eroded by a competitor, but only to the extent that the first respondent's departure from the appellants weakens the appellant's competitive position and strengthens that of the competitor.'

[61] Notwithstanding the paucity of evidence from the first and third respondents on reasonableness or otherwise of the restraint, I consider that it is incumbent upon me to consider whether the duration of the restraint will result in any material hardship on them at this stage. As I mentioned already, the applicant seeks no enforcement against the second respondent. The applicant could have taken steps against the second respondent but elected not to do so. In my view, the damage to applicant's proprietary interests was already done when Dumas left, let alone the second respondent. To now 'punish' the first and third respondents the full extent of the restraint would, in my view, be manifestly unfair and unreasonable. I am accordingly of the opinion that a period not exceeding nine (9) months with effect from their termination dates would suffice in the circumstances. Anything more would result in undue hardship and prejudice.

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[23] *Sibex Engineering Services (Pty) Ltd v Van Wyk & another* 1991 (2) SA 482 (T) at 511F-H.

[62] I consider that every person is entitled to engage in free economic activity and in a vocation of his or her choice. Our Constitution[24] provides for this. The views expressed in the following cases are instructive:

62.1 In *Zero Model Management (Pty) Ltd v Barnard*[25] the following was stated in relation to the constitutionality of contractual clauses:

'As regards the Constitutional Court's approach to constitutional challenges to contractual terms, I refer in particular to *Barkhuizen* at paragraphs 27 to 30. As regards the test for assessing the constitutionality of contractual time-limitation clauses, I refer in particular to *Barkhuizen* at paragraphs 45 to 52, 56 to 60 and 69 to 70. As this is an urgent application in which, in my judgment, a prompt decision by this court is required, suffice it to say the following concerning the approach of the majority of the Constitutional Court in *Barkhuizen:* it said that the proper approach to constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by our constitutional values, in particular those found in the Bill of Rights; this approach, it said, leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them; and that public policy required that contractual time-limitation clauses be reasonable and fair, more specifically that they afford an adequate and fair opportunity to seek judicial redress, a matter to be determined in the light of the relative situation of the contracting parties including any inequality of bargaining power.'

62.2 Further to the constitutionality of, specifically, restraint of trade clauses Tlhapi J in *Brisan Distributers CC v Du Plessis & another*[26] set out the following

'It was argued for the respondents that the restraint of trade agreement infringed on section 22 of the Constitution. The competing rights of the employer and employee in as far as the Constitution is concerned, are not absolute rights in that the agreement is deemed to be *prima facie* valid and enforceable in the spirit of holding contracting parties to agreements they enter into. The employer's right to protect certain interests, which are usually not in the public domain, from unfair competitive exploitation by an employee is recognized. On the other hand, the right of an

[24] See section 22 of the Bill of Rights.
[25] *Zero Model Management (Pty) Ltd v Barnard* 2010 JDR 0842 (WCC) para 38: the court referred to *Barkhuzen v Napier* 2007 (5) SA 323 (CC).
[26] *Brisan Distributers CC v Du Plessis & another* [2017] ZAGPPHC 1061 para 23.

employee to freely choose and exercise his or her trade and to engage in fair competition as long as the agreement is not against public policy is also recognised.'

62.3 Discussing Davis J's remarks in *Advtech Resourcing t/a Communication Personal Group v Kuhn*[27] Tlhapi J held as follows in respect to the development of the common law with regards to restraint of trade clauses[28]

'Counsel for the respondents, relying on what was stated by Davis J in *Advtech Resourcing t/a Communicate Personel Group v Kuhn* 2008 (2) SA 375 (CPD) at para 28, submitted that in relation to certain sections in the Constitution the employer 'was required to justify a restraint, i.e. that the employer bore the onus of proving reasonableness of a restraint '. The law in as far as who bore the onus regarding unreasonableness of a restraint of trade agreement still remains with the employee. In *Advetch supra* Davis J, in *obiter,* discussed the need to develop the common law in restraint of trade matters, so as to place the onus on the employer to justify the need for a restraint agreement, since these agreements entail a limitation on the right to work of an employee. This issue was not settled.'

62.4 Further to the cases referred to above, I agree fully with the views expressed by Davis J in *Mozart Ice Cream Franchisers* in which the learned Judge says the following at page 85 F-H:

> 'The challenge of our Constitution is therefore not to reproduce uncritically the shibboleths of the past, but to transform (as opposed to abolish or ignore) legal concepts in the image of the Constitution. Contract law cannot be reduced to a museum of a past *judisprudence*. Expressed differently, the methodology mandated by 39 (2) of the Constitution needs to be implemented whenever a dispute such as the present is placed before a court. This permits a far less deferential approach to the formal contractual provisions than if the decision in *Den Braven* is followed.'

[63] Although not dealing specifically with restraints of trade, the comments made by Mhlantla J in *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd & others*[29] should be kept in mind, namely, that a standard of

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[27] *Advtech Resourcing t/a Communicate Personel Group v Kuhn* 2008 (2) SA 375 (CPD)
[28] *Brisan Distributers CC v Du Plessis & another* fn25 para 25.
[29] *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd & others* 2017 (6) BCLR 773 (CC) para 52.

fairness and equitableness and reasonableness must prevail in all contracts, including whether these are referred to arbitration or formal court litigation. To unduly restrict a person from being economically active offends the notion of fairness and the values underlying our constitutional order. It is a known fact that we are currently experiencing unprecedented rates of unemployment in this country, the repercussions of which affect every facet of society. Restraint clauses of the nature herein do not help the situation. They serve to aggravate it. I consider that perhaps it is time for the Constitutional Court (in a suitable case) to closely examine whether such a restrictive clause in an employment contract should continue to remain part of our jurisprudence.[30]

[64] As far as the relief contained in sub-paragraph 1.2 is concerned, I consider that the applicant is entitled to the return of these laptops from the second and third respondents. There is no dispute that these computers are the property of the applicant. I further consider that the applicant is entitled to the relief contained in sub-paragraph 1.3. As for the question of costs, I see no reason why the applicant should not be entitled to its costs herein.

Order

[65] In the result I grant the following order:

1. The First and Third Respondents are interdicted from continuing with their employment with the Fourth Respondent for a period of 9 months, as calculated from 9 March 2019 in respect of the First Respondent and 9 February 2019 in respect of the Third Respondent, and an interdict restraining the Fourth Respondent from employing them for those respective periods;

2. The Second and Third Respondents are directed, within 24 hours of the granting of this Order, to deliver their laptop computers taken by them when they left the employ of the Applicant to the Applicant in order to permit an expert to analyse the hard drives of the respective laptops for confidential and proprietary information belonging to the Applicant;

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[30] JM Otto 'Bedinge en kontrakre ter beperking van die handelsvryheid. Drie Dekades sedert *Magna Alloys v Ellis* 1984 4 SA 874 (A)' (2016) 1 *TSAR* 133, the learned author herein in his concluding remarks, states as follows (translated) 'Unless the Constitutional Court makes a radical decision regarding the onus and current position of the law on restraints of trade and consensual contracts, not much will change'

3. The First, Second and Third Respondents are to deliver a list to the Applicant of all and any confidential information and/or proprietary information of the Applicant that they have disseminated and to whom it was disseminated;

4. The respondents are to pay the applicant's costs, such costs to include the costs of senior counsel.

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Seegobin J

APPEARANCES:

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