

IN THE LABOUR COURT OF SOUTH AFRICA  
(HELD AT JOHANNESBURG)

Case Number: J 2499 / 08

In the matter between:

**DAVID CROUCH MARKETING CC**

**Applicant**

and

**DU PLESSIS MARK**

**Respondent**

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**JUDGEMENT**

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**AC BASSON, J**

[1] On 28 November 2008 the Applicant in this matter obtained an interim order from this Court interdicting the Respondent from revealing or disclosing any of the Applicant's confidential information, technical know-how, systems, methods, processes,

client lists and marketing and/or financial information. The Respondent was also interdicted from competing with the business of the Applicant for a period of three years. The order further interdicted the Respondent from directly and indirectly alternatively from unlawfully competing with the Applicant in breach of the Respondent's restraint of trade covenant. The application was unopposed.

[2] This was the return date of the *rule nisi*. The Respondent has since filed an answering affidavit opposing the application and the Applicant a replying affidavit.

[3] The Applicant is described in its founding affidavit as a close corporation operating as a booking agent and event planning business for the purpose of providing artists and celebrities for appearances at corporate functions. It is further stated in the founding affidavit that the industry is very specialized and that it operates in a competitive market. The Respondent in his answering affidavit disputes the fact that the Applicant has some form of exclusivity with regard to artists (and other information) but conceded that the Applicant may well have built up relationships with some artists. The Respondent, however, disputes that this

precludes any other event planning or entertainment business from dealing with and building similar relationships with these artists.

[4] The Respondent had been employed in the Applicant's business as an artist booking agent since 2006. It is disputed on the papers whether or not the Respondent was also involved with event planning. I do not deem it necessary for purposes of this application to go into the finer details of this dispute of fact. Suffice to point out that I am on the papers persuaded that the Respondent only did bookings and not events planning. The document (an e-mail complaining about the manner in which the Respondent performed in respect of a function of a client) upon which the Applicant relies in an attempt to persuade this Court that the Respondent also did events planning, is not persuasive. No other proof of such activities was placed before this court. If the Respondent was involved in events planning, it does beg the question why the Applicant is only able to rely on one document which is a complaint from a client.

[5] In essence it was the Respondent's case that the Applicant's business is merely the provision of artists and celebrities for corporate events and functions. These artists include singers, musical bands, comedians, sportsmen and other celebrities. The Respondent denies that the Applicant has exclusive rights to these

individuals as most of these individuals are contracted and represented by their own agents and managers. In any event, so it was argued, even if the Applicant does have exclusivity to some artists, the contractual relationship between the Applicant and those artists regulating the alleged exclusivity would, in any event, prevent any other booking agent (including the Respondent) from approaching the artist. It was thus argued that there exists no need to rely on the restraint of trade agreement in order to protect that exclusive relationship (if it indeed exists).

- [6] It appears from the argument that what the Applicant principally wishes to protect is the relationship which it has build up with various artists (although, as already indicated, it conceded that it does not have an exclusive relationship with all of the artists it deals with). Moreover and in particular, it appears that the Applicant seeks to prevent the Respondent from building up future relationships with artists all of whom are well known to the public and thus in the public domain. In addition hereto, the Applicant also seeks to prevent the Applicant from using or disclosing certain confidential information, technical know - how, systems, methods, processes, client lists, and marketing and/or financial information. (I will return to these issues in more detail hereinbelow.)

[7] It must be pointed out that the Respondent (although expressly reiterating the fact that it does not concede the merits) formally tendered, that it will not approach any of the Applicant's existing clients. The Respondent explains in his answering affidavit that the tender was made purely so as to avoid having to formally enter into these proceedings. However, notwithstanding this tender, the Respondent still maintained that the Applicant has no propriety right in respect of the artists it contracts simply because these artists perform in the public domain and because their services are accessible to any third party who wishes to approach them. In essence it was the Respondent's argument that the Applicant's business/services amounts to nothing more than that of a middle-man in the artist booking process. The Respondent further submitted that the Applicant possesses no information about artists that is not easily attainable from the artist themselves or from their agents and/or managers.

***Brief background facts leading up to this urgent application***

[8] Approximately six months into his employment with the Applicant, the Respondent and the Applicant concluded a written employment agreement. The employment agreement contains two clauses relevant to this dispute: One is a very detailed restraint of trade covenant and the other is a confidentiality clause. These clauses,

*inter alia*, prohibit the Respondent from disclosing confidential information of the Applicant and from being directly or indirectly employed by a competitor of the Applicant.

[9] Central to this application is the enforceability of the restraint clause. I am in agreement with the Respondent that the confidentiality clause, although ancillary to the dispute raised in these proceedings, is not material in itself. On behalf of the Applicant it was submitted that the restraint of trade is enforceable. On behalf of the Respondent it was submitted that, if the restraint fails, then the confidentiality clause is not being breached in itself, and conversely if the restraint succeeds no reliance on the confidentiality clause is necessary.

[10] In November 2008 the Respondent tendered his resignation with effect from 31 December 2008 to take up employment with an events co-coordinating company – “Smilemakers”. The Applicant submitted that the Respondent’s resignation was unexpected especially in light of an e-mail that he had sent to the Applicant stating that the reason why he was leaving the Applicant was because he was relocating to Knysna for family reasons. This, the Applicant contended, shows that the Respondent intended to mislead the Applicant and that he had a clear intention to compete

with the Applicant. The Applicant also referred to other incidents which show, according to the Applicant, that the Respondent could not be trusted and that he had a clear intention of competing with the Applicant. The Court was, for example, referred to an incident when the Applicant discovered that the Respondent had sent an sms to one of its clients suggesting to the client that the client use one of the Respondent's friends. The client was specifically asked to keep this arrangement "mum". The Applicant also came into possession of e-mails that the Respondent had sent to himself and to which the Respondent had attached certain documents. These documents are, *inter alia*, a list of "impersonators" (artists), an invoice of SA tourism Ogilvy and the internal telephone list. A document stating the provisional fee charged in respect of the Frontline Drum Beat Concert and a "show equip event questionnaire" were also attached to one of these e-mails. The Applicant submitted that these documents show that the Respondent wished to use information belonging to the Applicant for his own personal use and in competition with the Applicant. It is important to point out that the Applicant has elected not to attach any of the actual documents that were e-mailed to the Respondent. The e-mails only confirm an e-mail was in fact sent to the Respondent and that certain documents were attached. It is therefore difficult, if not impossible, for this Court to make a finding

in respect of the documents that were e-mailed by the Respondent to himself, especially with regard to the question whether or not these documents contain information to which the Applicant has a proprietary right. I will return to this issue hereinbelow where the reasonableness of the restraint of trade clause is considered. The Respondent, on the other hand, deals in some detail with the content of each of these documents and sets out why some documents are not proprietary or confidential to the Applicant's business as alleged by the Applicant. In respect of the lists of impersonators, the Respondent explains that this list is not confidential simply because of the fact that the Respondent had obtained the list from a South African entertainment website. The internal telephone list cannot, according to the Respondent, be construed as being proprietary to the Applicant simply because it is possible to phone the switch board and request to be connected to any person working at the Applicant. Some of the other documents, according to the Respondent, do not even relate to the Applicant's business. I am, as far as these documents are concerned, not persuaded that the information that was e-mailed to the Respondent (by himself) is proprietary or confidential. As already pointed out, the Applicant has elected not to attach the actual documents sent to the Respondent to its papers thus making it impossible for this Court to determine, *inter alia*, the confidential



nature thereof (if any), and the possible or potential harm that the Applicant may suffer if this information falls in the hands of others or used by the Respondent. I am thus not persuaded on the papers that the information attached to these e-mails and which the Applicant alleges is proprietary constitutes a protectable interest as contemplated by the Courts in various cases (see the discussion hereinbelow).

[11] The Applicant also referred this Court to an e-mail which the Respondent sent to his mother in which he stated that he has sent a copy of his current contract to his future employer so that “*they can figure out a way around the very restrictive restraint of trade clause put in place by the clever Crouches*”. This, the Applicant argued, showed not only that the Respondent was aware of the restraint of trade clause, but that he had intended to breach it. Although I do take the Applicant’s point that the Respondent was not entirely honest in his dealings with the Applicant upon his resignation and the reasons for resigning, this in itself does not mean that the restraint of trade clause is enforceable. Whether or not the restraint of trade clause should stand, depends on other (legal) considerations (see paragraph [15] *et seq.*)

***Summary of the submissions***

[12] The Applicant submitted that the Respondent's employment with Smilemakers or with any third party whose business is the same or similar to that of the Applicant's, is and will be in breach of the restraint of trade clause. It was submitted that the Respondent will utilise the information which he has gained as a result of his employment with the Applicant, to solicit the artists utilised by the Applicant and/or solicit the business of the Applicant's existing and/or potential customers. The Respondent (during his employment) dealt with artists and customers of the Applicant and did certain of the work in booking artists for the Applicant's customers. It was further submitted by the Applicant that the Respondent will in future do the same work for Smilemakers and/or any other third-party events co-coordinating company. The Applicant further submitted that, in doing so, the Respondent will utilise the relationships it (the Applicant through the Respondent) has established with the artists as well as the Applicant's pricing and know-how which is confidential to the Applicant and which was gained and learnt during the Respondent's employment with the Applicant. The Applicant thus contended that it has a proprietary interest in such relationships, pricing and know-how and that it is therefore entitled to interdictory relief as set out in the Notice of Motion.

[13] In essence it was the Respondent's case that he has not solicited the business of the Applicant's customers and that, in any event, the Applicant does not have an interest worthy of protection. He further contended that the entertainment industry is the only industry in which he has skills and experience and in which he had been working for 15 years. Restraining him from working in the industry will therefore deprive him of his livelihood. Lastly it was argued that the enforcement of the restraint of trade clause is unreasonable and *contra bonos mores*.

***Jurisdiction of this Court***

[14] It is trite that this Court does have the jurisdiction to hear the present application. In terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997 the Labour Court has jurisdiction to determine any matter "*concerning a contract of employment*". In *Labournet Holdings (Pty) Ltd v McDermott & Another* (2003) 24 ILJ 185 (LC) the Court held as follows:

*"In my opinion, a restraint of trade clause, when it is seated in a contract of employment, is a matter concerning the contract of employment as envisaged by s 77 of the BCEA. Prima facie this Court has jurisdiction to grant the relief which LNH seeks."*

(See also *Sing v Adam* (2006) 27 ILJ 385 (LC).)

***Restraint of trade agreements: Brief overview of some applicable principles***

[15] Public policy dictates that agreements entered into voluntarily are binding and enforceable. Agreements in restraint of trade voluntarily entered into pursuant to one's right to freedom to contract, are thus valid and enforceable unless the party seeking to escape this agreement can show that the agreement is unreasonable and therefore contrary to public policy. (*Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at paragraph [10]; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) and *Hirt & Carter (Pty) Ltd v Mansfield & Another* 2008 (3) SA 512 (D)<sup>1</sup> at paragraph [39]). The Court in *Magna Alloys* (at page 892 E) confirmed that restraint of trade clauses are valid and enforceable to the extent that their

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<sup>1</sup> In *Hirt* the respondents had been employed by the applicant in the applicant's photographic department. The applicant alleged that on leaving its employ, the respondents were in breach of their restraint because they were competing with it (the applicant) in relation to: (a) performing photographic work in the advertising field; (b) soliciting business for photographic work from existing customers of the applicant; and (c) utilising information obtained whilst employed by the applicant, including the utilisation of technology, business contacts and knowledge of clients' requirements. The Court accepted that the party contesting the validity of the restraint bears the onus to prove that it is unreasonable. Reasonableness will be judged by public policy. The court emphasised that if the reasons for enforcing the restraint was to discourage or eliminate competition, the restraint would be unenforceable. The applicant failed to establish that there was anything secret or confidential about the information which existed in respect of its business where it involved photography. The applicant could not show that the technology or methodology used was something that was unique and peculiar to it and not in the public knowledge. The court concluded that the restraint was directed solely against competition and held it to be against public policy and unenforceable. The application was also accordingly dismissed with costs.

enforcement would not be contrary to public policy. A restraint of trade will therefore be unenforceable if it is unreasonable in that it unreasonably restricts an individual's freedom to work or to trade.

[16] Whether or not the agreement is unreasonable should be evaluated taking into account all the circumstances of the case including the relevant circumstances which exist at the time of the enforcement of the restraint of trade (see *Reddy (supra)* at paragraph [10] and *Hirt (supra)* at paragraph [39]). See also *Dickinson Holdings (Group) (Pty) Ltd & Others v Du Plessis & Another* 2008 (4) SA 214 (N) at paragraph [34]).

[17] The Constitution of the Republic of South Africa, 1996 forms the value system against which the tension between the ex-employer, who wishes to enforce the restraint of trade, and the employee, who wishes to escape the restrictive effect of the restraint of trade clause, must be resolved. Malan AJA in *Reddy (supra)* succinctly summarises this principle as follows:

*“[11] All agreements including agreements in restraint of trade are subject to constitutional rights obliging courts to consider fundamental constitutional values when applying and developing the law of contract in accordance with the*

*Constitution of the Republic of South Africa, 1996. Section 8 of the Constitution is imperative. The Bill of Rights applies to all law, also private law, and binds, inter alia, the Judiciary (s 8(1)). Its provisions bind natural and juristic persons if, and to the extent that, they are applicable, taking into account the nature of the right and the nature of any duty imposed by the right (s 8(2)). In their application to natural and juristic persons a court must apply or, if necessary, develop the common law to give effect to the right when legislation does not do so (s 8(3)(a)). A court may also develop the common law to limit the right in accordance with s 36 (s 8(3)(b)). Section 39(2) requires a court when interpreting and developing the common law to promote the spirit, purport and objects of the Bill of Rights.*

*[12] ..... The exercise of a right may be limited by the exercise of another person of his own fundamental right. To determine whether there has been an unconstitutional limitation of a right, the purpose of the limitation has to be considered in conjunction with all the other factors referred to in s 36(1). This situation may occur when the enforceability of agreements in restraint of trade and the balancing or reconciling of the concurring private and public interest are considered.” (Ad paragraph [11] and [12]).*

See also the decision in *Advtech Resourcing (Pty) Ltd t/a Communicative Personnel Group v Kuhn & Another* 2008 (2) SA 375 (C)<sup>2</sup> where the Court stated the following:

*“What public policy is and whether a term in a contract is contrary to public policy must now be determined by a reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is therefore unenforceable.”* (Ad paragraph [25].)

[18] The person seeking to escape the limitations of a restraint of trade bears the onus to show that it is unreasonable and thus against public policy (see *Reddy (supra)* at paragraph [10]). The

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<sup>2</sup> In *Advtech* a personnel recruitment agency specialising in placing individuals in the IT and engineering fields employed the Respondent. The Respondent subsequently left the Applicant's employment to become a consultant in the IT recruitment field. The Applicant claimed that because the Respondent was operating in the same industry, she was in breach of her restraint of trade agreement. The Court confirmed that a restraint of trade can only be enforced if it protects some proprietary interest and emphasized that a Court will not enforce agreements that are contrary to public policy. It held that part of the test for reasonableness of a restraint involved a proportionality enquiry. In that case, the Court found that the restraint was so wide that the agreement was rendered unenforceable. On the facts, the court concluded that there was insufficient evidence to justify any protectable proprietary interests that would trump the Respondent's right to continue to work in her chosen field. The application was accordingly dismissed with costs.

*assessment* of the reasonableness of the restraint is, however, a value judgment in which the incidence of onus does not play a role.

[19] In motion proceedings, such as in the present case where the Applicant seeks final relief, and to the extent there exist disputes of fact, those must be decided in favour of the Respondent taking into account the principles as set out in *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635B. If the facts disclose that the restraint is unreasonable, the Applicant must fail. As already pointed out, the Court has to exercise a value judgment against the framework of the Constitution and weigh up the competing values - the one being the requirement that contracting parties are bound by a restraint of trade agreement (*pacta servanda sunt*), and the other being the value which requires individuals to be able to participate freely in trade, or to work and earn a living (see, *inter alia*, *Sunshine Records (Pty) Ltd v Frohling & Others* 1990 (4) SA 782 (A) at 794C-E). In weighing up these competing values, the Court must consider the particular interests of the conflicting parties: The employer's interest in enforcing the restraint of trade is obvious and undoubtedly valid. The employer is seeking to prevent a former employee from working for a competitor or in a new employment environment in circumstances where the former employee may use or disclose confidential



information; business connections or trade secrets which, if used, may harm the business of the former employer. It is, however, not necessary for the employer to show *actual* harm, it may be sufficient if the former employer is able to show that the former employee may potentially exploit trade secrets or business connections in a new employment environment (see *Reddy* (supra)). As will be pointed out hereinbelow, not all information obtained by the employee during the course of his employment is secret or confidential and therefore a protectable interest of the former employer. The former employee's interest is equally valid. He or she wishes to freely engage in trade or work for a different employer or for his or her own business in order to earn a living. Very often the employee has been working in a specific employment environment for a long time and possesses skills confined to the very trade or employment environment the former employer wishes to limit the employee from working or trading in. A restraint of trade will be unenforceable if the former employer is unable to show that it has an interest that deserves protection after the termination of the employment relationship.<sup>3</sup> To assist the Court in weighing up these competing interests, the Court in *Basson v*

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<sup>3</sup> See also *Reddy* (supra) where the Court held as follows at paragraph [16]: “A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest.”

*Chilwan & Others* 1993 (3) SA 742 (A) lists four questions that must be considered by a Court:

*“(a) whether claiming party has a protectable interest; (b) whether such interest prejudiced by other party; (c) if so, whether such interest, weighed qualitatively and quantitatively against interest of other party, such that latter should not be economically inactive and unproductive; and (d) whether there is another facet of public policy having nothing to do with relationship between parties which requires restraint either to be enforced or to be voided.”*<sup>4</sup>

(See page 767G-I of the *Basson*- judgment. See also *Hirt (supra)* at paragraph [40]). For a detailed discussion of some of these principles see *Reddy (supra)* at paragraph [15] and [16]).

[20] It is clear from the case law that it will not be in the interest of public policy to enforce a restraint of trade if it aims to prevent one party from participating in the commercial world after termination of their contractual relationship in the absence of a protectable interest of the erstwhile employer (see *Basson (supra)*.) The respective party's view as to the reasonableness of the restraint is

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<sup>4</sup> English translation quoted from the headnote.

not decisive but merely a factor to be considered in deciding issue (see *Basson (supra)*). A restraint of trade agreement should therefore not be utilised merely to eliminate competition but only to protect a protectable interest. See *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007 (2) SA 271 (SCA):

*“An agreement in restraint of trade is enforceable unless it is unreasonable. It is generally accepted that a restraint will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some legally recognisable interest of the employer but merely seeks to exclude or eliminate competition”. (Ad paragraph [8])*

The Court referred with approval to the following extract from *Basson (supra)* where this principle was also emphasised as follows:

*‘Wat die partye self betref, is ‘n verbod onredelik as dit een party verhinder om hom, na beëindiging van hul kontraktuele verhouding, vryelik in die handels- en beroepswêreld te laat geld, sonder dat ‘n beskermingswaardige belang van die ander party na behore daardeur gedien word. So iets is op sigself strydig met die openbare beleid.’ (Ad 767E-F).*

[21] A former employer who wishes to rely on or enforce a restraint of trade agreement in order to protect secrets and confidential information must therefore show that the information, know-how technology or methods is unique and peculiar to its business and that such information is not public property or that it falls within the public's knowledge. In other words, the former employer must show that the interest that it has in the information it seeks to protect, is indeed worthy of protection. In this regard the Court in *Hira (supra)* pointed out that the information which the former employer wishes to protect "*must be objectively useful to a competitor in order to be confidential as between ex-employee and an ex-employer*" (ad paragraph [46]). Clearly, as already indicated, not all information obtained by the employee during the course of his employment will be secret or confidential (see also *Advtech (supra)* at paragraph [20]). The following passage referred to by the Court in *Hira (supra)* with approval from Colman *The law of Trade Secrets* (Sweet & Maxwell 1992 at page 60) explains the circumstances in which information may be considered to be confidential:

*"(The) latest attempt to draw the line between protectable and non-protectable information in English law is to be found in Faccenda Chicken v Fowler [1986] 1 All ER 617 (CA)*

*where it will be remembered that Neill J said that, in order to determine whether information could be classified as so confidential that an employee should not be allowed to use or disclose it after termination of contract of employment, it was necessary to consider all of the circumstances of the particular case, but the following were among those to which particular attention should be paid:*

- (1) The nature of the employment; employment in a capacity where confidential information is habitually handled may impose a higher obligation of confidentiality, because the employee could be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reached him only occasionally.*
- (2) The nature of the information itself; in order to be protected, the information must be of a highly confidential character - no other information could be protected even by a covenant in restraint of trade.*
- (3) Whether the employer impressed on the employee the confidentiality of the information.*
- (4) Whether the information can easily be isolated from other information which the employee is free to use or disclose.*

*The result of this is that if information is not categorised as confidential under Neill LJ's criteria, then it forms part of the employee's general knowledge and skill, which he is free to use for his own benefit or for the benefit of others after the termination of the contract of employment. . . . “*

[22] Customer goodwill and trade connections may likewise be regarded as a protectable interest in circumstances where the former employee has built up a relationship with a customer to the extent that the customer will easily be induced to forsake the business of the former employer and follow the employee to his/her new business or employment. If the authorities referred to by the Court in *Hira* (*supra* ad paragraph [37]) is perused, it appears that the employer will have to show that there is a strong attachment between the customer and the former employee to such an extent “*that when the employee quits and joins a rival he automatically carries the customer with him in his pocket*”.

[23] In argument in these proceedings, the Court was referred to various cases by both parties. More in particular, the Respondent urged this Court to take into account the decision of the Court in *Automotive Tooling Systems* (*supra*). In that case the Supreme

Court of Appeal confirmed<sup>5</sup> the principle that a restraint will be considered to be unreasonable and thus contrary to public policy and therefore unenforceable, if it does not protect some legally recognisable interest of the employer but merely seeks to exclude or eliminate competition. The Court further pointed out that the dividing line between the use by an employee of his own skill, knowledge and experience which he cannot be restrained from using, and the use of his employer's trade secrets or confidential information or other interest which he may not disclose if bound by a restraint, is often very difficult to define. What must be clear, according to the Court, is that the interest must be one that might properly be described as belonging to the employer rather than to the employee, and in that sense '*proprietary to the employer*'. In that particular case the business of the appellant was in a specialised technological field relating to the design, manufacture and/or customisation of special purpose machines and tooling. The respondents had been employed as skilled toolmakers. They concluded a restraint of trade and confidentiality clause with the appellant. The respondents resigned and took up employment with the third respondent. The respondents did the same work for the third respondent that they did for the appellant. The appellant claimed to have a proprietary interest in the know-how acquired by

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<sup>5</sup> See the headnote.

the respondents and sought to interdict them relying on the restraint of trade clause. The respondents denied the proprietary interest claimed and contended that the relevant know-how acquired by the first and second respondents was neither confidential nor specific to the appellant's business but was commonly available to artisans and technicians. As a result it was argued that the knowledge formed part of the first and second respondents' stock of general knowledge, skill and experience with which they were entitled to earn their living in any other business. The SCA pointed out that the mere fact that a former employee take up employment with a competitor does not in itself entitle the appellant (the former employer) to any relief if all they will be doing is to apply their skills and knowledge acquired whilst in the employ of the appellant. The Court dismissed the appeal on the basis that the appellant failed to establish a propriety interest that might legitimately be protected and concluded that the restraint was therefore inimical to public policy and therefore unenforceable.

[24] The Applicant in the present matter strongly relied on the case of *Reddy (supra)* where the SCA upheld the enforceability of the restraint of trade clause with reference to the particular facts in that matter. Reddy was employed by Siemens as a solutions integrator. As such he was trained in respect of Siemens products and



networks as well as in respect of the application of software used in the cellular telecommunications industry. When he resigned he took up employment with Ericsson (a competitor). Reddy had signed an agreement in terms of which he would not work for a competitor for a period of one year after termination of his employment. He also undertook not to disclose trade secrets and confidential information belonging to Siemens. The restraint was aimed at preventing a person (in this case Reddy) with knowledge of confidential technologies from utilising this information to the detriment of Siemens. The Court held that Reddy was in the possession of trade secrets and confidential knowledge. More in particular he had knowledge about the processes, methodologies and system architecture developed by Siemens. The Court found that the information that Reddy had, if disclosed, could be used to the disadvantage of Siemens. The risk of disclosure was considered by the Court to be sufficient. Reddy was accordingly held to his contractual undertakings.

[25] I am in agreement with the Respondent that the facts in *Reddy* are clearly distinguishable from those in the present matter. Apart from the fact that each case should be considered taking into account its own circumstances, it is clear from the *Reddy*- case that Reddy was an employee with highly specialised and specific knowledge

and know-how of the telecommunication environment. He received special training about systems and methodology particular to Siemens (his former employer). His situation can, by no stretch of imagination, be equated with the circumstances which prevailed in the present case where the information about potential customers / artists are in the public domain. I will also in the discussion hereinbelow show that the Applicant has failed to place such evidence before this Court to show that the information or business methods which the Applicant also seeks to protect are indeed protectable as contemplated by the Courts in the cases referred to hereinabove.

***Does the Applicant have a protectable interest/ interests?***

[26] I will now briefly, evaluate whether or not the restraint of trade agreement in the present matter is reasonable in light of the principles set out hereinabove.

[27] From the case law it is clear that in order to come to a conclusion, the questions posed by Nienaber JA must be investigated (see paragraph [18] *supra*). The first question is whether the one party has an interest that deserves protection after termination of the agreement? If answered in the negative it will dispose of this application. I will now proceed to briefly evaluate the interests which

the Applicant seeks to protect through the enforcement of the restraint of trade clause.

[28] The Applicant alleged that it has a protectable interest in respect of established contracts with artist as well as in respect of the relationships built up with artists. These artists are the so-called services providers in that the Applicant (as a booking agent) provides these artists to its customers. On behalf of the Respondent it was submitted that this relationship with the artists (the service providers) can in no manner constitute a protectable interest to the Applicant. I have already referred to the Respondents argument in this regard. To recap: It was submitted that the Applicant cannot have, and in fact does not have, an exclusive relationship with the artists in light of the fact that the services of the artists are easily accessible in the public domain especially via public media such as the internet. It was further submitted that, in any event, most artists are managed by their own personal agents or managers making them therefore accessible to the general public. It was thus submitted that the Applicant cannot claim to have a monopoly over or have the exclusive right to artists as artists are able to be approached and be booked directly by any entertainment organiser or event corporate client via the artist's personal agency or manager. The Applicant in fact concedes in the

replying affidavit that artists do have their own agents but contends that these agents are not always known to event companies and clients who wish to acquire the services of these artists. The Applicant does not, however, in the replying affidavit, reply to the Respondent's submission that the artists and/or their agents or managers are easily contactable via their websites or other internet domains.

[29] I am in agreement with the Respondent's submission that the information in respect of artists which the Applicant seeks to protect in the present application, falls within the public domain. As such these service providers (the artists) are readily accessible by any person who has access to the internet or the public media. I am further in agreement with the submission that it would be untenable for this Court to prevent the Respondent from approaching artists all of whom are in the public domain. I further find it difficult to accept that this Court will prevent an individual from establishing business contact with an artist in circumstances where any other individual is potentially able to do so. I must also point out that there is nothing on the papers to gainsay the submission on the papers that the information sought to be protected by the Applicant is not easily accessible by the public at large and for that matter by any other booking agent. The Applicant also does not provide this Court

with sufficient or specific details as to why the relationship, which it alleges it has with certain artists, should be protected. Apart from a general allegation that the Respondent has built up a special relationship with some artists and three references to specific artists who each states that the Applicant manage their bookings exclusively, no specific information or details are given as to why this relationship is worthy of protection. There is also no evidence before this court that any of the existing clients will follow the Respondent. In fact, the Respondent was even prepared, in order to settle this matter, to undertake not to approach any of the existing clients. Put differently, in the absence of specific allegations justifying protection by the restraint, this Court cannot come to the conclusion that the Applicant has a protectable interest in respect of either its existing clients or in respect of any other artist who may potentially become a client of the Respondent (or for that matter of the Applicant). I find the following passage from the decision in *Hirt (supra)* where the Court pointed out that the former employer must be reasonably specific as to why the information or secrets which it seeks to establish is worthy of protection, relevant in the present matter:

*“[56] I agree with Mr Kemp. In my view, the applicant has failed in its endeavours to establish that there was anything*

*secret or confidential about the information which existed in respect of its business where it involved photography. Its assertions regarding the existence of confidential information were vague in the extreme. The evidence presented by and on behalf of the respondents, however, points the other way.*

*[57] In my view, for an employer to succeed in establishing that trade secrets and confidential information are interests justifying protection by the restraint, it should demonstrate in reasonably clear terms that the information, know-how, technology or method, as the case may be, is something which is unique and peculiar to the employer and which is not public property or public knowledge, and is more than just trivial.*

*[58] In the light of the challenge to specify the precise nature and details of this confidential information and trade secrets relied upon by it, it was incumbent upon the applicant, in my view, to identify what the specific information was, the reason why it was regarded as confidential and a trade secret, how and when it was developed and who developed it and the period of its expected existence.”*

[30] The Applicant also contends that it has a unique pricing system which warrants protection. The difficulty that I have with this submission is the fact that the Respondent fails to disclose either in its founding affidavit or in its replying affidavit why this pricing system is so unique and worthy of protection. It was the Respondent's submission that the Applicant has no specialised pricing system and that the practice is generally a twenty-five percent mark-up on the artist's fee. In the replying affidavit the Applicant does nothing more than reiterate that its pricing system is unique and is based on "*negotiation*". The Applicant then states that it is unwilling to disclose the nature of its alleged unique pricing system in these proceedings. Why it is unwilling to disclose its alleged unique pricing system is difficult to understand. The onus is on the Applicant, seeking protection for an alleged unique pricing system which it (the Applicant) alleges is worthy of protection, to give sufficient details as to the precise characteristics of its pricing system which renders it unique and a proprietary interest worthy of the protection. The only conclusion that this Court can reach in light of the Applicant's failure to do so is that the Applicant has no unique or specialised pricing system. See in this regard In *Automotive Tooling Systems* (*supra* at paragraph [15]) where the SCA pointed out that the mere assertion by an applicant that the processes and methodologies in design is confidential does not

make it so. Sufficient evidence must be place before a Court to establish that the information is of interest justifying protection by the restraint.

[31] The Applicant in its founding affidavit also submits that its *modus operandae* and products as well as its services are indeed confidential and worthy of protection. The Applicant again does not elaborate or give any details as to why these products, *modus operandae* and services are worthy of protection. Why these aspects are so unique is not clear from the founding affidavit. I am again in agreement with the submission advanced on behalf of the Respondent that, without elaborating on the details of the Applicant's alleged unique *modus operandae*, products and services, it must be accepted that the Applicant has no unique *modus operandae*, products or services that are worthy of protection. The same criticism can also be leveled against the Applicant's allegation that its marketing strategies are confidential and worthy of protection. Again, why these aspects are worthy of protection is not clear and without sufficient particularity, this Court must accept that the Applicant has no unique marketing strategies which are worthy of protection.



[32] The Applicant alleges that the Respondent has been privy to all the strategies and processes utilised by the Applicant to procure new customers and services. It is further alleged that the Respondent will now seek to procure new customers, artists and celebrities for his own benefit and that the easiest place to procure such new customers or artists would obviously be from the Applicants existing data bases to which the Respondent had access. It was thus submitted by the Applicant that its artist base is confidential and thus a protectable interest. On behalf of the Respondent it was submitted on behalf of the Respondent that the Applicant's artist database can in no manner be described as confidential, particularly when judicial notice can be taken by this Court of the fact that the Applicant's entire artist database (which consists of virtually every single artist, celebrity or sporting personality in South Africa) is readily accessible to any person, by means of an alphabetical search facility, on the Applicant's website itself. I intend to decide this issue strictly within the confines of the papers. I debated this aspect at length with Applicant's counsel. I did not understand him to deny that the information about artists in South Africa to be generally in the public domain (it is in any event not clearly denied in the papers). He, however, persisted with his argument that the Respondent should be restrained from approaching these artists with the knowledge that he has obtained

through working for the Applicant. I am not persuaded that what the Applicant seeks to protect - which is principally the pool of artists who are in the public domain - constitutes a protectable interest nor am I persuaded (as already indicated) that the Respondent has a special relationship with certain existing clients of the Applicant. I am also not persuaded, especially in the absence of sufficient particulars that the Applicant has developed a business model which is unique and worthy of the protection which the Applicant now seeks to protect in these urgent proceedings. I am thus not persuaded that the Applicant has established a protectable interest in respect of this claim.

[33] I am, in light of the foregoing, in agreement with the Respondent that the first question established by Nienaber JA, namely whether or not the Applicant in fact has a protectable interest, is the only question which needs to be investigated in this matter. I have, for the reasons set out in the foregoing paragraphs come to the conclusion that the Applicant does not have a protectable interest as alleged. Accordingly the application should fail and the rule nisi discharged.

In the event the following order is made:

1. The Application is dismissed. The *rule nisi* issued on 28 November 2008 is accordingly discharged.
2. The Applicant is ordered to pay the costs.

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**AC BASSON, J**

**Date of judgment:** 17 June 2009

**Date of proceedings:** 21 May 2009

**For the Applicant**

Snyman Attorneys

**Attorneys for Respondent**

Mr. Macartney of Macartney Attorneys