IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)
"REPORTABLE"

CASE NO:249/2005

In the matter between:

AQUA D'OR MINERAL WATER (PTY) LTD.
T/a AQUA D'OR **Applicant**

And

ROBERTO CAMARA **1st Respondent**

CONSTANTIA DIEU DONNE INVESTMENTS'(PTY)
Ltd. t/a CONSTANTIA MINERAL WATER **2nd Respondent**

JUDGMENT DELIVERED ON 25 AUGUST 2005

DLODLO, J

INTRODUCTION

1) The Applicant in this matter conducts business as a manufacturer, wholesaler and distributor of non-alcoholic beverages, and in particular mineral water. The Applicant seeks to interdict the First Respondent from breaching the terms of Clause 30 of his contract of employment, which contains a so-called restraint of trade provision. For ease of reference, Clause 30 thereof is repeated, in full, below:

" 30 Restraint of Trade

30.1.1 In the event of you leaving the employ of the Company, for whatever reason, you agree, by

your signature to this letter, that you shall be restrained from working in, owning, or otherwise be involved in, whether directly or indirectly and whether jointly or solely, in any Company, Partnership, Close Corporation or Sole Trader engaged in the Beverage Industry or manufacturing for the Beverage Industry.

30.1.2 This restraint to be valid for a period of not less than two (2) years commencing from the date on which you leave the company and shall extend over an area with a radius of one hundred (100 km) kilometers of the premises of the Company in Cape Town, and stretches to the Helderberg area.

30.1.3 You further agree that the above restraint of trade contained in the above clauses to be valid and binding on you and that such restraint of trade is fair and reasonable in all respects.

30.1.4 In addition you acknowledge and agree that the business of the Company is such that the matters referred to in these clauses are legitimate interests which require protection."

2) The application is opposed by the First Respondent, and an entry of appearance to defend has been entered purportedly on behalf of the Second Respondent as well. The First Respondent was previously employed by the

Applicant as a sales representative. He left the employment of the Applicant on 28 December 2004.

3) The First Respondent is now employed by an entity known as Constantia Valley Dieu Donne Supreme Natural Spring Water (PTY) Ltd. ("Constantia Valley"). It is common cause that Constantia Valley markets and distributes mineral water. According to the First Respondent, it does so primarily in the so-called southern suburbs of Cape Town.

4) The Second Respondent in this matter is cited as "Constantia Dieu Donne Investments (Pty) Ltd. t/a Constantia Mineral Water." The Address at which it was attempted to serve the founding papers on the Second Respondent, namely 42 Nova Constantia Road, Constantia, Cape Town, is the same address as that of the Constantia Valley. In the result therefore the applicant has merely incorrectly cited the name of the Second Respondent, and upon the unopposed application at the hearing of this application, the Applicant was granted leave to amend the citation of the Second Respondent to that of Constantia Valley. Mr. Smalberger and Mr. Greig appeared for the Applicant and the First Respondent respectively.

BACKGROUND

5) The Applicant conducts business as a manufacturer, wholesaler and distributor of non-alcoholic beverages

and in particular mineral water. The Applicant commenced business in November 1997 and has since then developed a substantial client base and refined its pricing structures and business model. It seems common cause between the parties that the Applicant has become a successful and profitable company enjoying a monthly turnover of some R3.3 million.

6) The First Respondent commenced his formal employment with the Applicant on 1 October 2004 after he had served out a probation period of six (6) months prior to that date. In effect the First Respondent's involvement with the Applicant's business actually began in April 2004. On 6 October 2004 the First Respondent signed a contract of employment with the Applicant ("the contract of employment"). The contract of employment signed between the parties annexed to the founding papers as "DH1" contains the following terms which can be described as material:

   i) In terms of Clause 1 the date of employment is given as 1 October 2004.
   ii) In terms of Clause 2 the First Respondent's job title is recorded as "sales representative".
   iii) In terms of Clause 5 the First Respondent's basic salary is given as R5800.00 per month.
   iv) Clause 30 contains a restraint of Trade the terms of which have been set out fully supra.

7) The First Respondent subsequently resigned from the Applicant and took employment with the Second Respondent. This was viewed by the Applicant as a

direct breach of restrain of trade clause by the First Respondent hence this application. The application is resisted by the First Respondent on various grounds set out fully in the answering affidavit summarized *infra*.

THE FOUNDING AFIDAVIT

8) This was deposed to by one Mr. Dirk Martin Howsley, the director of the Applicant. He averred that he fully explained to the First Respondent that for a period of two (2) years after the termination of the contract of employment he would not be permitted to work for another entity engaged in the beverage industry or for any entity that was involved in manufacturing goods for the beverage industry in particular in competition with the Applicant. Mr. Howsley further stated that he, however, specifically advised the First Respondent that there would be nothing to prevent him from working for a non-competitive beverage entity. He made use of the South African Breweries and a wine farm as examples of non-competitive beverage entities.

9) According to Mr. Howsley it was never the intention of the Applicant to prevent the First Respondent from working in any part of the beverage industry. Mr. Howsley conceded that prior to commencing his employment with the Applicant, the First Respondent had no knowledge or experience of the mineral water industry. In Mr. Howsley's further averment during his employment with the Applicant, the First Respondent received general training and acquired specific training into the Applicant's business model. Furthermore

according to Mr. Howsley the First Respondent enjoyed unrestricted access to the Applicant's client base as well as to the Applicant's pricing structure. Mr. Howsley mentioned in conclusion on this aspect that such information is by its very nature confidential.

10) In Mr. Howsley's view the First Respondent would have been in almost daily contact with the Applicant's customers, and would have built up relationships with those customers. Similarly the First Respondent would have been exposed to all of the expertise which the Applicant has built up over the last seven (7) years which expertise has turned it into a successful business.

11) Following the First Respondent's resignation, it was ascertained that he intended taking up employment with the Second Respondent. Mr. Howsley averred that the Second Respondent is a direct competitor of the First Respondent in that it also sells non-alcoholic beverages, mineral water being its primary product. A letter copy of which is annexed as "DH3" was forwarded by the Applicant to the First Respondent. The content of the said letter advised the First Respondent that should he breach the terms of the restraint of trade as contained in Clause 30 of his contract of employment, the Applicant would take legal steps to interdict his conduct.

12) On January 2005 the Applicant's attorneys caused another letter (Annexure "DH4") to be delivered. This letter inter alia read as follows:

> "*We are furthermore instructed that you have informed our client that you intended taking up employment with one its competitors being Constantia Mineral Water.....*
>
> *We have furthermore been requested to demand that you notify my offices within 48 hours of receipt of this letter that you will abide by the provisions of the restraint of trade failing which our client will assume that you intend taking up your new employment and in which event our client will commence urgent legal proceedings against you.*"

(13) According to Mr. Howsley the First Respondent did not respond to these letters. Mr. Howsley averred that in his view the Applicant has a clear right to interdict the First Respondent. Strengthening this right is the fact that the First Respondent has not sought to deny the breach complained of when he had the opportunity to do so. Mr. Howsley averred further that the First Respondent will utilise the knowledge he has acquired during the time of his employment with the Applicant particularly the knowledge relating to the Applicant's customers, price structures and business methods to enable the Second Respondent to compete unfairly and unlawfully with the Applicant. He emphasised that the Second Respondent is a direct competitor of the Applicant and that their core business is in the exact same sector of the market. Accordingly the Applicant apprehends and this apprehension is a reasonable one, that the First Respondent will approach the Applicant's present customers to prevail upon them to terminate their business

relationships with the Applicant in favour of the Second Respondent. According to Mr. Howsley the First Respondent is well placed to do what the Applicant apprehends. He based this latter contention on the fact that the Applicant has become privy to the Applicant's confidential information and processes during the course of his employment and that the First Respondent is thus in a position to use that information to his benefit and to the detriment of the Applicant. In Mr. Howsley's view the Applicant does not have any meaningful alternative remedy against the First Respondent in that the latter has insufficient assets in his own name which would render an action for damages against him a meaningful one. Furthermore in terms of the advice given to the Applicant the damages the latter may suffer if the First Respondent should not be interdicted would be exceptionally difficult to calculate.

(14) In the view of Mr. Howsley Clause 30 of the contract of employment does not preclude the First Respondent from earning a living lawfully in that he is not precluded from working as a sales representative in some other industry. Furthermore in the views of Mr. Howsley the First Respondent's prospects are not seriously or unreasonably restricted by Clause 30 of the contract of employment. He is of the opinion that the geographical and time provisions of Clause 30 of the contract of employment are not so onerous that they are to be taken to be unreasonable. Mr. Howsley is further of the view that if the First Respondent joins the Second Respondent the former's customer base and confidential business information may well be

compromised. The First Respondent will be in a position to unfairly target the Applicant's customer base. Justifying the urgency of the matter Mr. Howsley stated that the First Respondent will be in a position to entice the customers away from the Applicant with potentially disastrous financial consequences for the latter. In his view a single meeting between the First Respondent in his new capacity as an employee of the Second Respondent and the Applicant's principal customers could have severe financial consequences for the Applicant.

ANSWERING AFFIDAVIT

(15) Mr. Roberto Camara, the First Respondent, deposed to this affidavit. He stated that he has very little knowledge of the extent of the "refinement" of the "pricing structures" and "business model" of the Applicant. According to Mr. Camara, he never was exposed to any written business model, business plan or other management or strategic documents of the Applicant. He averred further that he is unable to even say whether such documents and management material exist and cannot therefore comment on their refinement or sophistication. In his view his employment as a salesman did not naturally expose him to this type of information.

1) Mr. Camara mentioned that his experience of the business model of the Applicant comprised a very simple impression of the manner in which it does business, which in his view, appears to be unexceptional. Explaining further Mr. Camara further

averred that he cannot also say exactly how or where in the supply chain the Applicant's profits are made. This is because Mr. Camara only dealt with turnover figures or "Rand Values" for the area to which he was assigned namely, the Southern Suburbs of Cape Town. According to Mr. Camara the Applicant distributes to many retailers various soft drink like Snapple and Red Bull as well as its Aqua D'or mineral water. But, according to Mr. Camara, because of the junior sales position he held for a short time, he naturally was never privy to the relevant facts and figures. In his understanding though, the most important amongst these soft drinks the Applicant deals with in terms of profitability was the "Red Bull" energy drink. To Mr. Camara's best knowledge, profits attributable to the sale and distribution of Aqua D'or mineral water comprise a much smaller proportion of the Applicant's turnover than those attributable to the distribution of non-water products.

(17) In Mr. Camara's experience of the applicant's distribution of soft drinks products the distribution of Red Bull was far more important to the applicant than its mineral water. In his view Mr. Howsley's statement to the effect that the Applicant distributes "in particular: mineral water was disingenuous and was merely inserted with the object of the present application". As to the Applicant's "pricing structure" Mr. Camara states that the only document to which he was privy which conceivably merit that term was a list of the wholesale prices of the various soft drinks distributed by the

Applicant.

(18) He added that, however, this list was naturally available to any retailer, large or small, who wished to have it on their telefax machine. Mr. Camara stated that he personally no longer have a copy of such price list. The result is that he has no idea of the cost prices of the soft drinks, their mark-ups, their distribution costs, their respective contributions to profits, or any other information which may be said to comprise a "cost structure". Mr. Camara further averred that the only client base of which he was aware was a list of names and contact numbers provided to him at the advent of his employment in a manual flipcard file. According to him there were about two hundred (200) names in the flipcard file. They comprised small retailers, restaurants and the like in Cape Town's southern Suburbs. There was no "group business" in the file i.e. no large chain stores. In Mr. Camara's views the business of the Applicant differs markedly from that of the Second Respondent.

(19) Prior to the signature of the employment contract Mr. Camara alleged that he read through the document and had a number of queries which he wished to raise including but not limited to the restraint of trade contained in clause 30 of the agreement. His concern was that clause 30 was rather widely phrased and that it might prevent him from working in the very industry in which he had chosen to make a living. He had all these concerns discussed with Mr. Howsley but Mr. Chris Ryder

was not part of such discussion. In Mr. Camara's contention the contents of these discussions differ materially from the summary provided by Mr. Howsley in the founding affidavit. Mr. Camara denied that he was ever advised that there would "be nothing preventing him from working for a non - competitive beverage entity" or a "non-competitive alcoholic beverage company." According to Mr. Camaro the manner of the discussion developed along the lines that he tried to think of a number of examples and scenarios in an endeavour to ascertain what the likely purview of the clause might be and how it might affect his future. But Howsley's response on each occasion was that the restraint would not apply or would not be enforced. According to Mr. Camara when he continued to express some concern about the clause and its effect on more lucrative opportunities which could from time to time arise in his career, Mr. Howsley grew slightly impatient and uttered words "don't worry, we won't do that to you."

(20) In Mr. Camara's interpretation of the restraint of trade : *".....I assumed that the restraint would only be enforced if I left the Applicant and went to work for a direct competitor who distributed a similar range of beverages over a similar area, such as Amalgamated Beverage Industries, which, like the Applicant, distributes "Bon Aqua", a mineral water, but also distributes Coca Cola and related soft drinks. Other such companies include Bromor Foods and Big Bay Beverages".*

(21) Mr. Camara further averred that he relied on the assurances given by Mr. Howsley that the Applicant would not prevent him from taking up lucrative opportunities, and he thus signed the clause in order to move on to other issues. He further on stated that he received no additional remuneration or consideration from the Applicant in return for signing the restraint of trade. With regard to training Mr. Camara alleged that it comprised nothing more than being given a brochure containing the names of the various soft drink products in the Applicant's product line and the flipcard file to which he earlier on referred. He had to submit forms weekly indicating the retailers visited and the result of such visit. According to him the extent of the training was merely "here is your brochure, off you go." Mr. Camara expressed surprise at the Applicant's allegation of client base and pricing structure being "confidential information". In his view the pricing structure is eagerly and freely provided by the Applicant to any retailer who expresses an interest in the Applicant's products. Further in Mr. Camara's view the Applicant's "client base" is not one where important details of key decision makers in large chain stores have been identified.

(22) However, Mr. Camara conceded that he did develop relationships with some retailers whose details appear in the Applicant's flipcard file. But it was never because of these relationships that he was

approached by the Second Respondent. He was lured by the Second Respondent on a commission basis primarily to market Constantia Valley Mineral Water in Central Cape Town and the Northern Suburbs because those were areas in which the mineral water does not have extensive penetration.

(23) As far as the 100km radius is concerned, Mr. Camara averred that he is astounded that such a proscription is sought to be enforced against him because when he was employed by the Applicant, he was to market Cape Town's Southern Suburbs stretching from the Applicant's offices in Observatory to Simonstown. In his view the period is unreasonable in the circumstances of the whole matter. Further in Mr. Camara's views the Applicant is simply attempting to prevent him from earning a living and is preventing competition. Mr. Camara also disputed the urgency of the Applicant's application.

REPLYING AFFIDAVIT

(24) In reply Mr. Howsley extraneously denied that the core business of the Applicant is in fact the distribution and sale of "Red Bull" energy drink. He labelled these allegations as simply untrue. Mr. Howsley proceeded to set out the Applicant's turnover for the period 1 January 2004 to 31 December 2004 as amounting to some R20 862 299,78 and pointed out that sales of Aqua D'or mineral water, the Applicant's principal product, constituted some 67.77% whilst the "Red Bull" only contributed 12.62%. The figures

alluded to by Mr. Howsley were confirmed. In conclusion on this aspect Mr. Howsey contended that the core business of the Applicant is clearly mineral water.

(25) Mr. Howsley gave an example to show that the First Respondent was enticing the Applicant's customers. He pointed out that the First Respondent negotiated directly with the Regional Manager of the Picardi Rebel group, which is a chain of liquor outlets stocking non-alcoholic beverages. He alleged further that the First Respondent negotiated directly with persons at Primi Piatti, a chain of restaurants operating throughout the Peninsula, for the supply of products. According to Mr. Howsley both the Applicant and Constantia Valley (Second Respondent) trade predominantly in the on consumption category, a category the First Respondent was employed to work by the Applicant. This is the same category in which the First Respondent has now been employed by the Second Respondent.

(26) Mr. howsley then averred that there are, in his view, striking similarities between the Applicant's business and that of the Second Respondent's business in that:

"(i) both expressly indicate their involvement in the mineral water industry through their names;

ii) both are dependant on the sale of mineral water to ensure their ongoing financial survival;

iii) both own, market and distribute their own brand of mineral water;

iv) both are based in the Western Cape and the greater Cape Town area in their major source of turnover;

v) both are predominantly involved in the on consumption market;

vi) part of the value of both is determined by the value of their brand of mineral water."

(27) Disputing the assertion that the First Respondent has "very little knowledge" of the Applicant's business model and pricing structures, Mr. Howsley merely stated that an employer would not employ a person as sales representative without ensuring that such a person is fully equipped with knowledge of the business model and pricing structure of the employer's business. He contended that a sales representative who is not privy to that kind of information would not be able to perform his functions as such. According to Mr. Howsley the First Respondent was well aware of the fact that the Applicant would offer special deals and discounts to certain of its customers and he knew the identity of such customers. The First Respondent is further alleged to have been privy to information on each customer relating to the quantity of product sold to that client, and which products were purchased by that client. The First Respondent was also allegedly privy to individual customer's terms of payment as well as terms of discounts given to them.

(28) Mr. Howsley responding to the averment by the First Respondent that he was only aware of those clients in the list and had no contact with them, stated categorically that:

"....*the first Respondent dealt directly with approximately 240 clients in the Southern Suburbs of Cape Town. A*

further approximately 150 so-called house accounts were serviced by myself and the other members of the Applicant's senior management. However, the First Respondent was well aware of the identity of these clients, and indeed had access to them. Meetings were held almost daily with the various sales representatives, during which meetings all of the Applicant's customers were discussed."

All in all Mr. Howsley totally disputed all the assertions contained in the Answering Affidavit. He fully explained the ambit of clause 30 in the discussions he had with the First Respondent on the matter including but not limited to what the applicant actually intended in inserting the restraint of trade clause in the contract of employment.

THE ISSUES AND SUBMISSIONS

(29) Mr Greig referred to ***Magna Alloys & Research (SA) (Pty) Ltd. v Ellis*** 1984 (4) SA 874 and submitted that it is well established that in proceedings pertaining to a restraint of trade the Respondent bears the onus to show that a given restraint is unenforceable by virtue of it being contrary to public policy. In ascertaining the question of whether the restraint is contrary to public policy, the Respondent must show "that the restraint is not at the time reasonably necessary for the legitimate protection of the covenantee's protectable proprietary interests, being his goodwill in the form of trade connection, and his trade secrets."

(***Sibex Engineering Services (Pty) Ltd. v Van Wyk& Another*** 1991 (2) SA 482 (T) at 503 A;

Bridgestone Firestone Maxiprest Limited. v Taylor 2003 (1) All SA 299 (N) at 303 (A)

(30) I also have been referred to ***Basson v Chilwan & Others*** 1993 (3) SA 742 (A) at 767G where it was held that four (4) questions must first be answered in the determination of whether a given restraint is reasonable *inter partes* regard being had to the broader interests of the community. These questions are:

"*(a) Is daar 'n belang van die een party wat na afloop van die ooreenkoms beskerming verdien?*

b) Word so 'n belang deur die ander party in gedrang gebring?

c) Indien wel, weeg sodanige belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy ekonomies nie onaktief en onproduktief moet wees nie?

d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te make het nie, maar wat verg dat die beperking gehandhaaf moet word, al dan nie?"

(31) Before I fully deal with the reasonableness or unreasonableness of the restraint of trade in *casu*, I deem it apposite to set out an exposition regarding trade connections as it appears in ***Rawlins & Another v Caravantruck (Pty) Ltd.*** 1993 (1) SA 537 (A) at 541 G-H namely:

"The need of an employer to protect his trade

connections arises where the employee has access to customers and is in the 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. This depends on whether the employee, by contact 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. 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 customer; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of the 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 salesman the type of product being sold; and whether there is evidence that customers were lost after the employee left"

With regards to trade secrets and pricing structures, in order for the Applicant to demonstrate that its pricing structures constitute proprietary information, the Applicant must show the extent to which its pricing structures are important in the sense that they are confidential and would be valuable to a former employee (***Bridgestone Firestone Maxiprest***

Limited v Taylor 2003 (1) All SA 299 (N) at 303A).

(32) My concerns are however, that the restraint of trade as set out in the employment contract is rather widely worded and can easily be said to be wider than is reasonably necessary for the protection of the Applicant's trade connection and trade secrets (See ***Sibex Engineering Services (Pty) Ltd v Van Wyk and Another*** 1991 (2) SA 482 (T).

The Applicant, however, in the Founding Affidavit explained that he had conversations with the First Respondent with regard to the ambit of the restraint of trade. He contended that it was never intended to prevent the First Respondent from working in any part of the beverage industry. Importantly the following averment appears in the Replying Affidavit:

"*To avoid any confusion, I re-iterate that clause 30, as explained to the First Respondent and understood by the parties, is aimed at preventing the First Respondent from being involved, in the manner prescribed in clause 30, with a direct competitor of the Applicant."*

My understanding is that the Applicant is not intent on enforcing the whole of the restraint of trade in its favour. Mr. Smalberger has referred me to the Judgment of this Court, namely ***Nampesca (SA) Products (Pty) Ltd. v Zanderer and Others*** 1999 (1) SA 886 (C) where the Court referred to what it called "blue pencil"test. The Court reasoned as follows:

"A Court may exercise the unreasonable parts of a restraint only if it does not defeat the parties' intention or offend against the fundamental rule that a Court may not make a contract for the parties……..Our Courts are furthermore reluctant to cut down restraint clauses, unless it can be done by deleting the oppresive parts neatly and

conveniently.....Where only partial enforcement of a restraint is sought an applicant must lay a proper basis for the enforcement of a lesser restraint."

(33) Regard being had to the contents of the Founding Affidavit and the portion of the Replying Affidavit quoted in this paragraph, it cannot successfully be contended that the Applicant has not laid a proper basis for the enforcement of a lesser restraint in the instant matter. I agree therefore with the submission made by Mr. Smalberger that the "oppressive" parts of the restraint may even in this matter be omitted "neatly and conveniently" and that in that way an eminently workable and equitable restraint of trade would be created. This certainly does not conflict with what the parties intended. Nor does it amount to making a contract for the parties.

34) The ***Rawlins*** case *supra* certainly contains an authoritative statement of the legal principles to be applied in the instant case. Case law on restraint of trade shows that it is customary to distinguish broadly between customer connections and trade secrets as two (2) types of proprietary interests that are capable of protection by means of a restraint clause. The Respondent bears the onus of proving that no protectable customer connection existed. The customer connection is capable of being established with a limited customer base than it is with a customer base consisting of a large number of different entities. Indeed a series of bold denials by a Respondent are

hardly helpful.

35) I am mindful of the case known as ***Canon Kwa-Zulu Natal (Pty) Ltd. t/a Canon Office Automation v Booth and Another*** 2005(3) SA 205 NPD, to which Mr. Greig has also referred. In the above mentioned case his Lordship Mr. Justice Kondile dealing with restraint of trade held *inter alia* as follows: *"Prior to the Constitution becoming the supreme law in this country, the Magna Alloys decision above was binding on every south African court. However the duty of every South African Court now is to take into account the provisions of the constitution particularly the Bill of Rights. Section 39(2) of the Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every Court, tribunal or forum must promote the spirit, purport and objects of the Bill of rights. The restraint of trade clause in the contract constitutes a limitation on first respondent's fundamental right to freedom of trade, occupation and profession. It is inconsistent with the constitution to impose the onus to prove a constitutional protection on the first respondent. Accordingly applicant, which seeks to restrict first respondent's fundamental right, has the duty of establishing that first respondent has forfeited his right to constitutional protection."*

It is certainly correct to say ever since the Constitution became the supreme law in this country, it became necessary to interpret any legislation and develop common law such that the spirit, purport and object of the Constitution is borne in mind. It suffices to mention

that the above approach though constitutes a drastic change to the well established principle with regard to restraint of trade. This Division has not advocated for the change in the approach envisaged by the above cited case. I consider myself still bound by the Magna Alloys decision *supra*.

36) The First Respondent is alleged to have been subjected to training i.e general training, product specific training. According to the Applicant, First Respondent acquired the Applicant's specific method of conducting business as well as the Applicant's business model. The First Respondent is once more alleged to have enjoyed unrestricted access to the Applicant's client base as well as the Applicant's pricing structure. According to the Applicant such information is confidential in nature. I am mindful of the First Respondent's denial with regard to the training. It is inconceivable that the Applicant could have taken a chance and given the First Respondent such an important position without subjecting him to training. Commercial enterprises do not work that way. Moreover, the First Respondent was totally new in the business world at the time.

37) Turning to the reasonableness or otherwise of the restraint clause complained of in *casu*, I also need to have regard to the duration which the First Respondent was employed by the Applicant. The importance of the latter consideration lies in the fact that it indicates the extent to which the First Respondent would have had an opportunity to gain influence over any alleged

customer base. According to Mr. Greig in view of the fact that the First Respondent's period of employment was short, coupled with other considerations, the Court must find that the Applicant has not demonstrated that it has a proprietary interest in pricing structures and trade connections upon which it bases its application. I do not agree. In my view the approach which this submission proposes is rather simplistic. In ***Rawlins*** case *supra* the Court made the following finding at 543 AB of the report: *"Rawlins worked for the respondent for some 15 months. During this time he received training in the use and marketing of products sold by the respondent.*

He was obviously a successful businessman.

Taking account of the realities of commerce, it is a fair inference in these circumstances that it was Rawlins' employment with the respondent that gave him the opportunity to consolidate or even strengthen the prior rapport which he had with his customers. This in substance is what the Judge a quo, with justification, found."

(38) I am of the view that the period spent by the First Respondent in employment by the Applicant was reasonably long enough to have enabled the former to have had an opportunity to gain an influence over the latter's customer base. The restraint is valid for a period of not less than two (2) years calculated from the date on which the First Respondent left the Applicant's company. The restraint extends over an area with a radius of one hundred (100kms) kilometers calculated as from the

premises of the Applicant's company in Cape Town. The question for determination is whether or not this restraint can be described as reasonable with regard to the duration and the radius within which it is to be enforced? I hope to have this question answered as I travel along the route of determination in this Judgment.

(39) It is to be emphasised that a relationship between employee and customers would only justify protection by way of a covenant in restraint of trade if it is of such a nature that the employee could easily induce the customers to follow him to a new business. I have already alluded above to the fact that I hold the view that the Applicant's customer connections, trade secrets in the nature of pricing structure etc. are indeed sufficiently important to the Applicant such that these justify to be protected by way of a restraint clause. Before reaching a conclusion with regard to the validity and reasonableness or otherwise of the restraint of trade clause, it is prudent in my view to address the issues raised surrounding the interim or permanent interdict.

40) Mr. Greig attacks the manner in which this application was brought and contends that it was never urgent and should never have been brought on urgent basis. In his submission the Applicant made allegations such as those contained in paragraph 32.1 of the Founding Papers to the effect that the First Respondent would entice customers away with potentially disastrous financial consequences but omitted to proffer substantiation. I do not intend to devote much time on the aspect of urgency. The Applicant

apprehends harm to its business interest. It would be improper and unreasonable to expect that the Applicant should wait until its customers have been enticed before lodging this application. Our Courts have held that commercial interests have long been acknowledged as warranting the application of Rule 6 (12) (See ***Twentieth Century Fox Film Corporation & Another v Anthony Black Films (Pty) Ltd*** 1982(3) SA 582 (W) at 586 G; ***Bandle Investments (Pty) Ltd v Registrar of Deeds & Others*** 2001(2) SA 203 (SECLD at 213 E-F). I hold therefore that this application is by its very nature undoubtedly urgent.

41) The requirements for the granting of an interdict are well known and need not be set out in this judgment. It is trite law that a final interdict in application proceedings will be granted only if the facts as stated by the Respondent, together with the admitted facts in the Applicant's affidavits, justify such an order, subject to the proviso that disputes of fact on the papers must be genuine or bona fide dispute of fact. As set out in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 620 (A) bald denials of fact by the Respondent or those denials which are so far-fetched or clearly untenable that the Court would be justified to reject same, do not generate bona fide disputes of fact. I hold the view that there are no genuine disputes of fact in the instant matter. It remains common cause that the first Respondent concluded and is a signatory to the contract of employment and that such contract has clause 30 which forms part of it. The First Respondent is admittedly presently in the employment of

Constantia Valley in a capacity exactly similar to the one he held whilst in employment with the Applicant. It is my view that it is not subject to debate that the Applicant in *casu* indeed has definite and substantial commercial interest which justify the protection ordinarily afforded by the business tool known as the restraint of trade. The First Respondent himself admits that whilst working for the Applicant he developed relationships with some of the Applicant's customers. In any event if facts set out by the Respondent throws serious doubt on the Applicant's case, (which is not the position in *casu*) the latter cannot succeed in obtaining temporary relief, but if there is a mere contradiction or unconvincing explanation, the right should be protected (***Webster v Mitchell*** 1948 (1) SA 1186 (W) at 1189; ***Gool v Minister of Justice & Another*** 1955 (2) SA 682 at 688 E-F; ***L F Boschoff Investments (Pty) Ltd. v Cape Town Municipality*** 1969 (2) SA 256 © at 267 E-F).

42) Any person employed as a sales representative (the position held by the First Respondent) must necessarily have knowledge of the business model and pricing structure of his employer. He cannot in any event discharge his duties without such knowledge. He must ordinarily have been exposed to the business model of the Applicant. I hold that the First Respondent had the knowledge of the business model and the pricing structure of the Applicant. In my view the restraint of trade contained in clause 30 is reasonable both in regard to duration and the distance over which it stretches. Constantia Valley is clearly a competitor of the Applicant.

They are both conducting their commercial activities which are similar. They are both based in this Province and importantly in the greater Cape Town area. In my view the Applicant has made out a prima facie case for the relief sought against the first Respondent. There is indeed a proper case made out for the granting of relief pending an action to be instituted against the First Respondent. As far as costs are concerned, the general rule applies, namely that a successful party is entitled to its costs.

ORDER

43) In the circumstances I make the following order:

Pending the outcome of an action to be instituted by the applicant against the First Respondent for final relief, the First Respondent be and he is hereby interdicted and restrained, at any time prior to 28 December 2006:

(a) From working in, owning or otherwise being involved in, whether directly or indirectly, or whether jointly or solely the Second Respondent.

(b) From working in, owning, or otherwise being involved in, whether directly or indirectly, or whether jointly or solely, any company, partnership, close corporation or sole trader engaged in the mineral water industry, or engaged in manufacturing for the mineral water industry, operating within a radius of one hundred (100) kilometers from Unit 4, Observatory Park, Howe Street, Observatory, Western Cape.

(c) The costs of this application shall be borne by the First Respondent.

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DLODLO, J