



Republic of South Africa

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

CASE NO: A419 / 2008

In the matter between:

**RANDOM LOGIC (PTY) LTD
t/a NASHUA, CAPE TOWN**

Appellant

and

WESLEY DEMPSTER

Respondent

Counsel for the Appellant:

Adv. PJ Berthold

Instructing Attorneys:

McGregor Standford Kruger Inc
Ref. OH Kruger

Counsel for the Respondent:

Adv. BC Wharton

Instructing Attorneys:

Cohen Shevel & Fourie
Ref. TO Price

Dates of hearing:

21 January 2008

Date of judgement:

12 December 2008

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JUDGMENT : 12 DECEMBER 2008

BOZALEK, J:

[1] Appellant, a company carrying on business as a distributor of office automation and electronic equipment, brought an application against respondent, a former employee, seeking to enforce certain restraint of trade provisions in the employment agreement and to prevent him divulging its trade secrets and confidential information.

[2] The relief initially sought by appellant on an urgent basis in October 2006 was cast in extremely wide terms, namely, a *rule nisi* whereby respondent would be interdicted from using or disclosing appellants trade secrets and confidential information and from being employed by,

or having any interest in, any business competing with appellant. No geographical limitation to the restraint of trade relief was envisaged. A rule *nisi* granting appellant certain interim relief was made whereafter the matter came before Blignault J on the return day for the determination of final relief. He dismissed the application but granted appellant leave to appeal to this court.

FACTUAL BACKGROUND

- [3] Appellant is a Nashua franchisee for a defined area in and around Cape Town including the central city and the southern suburbs but excluding the northern suburbs. One of its directors, Greenwood, testified that he had acquired the franchise for an amount exceeding R25 million and that the franchisor spent millions of rands each year on the *Nashua* brand name. It was uncontested that appellant sells office or automation equipment to approximately 5 000 clients and its annual turn-over exceeds R150 million.
- [4] Respondent was employed by the appellant as a sales representative for three years until his resignation in August 2006. Upon leaving he advised appellant that he was going to work for a glass company but, within a matter of weeks, was working as a sales representative for *Gestetner*, a competitor of appellant's within its franchise area. However, by the time the matter was argued before Blignault J, respondent had left *Gestetner's* employ and was working as a sales representative for another business known as *Smart Copy*, also a

competitor of appellant in the office automation market in the larger Cape Town area.

[5] Respondent testified that when he took up his position with *Gestetner* it was on the basis that he would work in the northern suburbs of Cape Town which falls outside appellant's exclusive franchise area. Regarding appellant's trade secrets and confidential information, respondent disputed that the information which he had gained during his employment with appellant amounted to trade secrets or confidential information which enjoyed protection in law. He stated that in any event he had little, if any, opportunity to utilise such knowledge given that he was working outside appellant's exclusive franchise area. Respondent testified, furthermore, that when he took up his position with *Gestetner* he undertook contractually not to use any of the information he had access to whilst employed by appellant nor to divulge such information to *Gestetner*. Similarly, he was contractually bound by his new employer not to target any of appellant's existing client base.

[6] Both *Gestetner's* and *Smart Copy's* head office were located in central Cape Town. When respondent commenced employment with *Smart Copy* he concluded a employment agreement which, again, provided that he would work as a sales person in the northern suburbs of Cape Town until September 2008 (when his restraint with *Nashua* would expire) whereafter he could be deployed elsewhere. Although not

directly dealt with in the affidavits, it seems clear that the office automation business, at least in the greater Cape Town area, is very competitive. Furthermore, judging by the number of similar applications brought by appellant in the two years prior to the present application, the phenomenon of employees leaving to join competitors or set up their own businesses is quite common-place.

THE INTERIM RELIEF OBTAINED

[7] The terms of the *rule nisi* comprising the order made in December 2006 called upon respondent to show cause on the return day why he should not:

- “1.1 be interdicted and restrained from directly or indirectly utilizing, disclosing, divulging or making known the trade secrets and confidential information of the Applicant;
- 1.2 pending the advent of 4th August 2008 be interdicted and restrained from:
 - 1.2.1 approaching, advising or contacting in order to either directly or indirectly solicit the custom of any person or entity who was a customer with whom or to whom either on behalf of the Applicant negotiations, discussions or representations were entered into or made during the period of the Respondent’s employ with the Applicant;
 - 1.2.2. either directly or indirectly being employed by or having an interest in either as employee, principal, agent, worker director, shareholder, partner, consultant, financier or advisor in or in any other like capacity in any concern or entity which carries on the same business or a business similar to or alike the business of the Applicant within the exclusive area of the franchise of the Applicant.”

[8] The latter prayer largely follows the provisions of the key clauses of the restraint agreement. In terms of the same order it was stipulated that the provisions of paragraphs 1.1 and 1.2.1 would operate as an interim interdict. At the hearing of the matter on the return date the parties’ arguments focused, however, on the relief sought in paragraph 1.2.2 of the *rule nisi* i.e. the enforcement of the restraint of trade, with the result that, when he found against appellant in respect of such relief, Blignault

J dismissed the application with costs, thereby discharging the *rule nisi* in its entirety.

THE JUDGMENT OF THE COURT A QUO

[9] In dealing with the merits of the application, Blignault J saw the crux of appellant's case as being an attempt to protect confidential information in regard to its customer connections. As a result the critical question was whether it would be reasonable for appellant to enforce the restraint clause against respondent in circumstances where he was actually working, and intended to continue working until the restraint expired, as a sales representative in an area outside appellant's exclusive franchise area. The Court noted that, although it was not suggested that respondent himself would exploit these connections, appellant's case was that there was a danger that he might convey the confidential information in his possession about his former customer connections to fellow employees of his new employer who would then be in a position to exploit these connections within the exclusive franchise area of appellant to its detriment.

[10] The learned judge considered the two categories of interest which appellant was seeking to protect and found that, on the facts before him, respondent's mere knowledge of customer connections, in an area where he himself was not working as a sales representative, was insufficient to justify the enforcement of the restraint.

[11] With regard to appellant's reliance on the protection of its trade secrets, Blignault J then considered whether he was being required by appellant to protect the knowledge which respondent had acquired of appellant's customers during his employment. He found that although a customer list could, in appropriate circumstances, qualify as protectable confidential information, a distinction had to be drawn where such confidential information was used for the purposes of impersonal large scale marketing, as was the case in *Telefund Raisers CC v Isaacs and Others* 1998 (1) SA 521 (C), and the situation where the sales representative builds up personal connections with the customers. Presumably taking into account the fact that respondent would not be working in the appellant's exclusive franchise area, at least until his restraint expired, and his undertaking not to target the appellant's existing customers, Blignault J concluded that appellant had not established that it reasonably required to enforce the restraint clause against respondent in the area where he was working for the purposes of protecting its confidential information about customers.

GROUND OF APPEAL

[12] Appellant's main grounds of appeal were that the court *a quo* failed to have proper regard to the nature of competition within the office automation industry and the value to competitors of appellant's customers lists and information regarding contractual details and customer requirements contained therein. Appellant also contended that the court *a quo* erred in effectively requiring appellant,

notwithstanding that it had established both the restraint of trade provisions and the breach thereof by respondent, to police respondent's compliance with the provisions of the restraint of trade. Appellant also averred that the court had erred in failing to confirm the terms of the interim order. In argument it was contended, furthermore, that the court *a quo* had incorrectly approached the matter on the basis that appellant had to establish that enforcement of the restraint was reasonable.

- [13] In granting leave to appeal Blignault J explained that, despite wording which may have suggested otherwise, he had not approached the matter on the basis the appellant bore an onus to establish the reasonableness of the restraint. Recently, in *Reddy v Siemens Telecommunications (Pty) Ltd*¹ the Court considered a challenge, based on s 22 of the Constitution of the Republic of South Africa, 1996, to the rule established in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*² that the party seeking to avoid a restraint of trade bears the onus of showing that it is unreasonable. The Court held that it was not called upon to decide that issue since the question of where the *onus* lies in a particular case is a consequence of the substantive law on the issue. At the same time the Court pointed out that the incidence of the *onus* plays no role in the question of whether a restraint is reasonable or not on a set of given facts since answering that question calls for a value judgment. In the circumstances, I approach the question of the

¹ 2007 (2) SA 486 (SCA)

² 1984 (4) SA 874 (A)

reasonableness of the restraint on the basis that neither party bears any onus of proof in this regard.

THE EXISTING LAW AND THE IMPACT OF THE CONSTITUTION UPON RESTRAINT OF TRADE AGREEMENTS

[14] In *Magna Alloys* (supra), it was held, contrary to the position in English law, that agreements in restraint of trade are valid and enforceable unless they are unreasonable and thus contrary to public policy. A necessary consequence of that approach, it held, is that the party who challenges the enforceability of the agreement must bear the burden of proving that it is unreasonable. Whether the restraint is in fact unreasonable must be determined with reference to the circumstances of the case and with account being taken of the situation prevailing at the time that enforcement is sought.³

[15] In *Basson v Chilwan*⁴ Nienaber JA identified four questions which should be asked when considering the reasonableness of a restraint:

- (1) Is there an interest of the one party which is deserving of protection on the termination of the agreement;
- (2) Is such interest being prejudiced by the other party;
- (3) If so, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive;
- (4) Is there an aspect of public policy, having nothing to do with the relationship between the parties, which requires that the restraint be enforced or not?

In Reddy (supra) it was said that in determining the reasonableness of a restraint:

“A Court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion

³ *J Louw and Company (Pty) Ltd v Richter and Others* 1987 (2) SA 237 (N) at 243[B] – [C]

⁴ 1993 (3) SA 742 (A) at 767[G] – [H]

expressed by the maxim pacta servanda sunt. The second is that all persons should in the interest of society be productive and be permitted to engage in trade and commerce or the professions.”⁵

Malan AJA stated further as follows at 497[C]:

“In applying these two principal considerations, the particular interest must be examined. 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. Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest.”

The learned judge cited with approval the four questions identified in *Basson v Chilwan* (supra).

- [16] In *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel v Kuhn and Another*,⁶ Davis J considered the impact of the Constitution on the interpretation and enforcement of restraint agreements. He concluded that contractual terms are subject to constitutional rights and that the courts will invalidate and refuse to enforce agreements that are contrary to public policy. Inherent within the test established in *Basson v Chilwan* (supra) for determining the reasonableness of a restraint agreement, is the principle of proportionality, a part of constitutional jurisprudence, and which involves a careful weighing of the competing interests of the parties. In this balancing exercise, in Davis J’s view, the concept of the dignity of work, which encompasses the freedom to choose a vocation, one’s work being a part of one’s identity and “... constitutive of one’s dignity”, must be given due weight. Dealing with the desirability of the courts re-visiting the issue of restraints of trade

⁵ At 496 [D] – [E]

⁶ 2008 (2) SA 375 (C); [2007] (4) All SA 368

from a perspective which places less emphasis on the notion of contractual autonomy, Davis J stated as follows:

“However, even if I were to be permitted by precedent to move more definitely in this direction it is unnecessary in this dispute to go further than the position adopted in Reddy, supra. In my view that judgment, read together with the test articulated by Nienaber JA in Basson, supra, can be easily infused with the spirit and objectives of the Constitution...”⁷

[17] Key aspects of the judgment in *Advtech* were criticised in *Den Braven SA (Pty) Ltd v Pillay and Another*.⁸ Wallis AJ disagreed with the view that an applicant seeking to enforce the provisions of a restraint of trade agreement should not only have to prove the breach or threatened breach of that agreement but also show that the restraint was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁹ Wallis AJ also took issue with the approach of Davis J in refusing to grant relief for the breach of a restraint of trade agreement on the grounds that the agreement as a whole was unenforceably wide and the application of a severability clause would result in the court developing an entirely different contract for the parties.

[18] The court’s conclusions in *Den Braven* are preceded by a thorough analysis of the case law particularly as it bears upon the questions of where the onus of proof lies and the weight to be given to the two conflicting principles involved in the value judgment concerning the reasonableness of a restraint of trade.

⁷ At page 389[A] – [B]

⁸ 2008 (6) SA 229 (D & CLD)

⁹ At page 248 [D].

[19] Wallis AJ expresses the view that the right of every citizen to choose their trade, occupation or profession freely can have no direct application to restraint of trade agreements *inter alia* because such application would have the inevitable effect of nullifying all such agreements. That right, however, has indirect application through the vehicle of public policy which represents the legal convictions of the community, in turn expressed in the founding provisions of the Constitution, including the values of human dignity, equality and freedom. Wallis AJ cites the following extract from the majority judgment of Ngcobo J in *Barkhuizen v Napier*:¹⁰

“On the one hand public policy, asformed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy or the ability to regulate ones own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity.”

As Wallis AJ points out, it is where the enforcement of a contractual provision would be unreasonable and unfair in the light of the fundamental constitutional values of freedom and dignity that it will be contrary to public policy to enforce the contractual term in question.

WAS THE RESTRAINT *IN CASU* BREACHED AND WAS IT REASONABLE?

[20] It is against this background that Blignault J’s evaluation of the reasonableness of the restraint of trade to which the respondent was subject, must be considered. Appellant had no difficulty establishing

¹⁰ At page 250[E] – [G]

the provisions of the restraint of trade constraining the respondent. They largely followed the wording of the relief sought in paragraph 1.2.2 of the interim order and were applicable for a period of 24 months after termination of respondent's employment. The overall restraint was geographically restricted by clause 12.3 of the employment agreement which reads as follows:

"This restraint shall apply to the area of Nashua's franchise as same exists at date of termination of the employees employment, irrespective of the franchise area in existence upon the effective date hereof."

Likewise appellant had no difficulty in establishing that respondent was *prima facie* in breach of the terms of the restraint. Both *Gestetner* and *Smart Copy* not only had offices within appellant's exclusive franchise area, but competed with it in that area. Accordingly Blignault J appeared to approach the dispute regarding the enforceability of the restraint as one relating largely to the question of its reasonableness.

- [21] In considering whether to enforce the restraint, Blignault J analysed to what extent the employer's interest in its trade secrets and trade connections were reasonably capable of being protected by means of a restraint of trade. He commenced from the starting point that what appellant was seeking was to protect was confidential information in regard to its customer connections. Here the Court drew a distinction between mere information regarding an employer's customers on the one hand and protectable customer connections on the other, the latter having been described in an American case as depending on the notion that:

“The employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins the rival he automatically carries the customer with him in his pocket.”¹¹

Without explicitly finding that respondent had developed such strong customer connections, Blignault J found that his uncontested statement that he would not have significant personal conduct with his former customers whilst working outside the appellant’s exclusive franchise area, neutralised or removed any risk of prejudice to appellant in this respect. The learned judge appears thus to have answered the first and second questions posed in *Basson v Chilwan* in favour of appellant and respondent respectively, namely, that the employer had established an interest worthy of protection but that such interest was not being prejudiced by the former employee. Blignault J’s approach may thus have elided the second question posed in *Basson* with the issue of the overall reasonableness of the restraint. In passing, it should also be noted that respondent contended throughout that the appellant had failed to establish any interest worthy of protection. In the view I take of this matter, however, it is not necessary to re-examine the question of whether appellant did indeed prove such an interest.

[22] Appellant argues, however, that the respondent could easily, either consciously or inadvertently, convey confidential information about his former customer connections to fellow employees of his new employer who themselves would be able to exploit those connections. It was argued further on behalf of appellant that it did not have to prove that this would probably take place since it was not obliged to police the

¹¹ Quoted in *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541[C] – [I]

application of the restraint of trade agreement. Whilst both of these propositions may well be correct as far as they go, acceptance thereof does not obviate the need, in determining overall the reasonableness of the restraint, to weigh the harm to the employer if the risk should eventuate against the former employee's interest or right to be economically active.

[23] As I have stated, even assuming that the court *a quo* should have found, or should have stated more clearly, that the second question postulated in *Basson* (supra) had to be answered in favour of appellant, i.e. that its protectable interest was prejudiced by respondent's new employment, it is still necessary to weigh the respective merits of the covenantee's interests against the covenantor's interest not to be economically inactive and unproductive. Where the latter's interest weighs more heavily than the interest to be protected, the restraint is unreasonable and consequently unenforceable.

[24] The weighing exercise involves a balancing of two conflicting principles, the first expressed by the maxim *pacta servanda sunt* and the second being that all persons should be permitted to engage in trade and commerce or a profession. Not only does the exercise calls for a value judgment to be made, as was stated in Reddy (supra):

“(t)he enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.”¹²

¹² At 947 [F]

[25] Blignault J did not expressly list the factors which led him to the conclusion that the balance of reasonableness was tipped in favour of respondent save in one important respect, namely, that respondent would not be physically working within appellant's exclusive franchise area. Although this is a factor which must be given due weight it is by no means decisive in itself either way since, as was pointed out in *BHT Water Treatment (Pty) Ltd v Leslie and Another*¹³ and reinforced in *Reddy's* case, in an appropriate case it is sufficient if the covenantor has the confidential information in his/her possession and the opportunity to disclose or impart to his/her new employer.

[26] There are, however, additional factors, not mentioned specifically by the court *a quo*, which must be brought into the reckoning. In the first place it is relevant, in my view, that respondent was at all times in a comparatively junior position. It follows from this, notwithstanding that respondent entered into the employment agreement, which included the restraint of trade conditions, freely and voluntarily, that the respective bargaining positions of the parties at the commencement of the employment contract would have been quite substantially weighted towards appellant. At that stage respondent was a young man, apparently without any previous experience or expertise in the particular field. Nor was any case made out by appellant that respondent had, in the course of his three years' employment, acquired a particularly influential or key position in appellant's organisation.

¹³ 1993 (1) SA 47 (W)

[27] As far as the actual terms of the restraint provisions are concerned, on the face of it the geographical reach of the restraint is not particularly wide, limited as it is to that part of Cape Town comprising appellant's exclusive franchise area. However, it is significant that the general effect of the restraint was to extend it to the larger Cape Town area since it stipulates that respondent could not work or in any way be associated with any entity which competed with appellant in its exclusive franchise area. Since that latter area comprised a very substantial portion of Cape Town, including the commercial centre of the city and the southern suburbs, the effect thereof was to disqualify respondent from being employed by any firm which itself did not limit its business to a much smaller area in Cape Town.

[28] The period of the restraint, 24 months, is by no means insubstantial. Appellant sought to justify this period on the ground that it is not arbitrary but rather based upon the fact that as a rule service contracts for leased equipment with customers are concluded for 60 month periods. After 36 months the customer's requirements are reviewed and "invariably" their equipment is upgraded within the last 24 months of the contract term and a new contract is concluded with the customer. However, I fail to see how these factors in any way justify the restraint for a period as long 24 months unless all or the majority of contracts are concluded by appellant at the same time of the year, something that was not suggested and is highly unlikely. It seems safe to assume

that contracts are concluded by sales persons throughout the year, in which event the rationale relied on by appellant has no bearing whatsoever on the duration of the restraint or its reasonableness.

[29] A further factor deserving of consideration is that on appellant's own version, although it has sought to enforce restraints of trade against former employees over the past few years, it has by no means been consistent in this regard. Several instances are cited in the papers of employees who were in a similar or more influential position than respondent but against whom appellant took no action when they left its employ and begun working for a competitor or setting up their own business, and in so doing, breached the terms of their restraint of trade. Appellant ascribed this failure, somewhat unconvincingly in my view, to policy considerations relating to the expense involved in enforcing restraints of trade provisions against former employees.

[30] It was contended on behalf of appellant that trade secrets and confidential information of a similar nature have been held by this Court to be worthy of protection and, furthermore, that the self-same restraint has been upheld in similar circumstances. However, the judgments relied upon in this regard are, in my view, for the most part distinguishable, either on their facts or by virtue of the form of relief sought. The one exception appears to be that of *Random Logic (Pty) Ltd t/a Nashua Cape Town v Phillip Malherbe* in which judgment was delivered by Cleaver J on 19 November 2007. In that case the learned

judge, although making a final order enforcing the restraint agreement, ordered the applicant to pay the respondent's costs on the basis that the applicant should have accepted an undertaking by the respondent that he would not be employed as a salesman within applicant's exclusive franchise area. In making the costs order, Cleaver J expressly adopted the reasoning of Blignault J in the present matter to the effect that mere knowledge of customer connections in an area where respondent himself is not working as a salesman is not sufficient to justify a restraint of the present nature.

- [31] In my view it is inevitable that, as the values of dignity, equality and freedom which underlie our Constitution take root, greater weight will be given to the right of every citizen to choose their trade, occupation or profession freely and that the courts will look more critically at restraint of trade agreements where, for example, they were concluded between parties whose respective bargaining powers were substantially disparate, where the *quid pro quo* is either non-existent or no more than the opportunity of employment and, where the attempt to enforce the restraint owes more to an aversion to fair competition than the protection of any legitimate employer interest. I do not suggest by these remarks, however, that the restraint agreement at issue herein bears each of these characteristics. Whether the employee's s 22 right will play a more decisive role in the evaluation of the reasonableness of restraint of trade agreements through the direct route envisaged by

Davis J in *Advtech* or through the vehicle of public policy remains to be seen.

- [32] To sum up, respondent concluded the restraint agreement for no consideration as a junior employee. When he left some three years later to work in the same industry, but in a different area of Cape Town, he was still a relatively junior sales person. He undertook not to use his customer connections during the term of the restraint and there was no indication that he would do so. I have previously noted that the reach of the restraint was wide, particularly its duration of two years. As Wallis AJ pointed out in *Den Braven*, a two year term constitutes the upper-limit of such proscriptions. The geographical reach of the restraint, although apparently only limited to a portion of Cape Town is, in practice, extended by virtue of the fact that most major suppliers of office automation equipment will in all likelihood look to do business in central Cape Town and the southern suburbs having regard to the amount of economic activity carried on in those areas. A further important factor is appellant's acceptance that the limit of the risk which it faced should respondent remain unrestrained, was no more than that of his inadvertently, or at worst even deliberately, supplying information regarding his former customers to fellow employees of his new employer. Not only was no persuasive case made out that respondent had developed such close relations with his customer connections that he could "carry them away in his pocket", but whatever influence or entrée he had would be diluted by the fact that there would, at least

during the period of the restraint, be no direct contact between the respondent and his former customers. Lastly, regard must also be had to appellant's lack of consistency in previously enforcing similar restraints where, on the face of it, its commercial interests were more directly threatened.

[33] It bears noting that questions of the severability of the restraint do not arise in the present matter. It was never appellant's case that it would limit its relief to a lesser period of time than that stipulated in the restraint or to a smaller geographic area or in any other significant respect. Assuming, for the purposes of argument, that the court might have been amenable to reducing the scope and breach of the restraint agreement, I nevertheless consider that the party seeking to enforce the restraint is obliged, at least, should it see fit, to indicate those elements of the restraint where the court should wield the notional blue pen.

[34] Taking all these factors into account, I remain unpersuaded that the court *a quo* erred, on any of the grounds of appeal advanced, in holding that enforcement of the restraint in question would be unreasonable. In my view, in the circumstances of this case, the interests of respondent not to be economically inactive or unproductive outweighed the interests of appellant to restrain respondent from being employed in his new position.

COSTS

[35] On behalf of the appellant it was contended that Blignault J had erred in not making the terms of the interim interdict, set out in paras 1.1 and 1.2.1 of the rule *nisi*, final. However, as the learned judge pointed out in granting leave to appeal, the focus of argument on the return day was the final relief sought in relation to the restraint agreement, para 1.2.2 of the rule *nisi*. Respondent agreed to the terms of the interim interdict. This appears from the fact that the original order made on 5 December 2006, cast in the form of a rule *nisi*, was taken by agreement. All the indications are, furthermore, that this would have continued to be respondent's stance on the return day. This is also borne out by the case which respondent made out in response to the application, namely, that he would respect the terms of the employment agreement insofar as it related to the divulging of appellant's trade secrets and confidential information and would conduct no business within appellant's franchise area during the relevant period.

[36] By now, slightly more than two years have passed since respondent terminated his employment with appellant and no point would be served by seeking to remedy what might have been an understandable oversight on the part of the court *a quo* by resuscitating, *ex post facto*, the terms of the agreed interim interdict. Further, in my view, this subsidiary issue has no cost implications for the parties since the primary focus of the initial hearing, and in this appeal, was the relief relating to the restraint. It is doubtful whether, had it not been for the

restraint dispute, the matter would have gone forward to argument before Blignault J on 5 December 2006. The real dispute between the parties has at all times been the enforceability of the restraint of trade. In this respondent has been successful throughout and therefore I can see no good reason why the court *a quo*'s order dismissing the application with costs should be varied or why respondent should not be awarded costs in the appeal.

[37] In the result I would dismiss the appeal with costs.

LJ BOZALEK, J

DESAI J: I agree, and it is so ordered.

S DESAI, J

NC ERASMUS J: I agree.

NC ERASMUS, J