

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO. 2013/30964

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

DATE

SIGNATURE

In the matter between:

MICAH KITCHENS CC

Applicant

And

BRADBURY, ROY DAVID

Respondent

JUDGMENT

NOCHUMSOHN AJ

1. This is an application, originally brought as one of urgency, to enforce an agreement in restraint of trade.
2. In terms of the Notice of Motion, in addition to costs, the Applicant seeks the following relief :

“2. *That the Respondent be interdicted and restrained from either alone or jointly, directly or indirectly (including through any other entity in which he is directly or indirectly interested, engaged or concerned) for a period of 24 months from 5 August 2013 and within a radius of 100 kilometres from 6 Oscar Road, Boksburg:*

2.1 *soliciting work of whatever nature from, accepting work of whatever nature from, referring work or being interested or engaged in any capacity whatsoever in or in connection with any person (including natural and juristic persons) who is a client of the Applicant as at 5*

August 2013 or who was a client of the Applicant at any time within 2 years prior to 5 August 2013;

2.2 competing with the Applicant in the field of corporate work;

2.3 engaging or contacting any person who is employed by the Applicant as at 5 August 2013 with the intention to solicit or to encourage such person to terminate his employment with the Applicant;

2.4 Disclosing any of the Applicant's confidential information and/or trade secrets to anybody;

3. Alternatively, and in the event of it being found that the restraint is unenforceable that the Respondent be interdicted from:

3.1 soliciting work of whatever nature from, accepting work of whatever nature from, referring work or being interested or engaged in any capacity whatsoever in or in connection with any person (including

natural and juristic persons) who is a client of the Applicant as at 5 August 2013 or who was a client of the Applicant at any time within 2 years prior to 5 August 2013”.

3. Before dealing with the substance and merits of the matter, it is necessary to set out the procedural history of this matter in this court :

- 3.1. The application was originally enrolled for hearing on 3 September 2013, as an urgent application in terms of Rule 6(12);

- 3.2. On that day, by consent between the parties, Judge Kathree-Setiloane made the following order (**“the Interim Order”**):

- “1. *The application is postponed until the 1st day of October 2013.*

2. *The Respondent is to deliver his Answering Affidavit on or before 17th September 2013.*

3. *Pending the final determination of the application, the Respondent is interdicted from soliciting work of whatever nature and accepting work of whatever nature from any person (including natural and juristic person) who was a client of the Applicant on 5 August 2013 and whose identity and/or contact details became known to the Respondent through his involvement with the Applicant.*
4. *Costs are reserved."*

3.3. In compliance with paragraph 2 of the Interim Order, the Respondent duly delivered his Answering Affidavit on 17 September 2013.

3.4. The matter was then placed by the applicant's attorneys before Claassen J on 1 October 2013, without it having appeared upon the printed roll, but the Applicant had not delivered its Replying Affidavit by

that date. The matter was removed because the Registrar could not allocate the matter.

3.5. The Applicant filed its Replying Affidavit on 16 October 2013.

3.6. The matter then stagnated for almost a year. It was enrolled for hearing on 19 August 2014, when Judge Nicholls again removed the matter from the roll, with no order as to costs. Whilst the Court file contains no indication as to why the application was not proceeded with on 19 August 2014, counsel for applicant informed me that he had filed a Practice Note. Mr Bradbury was unrepresented and had not filed a Practice Note, and absent a Practice Note from the respondent, the matter was removed.

3.7. The application was again re-enrolled for hearing in the week commencing 27 October 2014. It was argued before me on 29 October 2014.

4. The history related above is apposite insofar as the application was eventually argued before me, 15 months after the last day of the Respondent's employment with the Applicant, being 30 July 2013¹. As at time of delivery of this judgment, more than half of the 24 month restraint period which the Applicant seeks to enforce, has already elapsed. The delay in the adjudication of the matter is attributable directly and solely to the tardiness of the Applicant, who, failed to properly enrol the matter for more than a year.
5. In all of this time, the Applicant has been enjoying the benefit of the Interim Order, which, pertinently, only interdicts the Respondent from soliciting work from persons who were clients of the Applicant. The Interim Order does not encapsulate an all embracing restraint interdicting the Respondent from competing with the Applicant, as sought in prayer 2.2 of the Notice of Motion.
6. One can only assume that the Applicant was content to allow the matter to lie dormant for this extended period of time, because it was happy with the

¹ FA p20

protection afforded to it by the Interim Order. The Applicant's counsel did not seriously challenge this notion when I interrogated this aspect during the course of argument.

7. This is relevant because just 6 days after the grant of the Interim Order, the Respondent's attorneys made a with prejudice offer to the Applicant, offering to dispose of the matter upon substantially the same terms and conditions as those provided for in paragraph 3 of the Interim Order. This was communicated to the Applicant's attorneys in terms of a letter from the Respondent's attorneys dated 9 September 2013, ² the salient provisions of which read as follows :

*"2. We confirm that we act on behalf of Mr. Roy David Bradbury
(our client) who has instructed us as follows :*

*2.1 our client is an un-rehabilitated insolvent who has no assets or
source of fixed monthly income (attached hereto is a copy of the*

² Annexure RD6 to AA, p140

Court Order confirming the final sequestration of our client and his wife);

2.2 our client would have been more than willing to settle the above matter in an amicable manner, should your client have approached him in an arranged manner, without having to resort to costly litigation;

2.3 our client is further willing to settle the above matter on the following terms, which offer of settlement is open for acceptance until close of business on Wednesday the 11th of September 2013:

2.3.1 Our client will not solicit or accept work of whatever nature from any person (including natural and/or juristic) who was a client of your client as at the 5th of August 2013 and whose identity and/or contact details became known to our client through his

employment with your client, which client's are listed in annexure "FA4" to your pending application; and

2.3.2 each party to pay its own costs.

- 3. Should your client however not be willing to accept our client's offer of settlement, and no response is received as aforesaid, we have been instructed to oppose the matter at hand, at which point in time this letter will be incorporated into our opposing papers, and a cost order requested against your client.*
- 4. We trust that the aforesaid will meet your client's approval and await your favourable response pertaining thereto."*

8. This with prejudice offer was rejected out of hand ³by the Applicant, through its attorney, Boela Van der Merwe, who addressed the Respondent's attorneys as follows on 13 September 2013 :

"We refer to your client's settlement proposals as contained in your letter dated the 9th of September 2013 and wish to advise that the settlement proposals are unacceptable to our client.

Your client is therefore required to deliver his Answering Affidavit not later than close of business on the 17th of September 2013."

9. The Applicant's rejection of the with prejudice settlement offer effectively forced the Respondent, a man of meagre means, to pursue his opposition of the application. The Applicant's attitude in refusing to accept terms which it subsequently was seemingly happy to live with for more than a year since

³ Annexure RD8 to AA p146

the date of the Interim Order, is suggestive of a *modus operandi* which is bullying and punitive, to no real end.

10. In this regard, this court also notes, with surprise and displeasure, that the Applicant did not see fit to express any form of demand of the Respondent that he comply with the restraint agreement before proceeding to launch a voluminous and extremely costly application. The Respondent's attorney makes the point ⁴ that had the Applicant made an approach to the Respondent before launching the application, that the Respondent would have been amenable to settling the matter. It is thus apparent that the Applicant, through its conduct, has deliberately scuppered two opportunities to avoid the cost, acrimony and prolixity of this application. I will revert to this aspect below.

11. I turn now to deal with the merits of the application. The Applicant is a close corporation, having its principal place of business at 6 Oscar Road, Boksburg.

⁴ Annexure RD6 to AA, p140

It is in the business of manufacturing, selling and installation of kitchens, built-in cupboards, bars and vanities, as well as plumbing and electrical work and tiling⁵.

12. The Applicant states that it has been in business for the past 25 years, and claims to be one of the market leaders in the Gauteng area. The Respondent denies this.
13. The Applicant states that it services the entire spectrum of customers, from the small individual who requires a residential kitchen or cupboard, to so-called large developers and contractors who require entire developments to be fitted with kitchens and cupboards. The Applicant seeks to categorise this latter part of its business as being “corporate work”.⁶
14. The Applicant alleges that it has spent large amounts over the years in advertising its business. The media in which the Applicant advertises are listed as being Homemakers Fair Magazine, The Homeowners Magazine, The 94.7

⁵ FA p8

⁶ AA p9

radio station, flyers and brochures, and on its website.⁷ This advertising is seemingly directed at the individual or residential market, and not the corporate market. (The relevance of this is that the Respondent is not in fact restrained by the agreement from competing in the residential market.)

15. The Applicant states that its business relationships with its customers and suppliers are frail and easily attacked, but the Respondent disputes this.
16. On 27 May 2013, the Respondent approached the Applicant and applied for a position of Sales Consultant. The deponent to the Founding Affidavit, Gary Adamson (“**Adamson**”) states that he interviewed the Respondent on the same day. He states⁸ that during the course of this interview, the Respondent informed him that he had been in the kitchen industry for many years, but that he had however lost his job and all his possessions. The Respondent begged him for the job. It is clear that the approach for employment by the Respondent came at a time when he was desperate.

⁷ Para 6 of FA at p9

⁸ Para 6.2 of FA p11

17. It is common cause that the Respondent is a “*man of straw*”. In point of fact, the Respondent’s estate was sequestered in September 2011.⁹
18. Adamson states that he offered the Respondent the job of Sales Consultant, subject to an oral agreement in terms of which the Respondent would commence his employment with immediate effect, but on a trial basis for a period of three months. This probationary period would terminate on 27 August 2013. Adamson states that it was a material term of this oral agreement that the Respondent would, when requested, sign the Applicant’s standard written contract of employment which embodies a restraint.
19. Although the Respondent commenced his employment immediately (on 27 May 2013), the written contract of employment was eventually signed by both parties only on 12 July 2013. There is a dispute of fact as between the Applicant and the Respondent in relation to the surrounding circumstances pertaining to this delay. It is however common cause that the written contract

⁹ See Court Order under case no. 45496/2011, p142

of employment was signed, and it is annexed to the Founding Affidavit as annexure “FA3” ¹⁰.

20. The Respondent states that he signed the contract of employment very reluctantly, and only because his livelihood was threatened. The Respondent makes much of the fact that he was coerced into signing the contract of employment. I do not accept this. It is clear that the Respondent was not subject to any unlawful form of duress, and that he signed the contract of employment of his own volition. The restraint is contained in clause 16¹¹ of the contract of employment, and it reads as follows :

“16. *RESTRAINT*

16.1 The employee acknowledges that:-

16.1.1 during the course of his/her employment with the Employer,

he/she will be introduced and exposed to the confidential

information and secrets of the Employer, being inter alia,

¹⁰ At p44

¹¹ At p53

introductions to suppliers, clients, corporate clients and corporate work, pricing (notably corporate clients), copyrights, brand names, business manufacturing and marketing techniques, financial information, which he/she acknowledges and recognizes as being information of a highly confidential and potentially damaging nature and which, if disseminated amount the Employer's competitors, will result in unfair competition; and

16.1.2 it is both necessary and reasonable that he/she undertakes a restraint on the terms and condition set out hereunder, which he/she acknowledges and accepts are reasonable and which are freely, voluntarily and by choice given by him/her

16.2 The Employee undertakes to the Employer that he/she will not, either alone or jointly, directly or indirectly (including through any other entity in which he/she is directly or indirectly interested, engaged or concerned), or in any other manner whatsoever, for the duration of the agreement (save insofar as the performance of this agreement is concerned) and for

a period of 24 (twenty-four) months from the termination of his/her employment with the Employer (“the restraint period”) and within a radius of 100 kilometres from the head office of the Employer (“the restraint territory”) for whatsoever reason :-

16.2.1 solicit work of whatever nature from, accept work of whatever nature from, refer work to or be interested or engaged in any capacity whatsoever in or for or in connection with, any person (person includes natural and juristic persons) who is a client of the employer at the termination of the Employee’s employment, or who such a client at any time within 2 (two) years prior to such termination, within the restraint territory; or

16.2.2 compete with the Employer in the field of corporate work within the restraint territory; or

16.2.3 engage or contract any person who was employed by or contracted to the Employer;

*16.2.4 at any time within 2 (two) years prior to the termination of the
Employee's*

*16.2.5 employment, or encourage or solicit such person's termination
of his/her employment or contract with the Employer, or in any
way be involved with the said persons termination of
employment or contract with the Employer and the taking up by
such person of employment or contractual relationship
elsewhere; or*

*16.3 During any part of the restraint period and thereafter, to the extent that
the same are protected by law, the Employee shall not disclose any
confidential information and are/or trade secrets of the Employer.*

16.4 the Employee acknowledges and agreed that:-

*16.4.1 the restraints imposed upon him/her in terms of the above
provisions, are reasonable as to subject matter, period and
territorial limitation and are no more that are reasonably and*

necessary required by the Employer to maintain its goodwill, business and legitimate business interests, more particularly having regard to the frequency of his/her contact with the Employer's customers and clients, the knowledge which he/she will gain for the customers/clients' requirements and business, the general nature of the relationship between him/her and the customers/clients, the competitiveness of rival businesses, the type of product manufactured, sold and installed and the possibility of the loss of customers and clientele if and when the Employee should leave the employ of the Employer.

16.4.2 the restraint as herein provided for is the only effective and reasonable manner in which the Employers proprietary rights to its confidential information can be protected;

16.4.3 each restraint imposed herein and each clause of the restraint is severable, the one from the other, and in the event of any clause herein being found to be defective or unenforceable for

any reason by the competent Court of Law, the remaining clauses shall be of full force and effect and continue to be of full force and effect.

16.5 Should a Court of Law find any clause of term of these restraint provisions to be unreasonable, the Court may vary such provisions to bring them within the bounds of reasonableness.”

21. The Respondent, as stated above, commenced his employment on 27 May 2013, and he left the Applicant on 30 July 2013. Although he formally resigned on 5 August 2013, he was effectively employed for only 9 weeks (formally 10 weeks), and did not even serve out his probationary period.

22. Nevertheless, the Applicant alleges that the Respondent, during this short period, was exposed to all facets of the Applicant's business, including its customer lists (both individual and corporate), pricing structures, supplier lists.¹²

¹² FA, p18

23. The Applicant also states that the Respondent attended regular sales meetings, interacted with the Applicant's Admin Manager and staff, and received customer leads. The Applicant states that these leads constituted a handwritten list, which is annexed to the Founding Affidavit as annexure "FA4"¹³ of some 34 names. Pertinently, these are all handwritten names of individuals. No reference to any companies are made. The names of the individuals and their area is listed, but the customer list does not ascribe a telephone number to any of these individuals. It is relevant that all of the names on Annexure "FA4" are those of individuals (as opposed to companies), because the blanket restraint does not seek to disentitle the Respondent from competing in the residential market. Yet, the Applicant places much reliance on this list as being evidence of the "*customer connections*" to which the Applicant exposed the Respondent.

24. The Applicant also states ¹⁴ as follows :

¹³ At p60

¹⁴ At para 8.6 of FA, p19

“8.6 The Respondent through his employment with the Applicant, was introduced and exposed to the Applicant’s confidential information, such as the Applicant’s know-how, formula processes, systems, business methods, marketing methods, financial methods, pricing structures, financial arrangements with corporate clients and operating results.”

25. I find these allegations as being vague, embarrassing and meaningless. They appear to be a cut and paste from similar applications of this nature. Not only do they lack detail, but given the extremely short and unsuccessful duration of the Respondent’s employment with the Applicant, I find these allegations to be highly improbable. (They are denied by the Respondent). Be that as it may, the Applicant asserts that it has a proprietary interest which is in need of protection.

26. In deciding whether or not the Applicant has established a *prima facie* case, the enforceability of the contractual stipulation in clause 16 of the contract of employment, depends upon whether the Applicant has established a proprietary interest of a kind that our law recognises as susceptible to

protection by way of a restraint of trade. The proprietary interests which the Applicant seeks to invoke are the so-called customer connections, most notably those as listed in Annexure “FA4”. Trade connections have been held to be recognised interests, which are protectable proprietary interests.

See **Basson v Chilwan and Others 1992 (3) SA 742 (AD), Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482.**

27. In the **Sibex Engineering** case at 502 **et seq** the court defined the two kind of interests that could be protected:

“The first kind consisted of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the “trade connection” of the business being an important aspect of its incorporeal property known as goodwill. The second kind consisted of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor if disclosed to him to gain a relative competitive advantage” (at 502D-E).

28. In **Humphrys v Laser Transport Holdings Limited and Another 1994 (4) SA 338 CPD**, the court stated as follows (at 400G), in regard to the enforceability of a restraint:

"The enforceability of the restraint

*It is now established South African law that agreements in restraint of trade are prima facie enforceable and that the onus is on the person seeking to avoid the restraint agreement to prove that its enforcement would be contrary to the public interest (see **Magnus Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at 897F-898D; Basson v Chilwan and Others 1993 (3) SA 742 (A) at 762 (D)**). in the **Basson** case supra, Eksteen JA stated the legal position thus (his references are to the **Magna Alloy** case at 762 C - F:*

'the public interest must be the touchstone for deciding whether the Courts will enforce the restraint clause or not. The party seeking to avoid the contractual obligation to which he had solemnly agreed should therefore be required to prove that the public interest would be detrimentally affected by

the enforcement of the clause (at 892I-893D). The mere fact that the clause may be unreasonable inter partes is not normally a ground for attacking its validity, since the public interest demands that parties to a contract be held to the terms of their agreement (at 893H-I). A second consideration however is this: that it is also generally accepted that a person should be free to engage in useful economic activity and to contribute to the welfare of society by the exercise of the skills to which he has been trained. Any unreasonable restrictions on such freedom would generally be regarded as contrary to public policy. In deciding on the enforceability of a restraint clause the Court would be required to consider both these aspects in the light of the circumstances of each particular case (at 894B-E)."

29. The Applicant alleges that the Respondent has breached the restraint by virtue of the fact that he is a member of Glorious Kitchens CC, whom the Applicant alleges are direct competitors of the Applicant. The Applicant also states that the Respondent has made contact with certain of the customers listed in Annexure "FA4". There are a multiplicity of factual disputes surrounding the

alleged breaches, but I do not propose to burden this judgment with an analysis thereof, as I consider them to be largely superfluous to this application, which hinges upon the reasonableness and enforceability or otherwise of the restraint.

30. In **Reddy v Siemens Telecommunications (Pty) Ltd**¹⁵ the court held that in deciding whether or not to enforce a restraint of trade, the following must be considered :

“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 expressed by the maxim pacta servanda sunt. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. A Contractual autonomy is part of freedom informing the constitutional value of

¹⁵ (2007) 28 ILJ 317 (SCA)

dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense freedom to contract is an integral part of the fundamental right referred to in s22.

In applying these two principal considerations, the particular interests 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.

31. The Respondent hotly disputes that he is apprised of highly confidential information which is the property of the Applicant. He states that he has been involved in the building / kitchen industry for approximately 20 years, and although he concedes that during the first two weeks of his employment he was office based and did undergo in-house training, he asserts that none of this

training “better equipped” him for the position ¹⁶. The Respondent alleges that he had the necessary know-how prior to commencing employment with the Applicant, and repeatedly states that he learned nothing new in the 10 weeks in which he was employed at the Applicant.

32. The Respondent states that he was asked to “shadow” a fellow sales consultant in the third week of his employment, but again he denies that he learned anything pertaining to the industry which was not previously known to him.

33. The Respondent concedes ¹⁷ that he was privy to approximately 34 leads, and that he managed to secure 5 sales for the Applicant.

34. He disputes however that the Applicant has a protectable interest in the restraint, and disputes that he constitutes any threat to the proprietary interests of the Applicant.

¹⁶ AA p98

¹⁷ At para 20 of AA, p99

35. The Respondent denied that he bears any knowledge of the so-called corporate work or corporate clients of the Applicant, or that the Applicant's relationship with its customers and suppliers is frail and easily attacked ¹⁸.
36. Although the Respondent does admit to being a member of Glorious Kitchens CC, he demonstrates that this entity is hardly a viable or a going concern. He does so by annexing a bundle of bank statements in relation to Glorious Kitchens' Nedbank account for the period March 2013 to June 2013 ¹⁹. Not only do these bank statements demonstrate a total lack of trade, but they are indicative of an entity in financial distress. The bank balances maintained throughout the period of the bank statements annexed are paltry, and shortly before the closure of the account, there are in fact various returned debit order items.
37. I therefore cannot take seriously the Applicant's suggestion to the effect that the Respondent's involvement in Glorious Kitchens CC justifies the imposition of a

¹⁸ Para 27.3 and 27.4 of AA at p101

¹⁹ Annexure "RD11" to AA, pp149-163

2 year (or indeed any) restraint period in the so-called corporate market. I cannot see how Glorious Kitchens CC poses any threat to the commercial interests of the Applicant.

38. In deciding whether a restraint of trade agreement is enforceable, the court is required to examine the circumstances which prevail as at the time of enforcement thereof ²⁰. *In casu*, the employment relationship lasted a mere 10 weeks. It ended some 15 months ago. The Respondent disputes that he gained any technical or confidential information from the Applicant, or that his brief association with the Applicant gave him any sort of springboard to compete. Nevertheless, the Applicant still belatedly seeks to enforce the balance of the two year restraint period.

39. The Respondent suggests that his employment with the Applicant was not only very short-lived, but also a spectacular disaster. He advances the following as

²⁰ Magna Alloys *supra*

reasons for his decisions to leave the Applicant in his resignation letter ²¹ of 5 August 2013 :

“My next ambition was to join a stable company like Micah Kitchens to share my expertise and make a better future for me and my family but sadly I am in a worse position now than what I ever was. Since joining Micah Kitchens I have lost my medical aid, life insurances and all policies due to the fact that I could not make ends meet. I was now given two weeks’ notice to vacate the premises I am renting also due to the fact that I was behind on mortgage payments and could not bring the payments up to date this month. The money that I am currently earning at Micah Kitchens is far below my bread line of income that I need per month even with sales going up we only get paid 10% on carcasses commission which 5% we add on automatically.”

40. There is an irrelevant factual dispute as to how much the Respondent actually earned in June and July 2013, but on the Applicant's own version, he earned a net salary of R9 835.02 in June 2013, and was paid a net amount of R14

²¹ Annexure “FA5” to AA, p62

796.74 in July 2013. The Applicant submits ²² that “*the only reasonable inference is that*” the Respondent was never really interested in taking up permanent employment with the Applicant, and that he just used the latter to gain knowledge of its business and leads. I find no justification in this suggestion.

41. Having regard to the brevity of the employment relationship, and the fact that the contract of employment was only signed four weeks prior to the termination thereof, this court is of the view that it is decidedly unreasonable, and indeed contrary to public policy, to prevent the Respondent from earning a living for 2 years in his chosen field of endeavour. The Respondent has worked in the kitchen building industry for some 20 years, and his experience and expertise in that field are what equip him to remain economically active. He is financially distressed as it – the imposition of a 2 year restraint would obviously break him. A brief 10 week stint with the Applicant surely cannot serve as being justification for the imposition of a two year restraint. To grant this relief against

²² Para 52 of RA, p183

the Respondent, would, to my mind, be extraordinarily harsh, and unnecessary.

I do not accept that the interdict sought by the Applicant is reasonably necessary to protect its proprietary interests.

42. Even if I was predisposed to exercising my discretion (as this court is entitled to do) to enforce a reduced period, the fact is that 15 months of the restraint period have already expired as at the time that I deliver this judgment. The reasons for this are enumerated in paragraph **3** above. The Applicant rushed to court with an urgent application, and then allowed the litigation to stagnate. In the result, the effluxion of all this time has effectively rendered the restraint period as being superfluous.

43. Accordingly, this court declines to grant the relief as sought in prayer 2.2 of the Notice of Motion.

44. Prayer 2.1 of the Notice of Motion seeks to restrain the Respondent from soliciting work with any person who was a client of the Applicant as at 5 August 2013 (or who was a client within a 2 year timeframe prior thereto). As I have

noted in paragraph **3.2** above, the Interim Order has given the Applicant the benefit of this relief since it was handed down on 3 September 2013, some 13 months ago. I believe this 13 month period to be more than adequate to protect any protectable proprietary interest to the customer connections to which the Respondent may have been exposed during his short term of employment with the Applicant. Surely, by now, any leads which the Respondent may have become exposed to have become sterilised by the effluxion of time. Typically, all of the leads arise from individuals in the residential market, who have responded to advertising, and in the nature of things, these people have either already bought kitchens, or they are no longer in the market.

45. I accordingly do not believe that the Applicant is in genuine need of the relief sought in terms of prayer 2.1, and I see no reason to extend the Interim Order (which was made pending the outcome of this application) any further.
46. Insofar as prayers 2.3 and 2.4 of the Notice of Motion are concerned, there is no suggestion in the Applicant's papers that the Respondent has at any time

sought to solicit the Applicant's staff. The Founding Affidavit also makes no allegations to the effect that the Respondent has disseminated any of the Applicant's confidential information. The Respondent denies being in possession of any such confidential information. In any event, any confidential information of which the Respondent may have been apprised during his 10 weeks of employment is, to my mind, of little benefit to a competitor, and I do not believe that the Applicant is in need of or is entitled to the relief sought in either of prayers 2.3 or 2.4.

47. In the circumstances, the application must fail. Having regard to the conduct of the Applicant, as enumerated in paragraphs **3** and **4** above, and more specifically the Applicant's :

47.1. failure to engage with the Respondent or to issue any form of demand prior to instituting these proceedings; and

47.2. rejection of an offer immediately succeeding the grant of the Interim Order, in circumstances where the Applicant's own conduct

demonstrates that the relief offered in terms thereof satisfied the Applicant to the extent that it dragged its feet for more than a year in enrolling this application.

48. The Applicant's conduct is laced with malice and vexatiousness in the way that it treated the Respondent in regard to these proceedings. I am also mindful of the fact that the Respondent is a man of meagre financial means, and have little doubt that the costs of this application constitute an immense financial burden on the Respondent. Indeed, I feel certain that this was the primary motivation in launching and pursuing this application (even after the restraint period became sterile), rather than a genuine endeavour to protect a proprietary interest. Accordingly, this court considers punitive costs against the Applicant to be appropriate.

In the circumstances, I make the following order :

1. The application is dismissed.
2. The Interim Order dated 3 September 2013 is discharged.

3. The Applicant is ordered to pay the Respondent's costs of the application, including the reserved costs of 3 September 2013 and 1 October 2013, on the scale as between attorney and client.

NOCHUMSOHN, G
ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant:	Advocate HD Baer
Instructed by:	Boela van der Merwe
On behalf of the Respondent:	In person
Date of Hearing:	29 October 2014
Date of Judgment:	31 October 2014