

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 15484/2010

DATE: 07/12/2010

In the matter between:

THE KELLY GROUP LIMITED

Applicant

and

CAPAZORIO, DIANE

First Respondent

ADCORP HOLDINGS LIMITED

Second Respondent

ADCORP TECHNOLOGY SOLUTIONS (PTY) LTD

Third Respondent

JUDGMENT

KATHREE-SETILOANE AJ:

Facts giving rise to this application

[1] This is an application in which Kelly Group Limited (“the applicant”) seeks an interdict to enforce the terms of a confidentiality and restraint of trade agreement (“the restraint agreement”), concluded between the applicant and the first respondent, Ms Capazorio, which it claims she has breached by taking up employment with the third respondent, Adcorp Technology Solutions (Pty) Ltd, a wholly owned subsidiary of the second respondent, Adcorp Holdings Limited.

[2] As appears from the papers filed of record, the first respondent was employed by the applicant since 1992. Over the course of 18 years, she was promoted to branch manager of the Park Town branch, Regional Client Services Manager, and then Regional Director. At the time of her resignation on 1 March 2010, she was employed by the Kelly division (“Kelly”) of the applicant as its Director: Strategic Business Solutions within its Corporate Accounts Department. She was responsible for the applicant’s Corporate Accounts Department Offices in Sandown, Cape Town and KwaZulu Natal. She was responsible for marketing staffing solutions to client companies with large volume staffing requirements, particularly call centres. The Kelly division constituted the applicant’s core business, generating approximately 85% of all earnings of the company. The Corporate Accounts Department, which the first respondent was responsible for achieved an income of more than R776 million for the 2009 year, which constituted approximately 85% of the applicant’s turnover.

[3] On taking up employment with Kelly, the first respondent was required to sign a restraint agreement that prohibited her, *inter alia*, from taking up employment with a competitor of Kelly for a period of 12 months and within 25 kilometres of any office in which she had been employed or for which she had responsibility. Each time that the first respondent was promoted, she was required to sign updated restraint agreements. In 1999, the period of her restraint was extended from 12 months to 24 months, and the restraint area was increased to prohibit her from working within 50 kilometres of any office in which she had been employed or for which she had responsibility. At that stage, she had already occupied a high level position for approximately three years.

[4] In 2004, the first respondent was required to sign a further restraint agreement. This is the agreement which was in force at the time of her resignation. It provides in relevant part as follows:

“3 *The employee hereby agrees that the proprietary interests of the company in the trade secrets and confidential information will be prejudiced if the employee takes up employment or becomes interested in any concern that competes with the company. It is accordingly agreed that, in order to protect such proprietary interests, the employer binds himself/herself during the period of the employees’ employment and for 24 [twenty four] months after termination thereof within a fifty [50] kilometre*

radius of any branch or office of the company, that the employee has been employed in or was responsible for, to the following restraints:

3.1 The EMPLOYEE will not encourage, assist, persuade, induce, incite or procure any employee of the COMPANY to become employed by or interested in [in whatsoever capacity, either directly or indirectly] any concern of whatsoever nature which carries on as part of or as the whole of its undertaking or business, the same business, or business similar to or alike the business of the COMPANY.

3.2 Save in the proper execution of the EMPLOYEE's duties as employee of the COMPANY, the EMPLOYEE will not approach, advise or contact in order to, either directly or indirectly, solicit the custom of any person or entity who was or is a customer or client to or to whom, on behalf of the COMPANY, negotiations, discussions or representations where [sic] entered into or made during the period of the EMPLOYEE's employment with the COMPANY.

3.3 The EMPLOYEE will not either directly or indirectly be employed by or have an interest, either as employee, principal, agent, member, shareholder, director, partner, consultant, financier or advisor or any other like capacity in any concern or entity which carries on the same business or similar business to or alike the business of the COMPANY. This does however not

exclude the employee from holding shares in companies listed on the Johannesburg Stock Exchange.”

[5] It is common cause that the first respondent was paid no compensation over and above her ordinary remuneration package for accepting the terms of the restraint agreement, and that all the applicant's employees are required to sign a similar or identical restraint agreement as a condition of their employment. Rather than tailoring the terms of the restraint agreement to suit the seniority of the employee and his or her access to confidential information and trade secrets, the applicant reassesses the terms of the restraint at the employees exit interview and, presumably, determines whether or not it will enforce the restraint.

[6] Now, on the respondent's version, although the applicant's restraint policy was harsh, the first respondent was largely satisfied in her employment there and had no intention of resigning. She was, however, forced to do so by a change in the company's ethos and structure, which made it unbearable for her to remain with the company. The events, which gave rise to this change unfolded in the following sequence. During the course of 2009, the Deputy Chief Executive Officer, and the Sales Director of the applicant determined that the company would embark on a process to reduce the employees over the age of 55. It was also decided that Kelly would need to be restructured because it was "unacceptably white". This was a cause for concern for the first respondent, who was a 52 year old white woman at the time. She viewed this as a clear message that she was the wrong age and colour to have any

real future with the applicant. In September 2009 and February 2010 respectively, two high-level women, namely the Managing Director of Kelly and the Executive: ICT (Denise Thomas) were charged with insubordination and forced to resign. In the same period, the first respondent was passed over for two potential promotions. This re-enforced her view that there was no real future prospect for her growth or advancement within Kelly.

[7] She was informed shortly thereafter, by Kelly's new Managing Director, Mr Wordon, that the Corporate Accounts Department, which she was responsible for, was to be re-structured. The restructuring was implemented after the first respondent had resigned, and the position which she had occupied ceased to exist. Mr Wordon apparently also informed the first respondent that Kelly could not accommodate both him and her, and that their relationship has irretrievably broken down. The first respondent viewed that as a clear indication that, despite her competent and loyal service for 18 years, she had to go. In the circumstances, the first respondent felt that she had no choice but to resign, and did so on 1 March 2010. The first respondent then took up employment with the third respondent, on 8 March 2010, as the Managing Executive of its Skillstream division.

[8] The applicant filed extensive founding papers detailing the nature and scope of its business. In summary, it described itself, and its subsidiaries, as being engaged in the provision of employment services, information technology (IT) skills development and outsource solutions. Its activities include, in broad terms,

- (a) permanent recruitment of employees;
- (b) providing clients with temporary staffing;
- (c) headhunting executive employees on behalf of clients in the employment market;
- (d) consulting services in respect of employment issues;
- (e) management of Business Process Outsourcing (“BPO”), which is a centralised office where clients and prospective clients are serviced through a telephonic contact or call centre;
- (f) management of client’s payroll and workforce productivity and time and productivity management of client’s employees by utilising an outsourced solution known as K-Log;
- (g) management of clients’ staffing requirements in respect of the recruitment process; and
- (f) vendor management, which is a process in terms of which the client appoints a master vendor (such as the applicant) to assist, in the process of recruiting, managing and payrolling of contingent, temporary, interim, contract and permanent employees and, the management of multiple staffing service providers/suppliers, which supply temporary and permanent recruitment services.

The Applicant’s Case in Reply

[9] The applicant, however, changed its entire case in reply stating, for the first time, that it provides a vendor management system by either using Bond Adapt, which it claims it has licensed from MCI Consultants (Pty) Ltd (“MCI”)

or through a combination of K-Log and Talent Ocean, which it claims is a software offering that it developed in-house. It is the applicant's version, in this regard, that it competes directly with Adcorp Technology Solutions (ATS), the third respondent, and its Skillstream product for the provision of vendor management systems either as part of a technological and recruitment solution offered by the applicant or as an independent product. In this regard, it states that it offers a complete technological support system to clients in respect of both vendor management solutions and managed services provider contracts or in respect of any variation or combination thereof that the client may require. Hence, the applicant states under reply that:

“the crux of the matter is that [it] competes for the award of contracts inter alia on the basis of the technological solutions in the form of software programming that it is able to offer customers. Should ATS or the first respondent market the Skillstream vendor management system successfully to a customer, this will mean that the applicant will not be able to market its own technological solution to such client. It often happens that a party who can successfully offer a technological solution to a particular client will succeed in locking in such a client for the rendering of other recruitment services or staff and vendor management services as well. Being able to compete with the applicant in respect of technological software solutions with the Skillstream product is accordingly a major competitive advantage to ATS and the Adcorp group. Their ability to compete is unfairly enhanced by the first respondent's intimate knowledge of the

applicant's confidential business information and her well established customer relationships with the applicant's clientele."

[10] The applicant relies upon a report by Jeremy Park, a K-Log executive, in which he found, after having compared Kelly group staffing modules on the one hand, and Skillstream and Adtime on the other, that Skillstream and K-log are direct competitors in the market, and where Skillstream is utilised by a customer, such customer has no further need to utilise the K-log system. Hence, according to the applicant the two systems, as far as time and attendance is concerned, are mutually exclusive. It is also the applicant's version, under reply that it identified the vendor management system, which it provides as a new opportunity, when the first respondent was still employed by it, and that it had made presentations to major clients on the basis of either its licensed recruitment process software or its own recruitment process software (of which vendor management systems forms a component, where required by the client), both whilst the first respondent was employed by the applicant and thereafter.

[11] The applicant's claims that it was required to change its case in reply because the respondents' attorney, in response to the applicant's letter of demand of 31 March 2010, confirmed in a letter, dated 6 April 2010, that the first respondent had entered into a contract of employment with Adcorp Holdings in terms of which she has been employed in its Skillstream business division focused on vendor management. It is the applicant's version that upon receipt of the letter of response, it prepared its founding affidavit on the

basis of the version presented on behalf of the first respondent in the letter of response, and that overwhelming evidence was presented in the founding affidavit that the first respondent is in breach of her restraint undertaking by being employed with Adcorp Holdings, and by being involved in vendor management activities.

[12] The first respondent, in her answering affidavit, however, contends that she is employed by a separate corporate entity, being Adcorp Technology Solutions (Pty) Ltd (the third respondent), and not by Adcorp Holdings (the second respondent). Her explanation for this changed version is that:

“My initial letter of appointment was signed by the second respondent. At the date of signature, it had not yet been determined where Skillstream would be housed. The intention was to register a separate company in the name of Skillstream (Pty) Ltd but an objection was raised to the use of the name because there was an existing company by the name of Skill Stream (Pty) Ltd. As a result, Skillstream was housed in ATS, which was an existing non-trading company in the Adcorp group.”

She goes on to explain that she neglected to inform her attorney of her “subsequent” letter of appointment, by the third respondent, due to the urgency under which the response to the letter of demand was prepared.

[13] In view of this so-called change in the first respondent’s version, the applicant has made application to join the third respondent to the application

and to amend its notice of motion accordingly. The application for joinder is not opposed, but the third respondent opposes the amended relief sought. The applicant had, consequently, amended its notice of motion. This being the case, the application for leave to join the third respondent is granted.

[14] The applicant claims to have been “severely prejudiced” by what it terms a “material change” in the first respondent’s version. The respondents, however, contend that the applicant’s claim of prejudice is unsustainable as it was informed that the first respondent was employed in the Skillstream division, which is responsible for the development of Skillstream. The respondents further contend that the applicant is well-aware of what Skillstream is and does as a vendor management system, because as set out in their answering affidavit, and which is not denied by the applicant under reply, the first respondent researched Skillstream for the applicant and advised that it obtain a licence for Skillstream. The respondents, therefore, contend that the applicant ought, in the circumstances, to have known what business areas to address in its founding papers in order to show a proprietary interest in the restraint it seeks to enforce. They contend that it was incumbent on the appellant to show, in its founding affidavit, that the first respondent had breached a provision of the restraint. It sought, in this regard, to establish a breach of clause 3.3 of the restraint agreement by showing that the first respondent had become employed in a staffing business, which was a competing business to the staffing business of the applicant. However, notwithstanding the great detail in which the applicant’s business was described in the founding affidavit, little attention was given to setting out the

applicant's business as a supplier of vendor management systems. They accordingly contend that the applicant has failed to make out a case in its founding affidavit for the relief which it seeks.

[15] When an objection such as this is taken, it is necessary to consider the founding affidavits alone. On consideration of the founding affidavit, I am of the view that the applicant has failed to make out a case for the relief which it seeks. In a belated attempt to remedy the position taken in its founding papers, the applicant delivered a substantial replying affidavit, in which it sought for the first time to show that the applicant engaged in the business of the provision of vendor management systems. Now, it is generally impermissible for an applicant to seek to make out a case in reply (*Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B; *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260).

[16] It is clear from the first respondents' letter of response, dated 6 April 2010, to the applicant's letter of demand, dated 31 March 2010, that she was employed in the Skillstream Division of an Adcorp company. As is evident from the respondents' version, the applicant knew, at all times, that Skillstream was a vendor management system as the first respondent had investigated vendor management systems, on behalf of the applicant, and identified this as an important new business opportunity that the applicant should pursue. As a result, a significant portion of the founding affidavit, and in particular paragraphs 39 to 60, is dedicated to establishing that K-log and

Skillstream are the same kind of product and that the applicant provides a vendor management system. It is significant, in this regard, that the applicant makes the following allegations in its founding affidavit:

“Similar to the applicant’s K-log, the second respondent makes use of a UK-based Skillstream software system to eliminate the problems associated with recruiting, management and pay-rolling of clients’ workforces.

*The details of the Skillstream product appear from a press release which the second respondent issued after it obtained the rights to the UK-based Skillstream product in 2008, a copy of which is annexed hereto, marked **FA7**. Although Skillstream and K-Log conduct substantially the same services and solutions to clients the applicant developed K-Log itself over time. The first respondent participated in this process and was well aware of the development thereof and the promotion of K-Log to its clients. It is clear from the first respondent’s description of her roll in the applicant that she regards K-Log as a solution to assist clients and that she regards the second respondent as a direct competitor.*

The second respondent realised the advantage of an IT solution such as K-Log and as a counter thereto, in 2008, the second respondent obtained the rights to the Skillstream product, which system is well known and which is utilised by international companies, such as Morgan Stanley and HSBC.

...

Skillstream is a multi-vendor recruitment management solution with a time management component. K-Log in turn is a multi-vendor, time and activity-management solution. There is an area of substantial overlap between the products in the area of time management, intuitive software platforms that facilitate end to end management solutions, dealing with the recruitment process, third party management and payroll, workforce productivity and management information, and electronic time sheets...

The applicant and the second respondent use K-log and Skillstream respectively to support vendor management. Vendor management and related staffing business models, as applied by the applicant and the second respondent, compete head-on in the marketplace. In fact, the second respondent and the applicant being the two largest companies in South Africa are the primary competitors in this area.

In order to support this contention, I reiterate that, headed by the first respondent, the applicant, with its K-log system recently competed, with the first respondent as director, with the second respondent and its Skillstream system for key accounts. An example hereof is where the applicant and the second respondent recently competed for the Vodacom account. The applicant with its K-log system and the second respondent with its Skillstream were the final two competitors on Vodacom's shortlist for this tender which was finally awarded to the applicant and which the applicant presently operates successfully.

In addition to its Vodacom client, the applicant renders vendor management services to inter alia Standard Bank. K-log is also

installed and used by inter alia ABSA, IBM, and First Rand, amongst approximately 40 other clients. The second respondent and the applicant compete head on for these accounts with these clients.

...

The K-log and Skillstream systems are tools to manage large and/or decentralised workforces and multiple shift changes and at the same time provide the staffing company and the client with real-time information. The staffing company and client can therefore immediately see which employees are on site, who is late, who is early and who has not arrived and the information is then transferred to key personnel of clients who require this information. The systems are also able to manage multi-vendor environments, contractors and permanent workforce staff with different payment cycles, different shifts and payroll exports within a company configuration.

The business of the applicant and the second respondent are similar in all material respects and they are direct competitors on a nationwide basis in all major business sectors.”

[17] It is clear from these allegations that the applicant has at all times known that Skillstream is a vendor management system, and what its capabilities are. I am accordingly of the view that the applicant ought to have addressed the issue of it also being in the business of providing a vendor management system either through Bond Adapt, or a combination of K-Log and Talent Ocean in its founding affidavit, in order to show a proprietary interest in the restraint it seeks to enforce. It was incumbent on the applicant

to show, in this regard, that the first respondent had breached a provision of the restraint agreement. Although it sought to establish, in its founding affidavit, a breach of clause 3.3 of the restraint agreement by showing that the first respondent had become employed in a staffing business, which competed with the staffing business of the applicant, little attention was given to showing that the applicant's business was a vendor management system. The applicant is therefore not allowed to do so in reply, when no case at all was made out in its founding affidavit. Having regard to the founding affidavit, it is clear that the applicant has failed to make out a case for the relief that it seeks in its founding affidavit.

Disputes of Fact

[18] However, and regardless of the applicant's belated assertions in its replying affidavit, as the proceedings before this Court are motion proceedings in which final relief is sought the rule, as enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C, that where there is a dispute as to the facts a final interdict should only be granted in motion proceedings if the facts as stated by respondents together with the admitted facts in the applicant's affidavits justify such an order, applies. Accordingly, the respondents' version must prevail. It is significant, in this regard, that the first respondent denies that the applicant, during the time of her employment with the applicant ever supplied vendor management systems to its customers.

[19] It is, moreover, clear from a reading of the papers filed of record that the application has given rise to a number of material disputes of fact between the parties, and that the filing of supplementary and further supplementary affidavits by the parties served to deepen these disputes, which include, *inter alia*:

- (a) whether the applicant conducts the same or a similar business or a like business to the third respondent;
- (b) whether the applicant owns or is licensed to offer a vendor management system;
- (c) whether the applicant in fact and in its own right offers a vendor management system;
- (d) the circumstances leading to the first respondent's resignation;
- (d) whether the first applicant came to possess any of the applicant's trade secrets and confidential information which is considered protectable; and
- (e) the first respondent's interaction with the applicant's clients since leaving the applicant's employ.

[20] The applicant is, however, adamant that it is clear from the affidavits filed by the parties that there are no disputes of fact on the papers. It has also, in this regard, produced a large volume of new documents (including agreements) to make out its case. These documents were not disclosed in the founding affidavit nor were they produced by the applicant in response to the respondents' application in terms of Rules 35(12), 35(11) and/or 35(14) of the Uniform Rules of Court.

[21] It is notable, therefore, that the core disputes in this matter relate to vendor management systems, and whether the provision of such systems form part of the applicant's business. As indicated earlier, in this judgment, the first respondent's reply to the applicant's letter of demand stated categorically that she is employed in the Skillstream division of an Adcorp Company. The applicant was likewise also, at all times, aware that Skillstream is a vendor management system, and what its capabilities are. It is therefore not surprising that the applicant dedicated a significant portion of the founding affidavit to establishing that K-log and Skillstream are the same product, and that the applicant consequently provides a vendor management system.

[22] The respondents, while preparing their answering papers, brought an application, in terms of Uniform Rules 35(11), (12), and (14), to compel the production, *inter alia*, of all agreements concluded between the applicant and its clients in terms of which it provided a vendor management system; all agreements in terms of which it was supplied or licensed to provide a vendor management system; and all revenue generated by the provision of such vendor management system. The affidavit in support of the application to compel pertinently states as follows:

“At the heart of the dispute between the applicant and the respondents lies the question of whether the applicant presently can provide or does provide a vendor management system – which is a software product that manages a client company's recruitment process.”

Significantly, the applicant did not deny that the documents requested in the application to compel were central to the matter. Nor did it dispute the respondents' characterisation of the case. Instead, it provided the confidential documentation. Notably, none of these documents mention Bond Adapt or Talent Ocean, either as products that the applicant has licensed from another company or as a product that it supplies to its clients. Moreover, only K-Log's revenue stream was furnished, which represents in the region of 0.01% and 0.16% of the applicants turnover. The applicant has, in addition, also failed to provide a single agreement concluded between it and a client for the provision of a vendor management system. Even when pressed by this Court for an example of the applicant having provided a vendor management system to a client, the applicant's counsel avoided directly answering my question. According, and despite the applicant's consistent denials that there are disputes of facts on the papers, accompanied by its production of a large volume of documents described as '*objective, corroborating evidence*' to make its case, it has failed to convince me that there are no real, genuine or *bona fide* disputes of fact on the papers.

Breach of Restraint Agreement

[23] It is conclusively settled that in considering the reasonableness of a restraint undertaking the following questions must be considered:

- (a) Does the one party have an interest that deserves protection after termination of the agreement?
- (b) If so, is that interest threatened by the other party?

- (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
- (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? (*Basson v Chilwan* 1993 (3) SA 742 (A) 767F-H).
- (e) Does the restraint go further than is necessary to protect the particular interest (*Kwik Kopy v Van Haarlem* 1999 (1) SA 472 (W) 484B-E)?

However, it is important, prior to considering the reasonableness of the restraint undertaking, to first determine whether or not the first respondent has breached the restraint agreement.

Businesses not same, similar or alike

[24] I will deal first with clause 3.3 of the restraint agreement, which provides that the concern in respect of which the employee is to be restrained from taking up employment is any concern “...*which carries on the same business or similar business to or alike the business of the COMPANY.*” Clause 3.3 is not a traditional non-compete clause as it does not expressly seek to prohibit employment in a competitive business. It seeks only to prohibit employment by “any concern or entity which carries on the same business or similar business to or alike the business of the COMPANY.” It is the respondents’ contention that the applicant has failed to prove a breach of

this provision as the respective businesses of the applicant and the third respondent are patently not the same, similar or alike.

[25] I am of the view that the phrase “any concern or entity which carries on the same business or similar business or alike the business of the COMPANY” postulates a comparison of the applicant’s business to the respondents business, as a composite whole (*Capnorizas v Webber Road Mansions (Pty) Ltd* 1967 (2) SA 425 (A)). Accordingly, because the applicant provides some of the services which are provided by the third respondent does not mean that the respective businesses viewed in their entirety, are the same, similar or alike.

[26] The applicant’s business is best described as the provision of staffing. It acts as a labour broker, and sometimes, as an on-site manager, to companies with large staffing contingents. Its business is to provide personnel to fill temporary or permanent positions within client companies and to manage those personnel’s performance and payment once they are employed. It is service oriented rather than product or technology driven. As a result, it employs a workforce of more than 1000 people. Significantly, the division of the applicant in which the first respondent was employed at the time of her resignation was accountable for 85% of the applicant’s revenue, which was derived from providing staffing and recruitment services. Its direct competitors in the Adcorp Group are Quest Staffing (which is a division of Adcorp Staffing Solutions (Pty) Ltd) and Emmanuel’s Staffing Services (which is a division of Adcorp Fulfilment Services (Pty) Ltd).

[27] The applicant remains steadfast, however, that it offers vendor management software, and vendor management and employee management services subsequent to recruitment of employees, in competition with the Skillstream software, by utilising its K-log system, or a combination of K-log and Talent Ocean or Bond Adapt. However, and despite having been called upon by the respondents to indicate what portion of its revenue was derived from the provision of vendor management systems to clients, and its repeated assertions that it is in competition with the third respondent, the applicant has failed to show that it derived any revenue from providing vendor management systems. Hence, it is the respondents' submission that there is no merit in the contention that the business of the applicant is the business of providing a vendor management system. In support of this contention, they rely upon the judgments of *PE Nightwatchman Patrol (Pty) Ltd v Blignaut* 1979 (2) SA 302 (SE) and *Poolquip Industries (Pty) Ltd v Griffin and Another* 1978 (4) SA 353 (W).

[28] *PE Nightwatchman Patrol v Blignaut (supra)* concerned an application for an order committing the respondent to prison for contempt of court on the ground that he had disobeyed an order of court interdicting him from carrying on a security service similar to, and in competition, with the business of the applicant. The applicant supplied a service which actually guarded premises, whereas the respondent did not guard anything, but the radio systems which he supplied could be used by guards. The court, citing *Mays v Roberts* 1928 SASR 217 at 219, in which it was argued that the word "similar" when used

with reference to houses did not mean “exactly alike”, concluded that it was not necessary that the respondent’s business was exactly like that of the applicant. It was sufficient if the respondent’s business “was so like that of the applicant as seriously to compete with it.” In *Poolquip Industries (Pty) Ltd v Griffin and Another* 1978 (4) SA 353 (W) at 361H, the Court arrived at a similar conclusion. *Poolquip Industries* concerned the enforcement of a restraint agreement, in terms of which the respondent, a managing director of the applicant (a manufacturer and distributor of equipment and chemicals for the swimming pool industry) agreed, prior to resigning and becoming employed with the second respondent (whose business was concerned with the manufacture and sale of chemicals, veterinary products, anti-freeze solutions, fibre glass products for agriculture and swimming pools and swimming pool cleaning equipment), not to be associated with a business “similar” to that being carried on by the employer or “which competes or is likely to compete with the business of the employer. The Court held that a “similar” business in the context in which it was used meant a business which competed with the applicant’s business, “in some material respect”, and not a business which was the same in all respects.

[29] Accordingly, and in so far as the applicant contends that the third respondent’s business and that of the applicant are similar, it must show that the two businesses compete in some material respect. Likewise, the term “business of the COMPANY” as used in clause 3.3 of the restraint agreement must also be construed as a reference to the business as a composite whole conducted by the applicant. That the applicant provides some of the services

provided by the third respondent does not mean that the respective businesses viewed in their entirety are the same business or similar business to or alike businesses. Having regard to the nature of the respective businesses of the applicant and the third respondent, it is clear that they are neither the same, similar or alike, and nor do they compete in any material respect. The applicant's core business is that of a staffing and recruitment service, while the third respondent's core and exclusive business is that of the provision of vendor management systems, that administers the staff recruitment process. In other words, it provides client companies with a software product to enable them to manage their recruitment process, where they rely on staffing vendors, such as the applicant to provide them with staff. Its products are ancillary to and supportive of staffing providers such as the applicant. It is not in competition with the applicant as it is not a staffing vendor which provides staff or staffing solutions. It is also technology and product driven, rather than service oriented. Unlike the large workforce of the applicant, the third respondent employs a small number of highly skilled business analysts who are able to assess a client's technology needs and customise the Skillstream product offering to match. It currently has three employees only. I am, accordingly, of the view that the third respondent's business is significantly different to the applicant and is, therefore, not the same, similar or alike the applicant's business. Nor do they compete in any material respect.

[30] As the Managing Executive of the third respondent's Skillstream South Africa Division, the first respondent is responsible for developing and

marketing Skillstream. Skillstream is a vendor management system that is a technology product that manages the end-to-end recruitment process, which involves, *inter alia*, publishing requests for staff, screening candidates on a formal level, and ensuring that their appointment and employment complies with the relevant statutory and corporate governance requirements. In contrast, the first respondent was not involved in developing and marketing software for the applicant, while in its employ. The applicant, in this regard, does not provide technology products at all; it is a service provider. It sometimes markets software called K-Log on behalf of K-Log (Pty) Ltd, which is a separate legal entity. The first respondent did not work for K-log (Pty) Ltd and has never signed a restraint in its favour. K-Log (Pty) Ltd, and not the applicant, earns revenue from the provision of the K-Log system to the applicant's clients. K-Log, in any event, does not compete with Skillstream. It is a time-and-attendance system that monitors an employee's hours on the job after appointment and in some instances generates a payroll and invoices based on time. It is not a tool involved in recruitment, and for that reason does not have the capabilities of a vendor management system. In an attempt to overcome this obstacle, the applicant contends in reply that a component of Skillstream performs time-and-attendance and payrolling functions and accordingly it is a competing product with K-Log. However, the respondents contend that this misrepresents the market as Skillstream's clients require a product that is able to manage their full recruitment process, and will therefore acquire the full technology bouquet that Skillstream offers. Where a client requires only time-and-attendance and payrolling, it will not purchase Skillstream. Rather, it will acquire K-Log or Adtime, which are competing

products. They accordingly contend that the K-Log market is not the same as the Skillstream market.

[31] Similarly, in so far as the applicant contends that it has developed a vendor management system by combining the capabilities of K-log and Talent Ocean, it is apparent from the respondent's version that Talent Ocean is a job-listing website, and not a vendor management system. The applicant elected not to acquire a licence for a vendor management system. It is, consequently, disallowed from marketing vendor management systems unless it enters into an agreement with a company that has a licence to operate a vendor management system, which it has not done. Significantly, in both its IBM proposal and its South African Post Office proposal, Kelly made it clear that it could not provide a vendor management system, and that if the client required one, it recommended that the client acquire Bond Adapt, which is licensed by a company called MCI (Pty) Ltd, and not by the applicant.

[32] As indicated earlier, in so far as the applicant contends that it carries on business in competition with the third respondent, which provides vendor management systems, it bears emphasis that the revenue earned by K-Log (Pty) Ltd, even if taken into account in relation to the applicants' activities represents between 0.01% and 0.16% of the applicants' turnover. I am of the view that the insignificant revenue generated by the applicant through K-Log (Pty) Ltd, and its notable failure to produce a single contract in terms of which the applicant provides a vendor management system to a client either in the form of K-log combined with Talent Ocean or through Bond Adapt, together

with the fact that its business is substantially different to that the third respondent, demonstrate conclusively that the two businesses do not compete in any material respect.

[33] It is furthermore important to bear in mind that mere employment with a competitor could not *per se* infringe a proprietary interest of a covenantee. There has to be a likelihood that the first respondent would use her employment or let it be used to wean away the applicants' goodwill. The applicant has, however, failed to demonstrate any such likelihood. In tacit acknowledgement of this flaw in the applicant's case, it contends that irrespective of whether the applicant and third respondent are competitors, the third respondent is part of a group of companies, and the first respondent, as an employee thereof, will "lock in" clients for the rendering of recruitment or staff and vendor management services. However, as contended for by the respondents, the third respondent only provides vendor management systems. It cannot, therefore, "lock" clients in to provide them with services that it does not provide, such as staff and vendor management services. The claim of this "lock in" effect is made by the applicant, in its replying affidavit, without putting forward any actual evidence to demonstrate that the provision of vendor management systems by the third respondent does in fact "lock in" clients for the provision of other services. I am accordingly unpersuaded by the applicant's argument in relation to the "lock in" effect.

[34] The applicant, in addition, contends that the first respondent will not only compete directly with the applicant for the supply of vendor management

systems/recruitment process outsourcing systems but will also be indirectly employed by or have a direct or indirect interest as employee, consultant or advisor in the business of the second respondent. It claims that this indirect involvement with the second respondent, will amount to an additional and independent breach of her restraint undertaking. The applicant relies, for this contention, on the decision of *Dickenson Holdings (Group) (Pty) Ltd v Du Plessis* (2008) 4 SA 214 at para 23, in which the court took into account that where the new employer was part of a family or group of companies, a strong probability is raised that, if a chance presented itself for the new employer to share information with its family of companies in areas where there is competition between the applicant and a member of the employer's group of companies, the company would be likely to share such information.

[35] I am again unpersuaded by the applicant's reliance on the *Dickensen decision*, as it is distinguishable from the matter at hand. In *Dickensen*, the Court was dealing with a restraint that specifically prohibited competition against the business engaged in by the Dickensen group of companies, commonly known as 'The Dickensen Group' which consisted of approximately sixteen companies. However, the clauses upon which the applicant relies in the restraint agreement, in this matter, do not contain such a broad wording. The undertaking is confined to only the applicant. Furthermore, the second respondent in the *Dickensen* matter, admitted that it could still accept work that was in competition with that of the applicant and pass it on to specialists that include the applicant and its competitors. The respondents in the current matter, however, make no such admission.

The Restraint is Unreasonable and Unenforceable

[36] In terms of clause 3.2 of the restraint undertaking, the first respondent is *“not [to] approach, advise or contact in order to, either directly or indirectly, solicit the custom of any person or entity who was or is a customer or client or to whom, on behalf of the COMPANY, negotiations, discussions or representations where [sic] entered into or made during the period of the EMPLOYEE’s employment with the COMPANY.”*

[37] The applicant concedes that this clause is unreasonable as it stands, and seeks to limit its applicability to a list of customers of the applicant as reflected in annexure “C1” to the confidential affidavit. It is the applicant’s case that annexure “C1” was stored on the first respondent’s personal laptop and was accessed by her on a daily basis. It contains a list of all the customers of the applicant with whom the first respondent had an established business relationship with at the time of her resignation. According to the applicant, the list was obviously not available at the time when the restraint and non-solicitation undertakings were agreed upon with the first respondent. It was, therefore, obviously not possible to anticipate at that stage the identity of the customers the first respondent would establish a business relationship with in the future. Accordingly, the applicant states that in light of the evidence currently available, it only seeks an enforcement of the non-solicitation restraint in respect of the customers reflected on annexure “C1” to the confidential affidavit.

[38] In light of this concession, the respondent contends that the applicant bears the onus of establishing the reasonableness of this restraint. *In BHT Water Treatment (Pty) Ltd v Leslie* 1993 (1) SA 47 (W), where the applicant conceded that the original restraint clause was too wide, and therefore sought partial enforcement thereof, Marais J stated that:

“I do not accept in principle that the litigant (on whom the onus does not originally rest) attracts the onus because he makes a limited concession in respect of matters where the onus initially rests on the opposite party. Save for matters directly affected by the concession, in my view, the onus remains undisturbed by the fact of the concession. The applicant, properly making a concession that the restraint is geographically too wide, does not in my view concede that the restraint is otherwise unreasonable, and I am of the view that the onus of showing that the enforcement of the cut-down restraint is unreasonable remains on the respondent.”

[39] This approach has been endorsed in a number of other cases including *Nampesca (SA) (Pty) Ltd v Zaderer* 1991 (1) SA 886 (C) 895H-I. It has, however, been recognised that despite the onus remaining with the respondent in cases of partial enforcement of the restraint by the applicant, the applicant must, nevertheless, lay a proper basis for the enforcement of the narrower or pared down restraint (*Macphail (Pty) Ltd v Janse Van Rensburg* 1996 (1) SA 594 (T) at 599C, *Sunshine Records (Pty) Ltd v Frohling* 1990 (4) SA 782 (A) at 795I).

[40] Saner, in *Agreements in Restraint of Trade in South African Law*, Lexis Nexis Butterworths 2009 at 5-15 to 5-16, has the following to say concerning the approach adopted by Marais J in the *BHT Water Treatment* decision:

“Whilst, with respect, Marais J’s reasoning is superficially attractive, it is submitted that it does not accord with the basic principles regarding the reasons why agreements in restraint of trade are now regarded as being prima facie valid and enforceable. The fact of the matter is that, according to Magna Alloys [1984 (4) SA 874 (A)] they are so because it is in the public interest that agreements solemnly entered into should be enforced unless they are unenforceable, in which case public interest demands that they should not be enforced. Consequently, once the covenantor has discharged the onus of proving that the covenant in restraint of trade is in conflict with the public interest and thus unenforceable as a whole [or the applicant (covenantee) has conceded that the restraint is unreasonable or otherwise in conflict with public policy], it would not seem unreasonable to require that the covenantee provide a suitable answer to indicate why partial enforcement should nevertheless be allowed. It is submitted that in the circumstances the covenantee must actually prove that partial enforcement is in the public interest because, in the words of Grosskopf JA in Sunshine Records (Pty) Ltd v Frohling: [1990 4 SA 782 (A) 796E]

‘The ratio for the partial enforcement of the restraint is that the public interest requires it. Thus Rabie CJ stated in the Magna Alloys case supra at 896E that the Court should be empowered to order the partial enforcement of a restraint clause ‘in ‘n gepaste geval, in die lig van die vereistes van die openbare belang’.

It should follow therefore that it is not for the covenantor to prove that partial enforcement would prejudice the public interest, but for the covenantee to prove that partial enforcement is in the public interest.”

[41] Having regard to *Magna Alloys v Ellis* 1984 (4) SA 874 (A) and subsequent cases regarding the incidence of the onus in restraint of trade cases, I am in agreement with Saner’s view that the correct approach, where a covenantor concedes that a restraint clause is unreasonable as it stands, and should therefore only be partially enforced, is that the covenantee must show that partial enforcement is in the public interest. Accordingly, I am of the view that the applicant bears the onus of proving the reasonableness of the restraint where it concedes that such restraint is too wide. It has, however, failed to do so. In any event, I am of the view that the applicants prayer for partial enforcement of clause 3 does not go far enough to cure the reasonableness thereof. The clause as it stands would preclude the first respondent from approaching any of the applicant’s customers listed on annexure “C1”, to solicit business of any nature from these customers. This unreasonableness is, moreover, exacerbated by the broad class of entities that the first respondent is prohibited from approaching. It is apparent, from

perusal of this list, that it nonetheless includes every significant corporate entity in the country. There is effectively little difference between the pared down clause 3.2 of the restraint agreement, and seeking to enforce the restraint throughout most of commercial South Africa, as originally intended.

[42] The applicant furthermore seeks to enforce a 24-month restraint. This period is the period stipulated in the restraint agreement. However, at the hearing of the matter, the applicant argued for an 18 month restraint. It is the respondents' contention that a 24 – month restraint is unreasonable, and the applicant's vain attempts at justifying the period of the restraint are undermined by the concession made by the applicant in argument, where the applicant argued for an 18-month restraint.

[43] I am of the view that there is much force in this contention for the following reasons. Where a court is asked to read down an agreement so as to make it reasonable and, hence, enforceable, this must be pertinently raised at the outset, in the applicant's papers, and the facts must be set out in support of the severance itself and, of the partial enforcement of the restraint clause, so that the issues can be fully ventilated (*Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C); *Macphail (Pty) Ltd v Janse van Rensburg* 1996 (1) SA 594 (T) at 599B; and *Forwarding African Transport Services CC t/a FATS v Manica Africa (Pty) Ltd* [2004] 4 All SA 527 (D) at 534b; *Alum-Phos (Pty) Ltd v Spatz* [1997] All SA 616 (W) at 633g)

[44] Having perused the applicant's affidavits, it is clear that the applicant only makes mention in passing, in its replying affidavit, that in the event of this Court concluding that the period of 24 months is not justifiable, it will seek an order for a period of 18 months from date of termination of the first respondent's employment. This notwithstanding, nowhere on its affidavits does the applicant state that its 24 – month restraint is too wide, and it seeks to enforce something less than that. Nor does it set out facts in support of the severance or the partial enforcement of the restraint. Therefore, severance or partial enforcement has, in my view, not been pertinently raised by the applicant. Accordingly, the case must be dealt with on the basis that the applicant seeks to enforce a 24-month restraint, and not on the basis of counsel's submission from the bar. Accordingly, I am persuaded by the respondents' submission that the applicant elected to seek to enforce the full extent of the agreement on its papers. It should, therefore, be held to this election, and the restraint should be held to be unreasonable in its terms on this account too.

[45] This, accordingly, brings me to the question of whether the restraint of 24 months is too long. It is important that the period of the restraint should not be any longer than is necessary to enable the applicant to replace the first respondent, and for that person to become acquainted with the nature of the job, the products and services provided, the customers, and the staff that will work under him or her (*Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 264 at para 55). In my view, two years, or even eighteen months for that matter, is much too long for a case such as this, particularly because the

executive position, which the first respondent had occupied, has ceased to exist as a result of the re-structuring of Kelly's Corporate Accounts Department.

[46] Our courts have accepted that an overbroad restraint of trade clause may be rendered reasonable by being partly enforced (*Magna Alloys* at 896A-E; *Sunshine Records* at 794G-H). However, a court cannot save an unenforceable restraint by engaging in judicial “*plastic surgery*” (*National Chemsearch* at 1117A; *Sunshine Records* at 796B-E). It can only give effect to a restraint agreement that is recognisably one that the parties agreed to (*Sunshine Records* at 796E-G; *Advtech Resourcing* at paras 43-45). Thus, where a restraint agreement was intended to operate in an unduly oppressive manner or *in terrorem*, a court cannot sever the agreement to give effect to a more innocuous form (*Ibid*). The restraint must be rendered unenforceable “*precisely because [its terms] were too grasping*” (*Sunshine Records* at 797B; *Interpark (South Africa) Ltd v Joubert and Another* [unreported judgment of the South Gauteng High Court, 30 April 2010, at para 71]).

[47] In the present circumstances, I am of the view that the restraint agreement is unusually stringent both in geographic area of operation and in duration, and that the applicant intended the restraint agreement to operate as an oppressive measure that would discourage employees from leaving its employ and seeking work elsewhere. In these circumstances, I remain convinced that the terms of the restraint agreement cannot be rendered reasonable by selective enforcement. It is overbroad and unenforceable in its

entirety, and I accordingly decline to give effect to it. Accordingly, and having regard to the unreasonableness of the restraint undertakings in clause 3, and its consequential unenforceability, I am satisfied that the first respondent is not in breach of such undertakings.

The applicant has no interest that requires protection

[48] Even if I am wrong in my finding as to the unreasonableness of the restraint agreement, I remain fortified in my view that the applicant has, on the papers, provided insufficient evidence to justify a conclusion that it has an interest that requires protection. The first consideration in assessing the validity of a restraint agreement is whether the covenantee has any interest that requires protection. If it has no protectable interest, it will not be entitled to enforce the restraint agreement.

[49] Trade secrets, confidential information, goodwill and customer connections may all constitute protectable interests for the purposes of a restraint of trade agreement (*Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375 (C) at para 11). These must be distinguished from a person's knowledge or skill, which he or she cannot be precluded from using, even where he acquired them in the course of employment with the covenantee (*Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007 (2) SA 271 (SCA) at para 8-10; *Aranda Textile Mills (Pty) Ltd v Hurn and Another* [2000] 4 All SA 183 (E) at para 33).

[50] The applicant must identify what confidential information and trade secrets it seeks to protect, and why (*Mozart Ice Cream Franchises (Pty) Ltd v*

Davidoff and Another 2009 (3) SA 78 (C) at 87A). Its mere say-so that it has confidential information and trade secrets is not sufficient. In order to qualify as confidential, such information must be capable of use and application in the industry concerned; be known and available to a restricted group of people; and be of business value to the covenantor (*Allum-Phos (Pty) Ltd v Spatz and Another* [1997] 1 All SA 616 (W) at 623g-624a; *Townsend Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33 (C) at 53I-54B; *Walter McNaughtan (Pty) Ltd v Schwartz and Others* 2004 (3) SA 381 (C) at 388J-389B).

[51] I am of the view that, in the present case, the applicant does not at any point set out with the appropriate level of specificity what information it seeks to protect. However, based on the contents of the confidential affidavit (and annexures thereto), it appears to suggest that the following constitute confidential information and/or trade secrets such that they should be protected by law:

- (a) The applicant's customer list and its customer connections;
- (b) The applicant's 2010 strategy document (including its products' strengths and weaknesses, its business strategy and its brand reviews;
- (c) Proposals to Kelly customers, including the pricing and terms offered; and
- (d) The capabilities of K-Log.

It is the respondents' contention that none of these classes of information is confidential and they do not give rise to a protectable interest.

The Kelly Group customer list and its customer connections

[52] I deal first with the Kelly Group customer list and its customer connections. The applicant contends that the first respondent knew the identity of Kelly's major clients, had the opportunity to build up a relationship with them and was aware of their specific needs. The first respondent admits that she knew Kelly's client list and had developed a business relationship with some of Kelly's clients. However, she denies that such information or relationships give rise to a protectable interest.

[53] In *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) at 87, the court held that a customer connection is protectable where it –

“denotes a knowledge of the needs of the customer, the way in which those needs are fulfilled by the party seeking to enforce the restraint and the identity of those within the customer's organisation who are in a position to influence the movement of the custom to the person sought to be restrained.”

Equally, where the market is so open that all potential customers and their needs are known to each competitor, it is unlikely that the covenantee will be able to establish a protectable trade connection (*Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 504I-505A). It is apparent from the respondents' version that, in the staffing solution industry in which the applicant operates, clients and their needs are well-known in the industry, and they are generally serviced by various staffing vendors simultaneously. By way of example, Kelly and Quest were simultaneously awarded contracts to provide staff to Vodacom. Client companies generally

call for proposals, either by way of a formal tender or during negotiation meetings where competing staffing vendors are present. Their needs are entirely transparent. This is amply demonstrated on the applicant's own version by the example of the Nestlé meeting, where Nestlé called in various companies that it believed could provide it with a recruitment outsourcing process model and technology, and described to them, orally and in writing, exactly what it required and the basis on which it would accept proposals. Since, staffing vendors are appointed through a formal procurement process; relationships play a very limited role. As the Nestlé RFP illustrates, applicants are considered according to strict criteria, which are assigned their respective weight and importance in advance. There is no real scope for an employee to influence the movement of custom. In any event, the client relationships within Kelly were maintained at many different levels by a number of different people. They were not the domain of the first respondent.

[54] Having regard to this state of affairs in the staffing industry in which the applicant operates, I am of the view that Kelly's customer lists and customer connections are known to a wide group of people and are, in any event, of no commercial value. They, therefore, do not constitute confidential information and do not give rise to a protectable interest. The law, in any event, recognises that an employee is likely to remember some of her former employer's customers and allows her to use such knowledge for her own benefit or for the benefit of her new employer (*Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W) at 428D-F; *Advtech Resourcing* at para 59. Since the applicant does not allege that the first has taken her client

lists, it can at best only claim that she is making use of her knowledge of the identity of Kelly's customers that she acquired during her employment at Kelly. She can, however, not be precluded from doing so.

[55] To the extent that the applicant claims that the first respondent may in her new employment benefit from the relationships she formed with her former customers, I am of the view that she cannot be precluded from doing so. Relationships with personnel flow inevitably from her skill and experience at Kelly; she cannot be precluded from using them. There is no evidence that she is or will improperly use any influence within customers to move them over to the third respondent.

The Kelly Group 2010 strategy document

[56] The first respondent was involved in drawing up the applicant's 2010 strategy document as part of the Kelly Executive Committee. The applicant contends that this contains confidential information and/or trade secrets. It is clear from the respondents' version that, on its face, the 2010 strategy document contains nothing that is not known throughout the industry and nothing of commercial value. In fact the challenges and areas for growth identified in the applicant's 2010 strategy document are, according to the respondents, known across the staffing industry. It is of particular significance that they are the same as those identified by Adcorp Holdings in its, publicly available, presentation to the financial analyst community, although the applicant's document contains significantly less detail. The only aspect of the applicant's strategy document that is not publicly known is who within Kelly

was responsible for which areas of growth. However, this information is of little commercial value. In any event, strategy documents of this kind have a very short lifespan and generally remain current for about six months. Hence, any commercial value that may have existed in the 2010 strategy document would have already expired. In the circumstances, I am in agreement with the respondents that the 2010 strategy document does not give rise to a protectable interest that justifies the terms of the restraint agreement.

Proposals to Kelly customers, including the pricing and terms offered

[57] It is again clear from both the respondents' and applicant's versions that the first respondent had access to proposals made to clients, and service level agreements concluded with them. It is, however, the respondents' contention that there was a vast volume of such agreements, and that the first respondent did not retain such documentation and can hardly remember any details pertaining to the documents. They therefore contend that the proposals and service level agreements (and the contents thereof) are not confidential information because the industry is relatively transparent. Staffing vendors know the terms including the price on which their competitors contract, and these terms are often dictated by the clients themselves. They are accordingly known to a wide group of people. Since, the applicant differentiates itself from its competitors on the basis of service and brand, and not on product or price, there is accordingly no commercial value associated with these proposals or service level agreements. In the circumstances, I am in agreement with the respondents' that these proposals to the applicants

including the terms and pricing thereof do not give rise to a protectable interest that justifies the terms of the restraint agreement.

The capabilities of K-Log

[58] In so far as the applicant appears to contend that K-Log's capabilities constitutes confidential information and that the applicant is entitled to protect this, it is clear from the respondents' version that the K-Log system belongs to K-Log (Pty) Ltd and not to the applicant. Kelly presents K-Log on behalf of K-Log (Pty) Ltd, but service agreements are entered into directly between the client company and K-Log (Pty) Ltd. K-Log (Pty) Ltd derives revenue from K-Log, and not the applicant. There is no restraint in favour of K-Log (Pty) Ltd.

[59] It is furthermore clear from the respondents' version that K-Log's capabilities are not secret. They are expressly set out on K-Log's website and in its user manual which is distributed to any client or staffing supplier that uses K-Log (including Kelly's direct competitor, Quest Staffing). All sub-contractors and clients have free access to the K-Log processes and methods. The applicant cannot, therefore complain that they are confidential (see *Automotive Tooling System* at para 19). It is clear from my review of the main confidential documents, which have been put up by the applicant, that none deal with K-Log's functions or processes. The second respondent, furthermore, owns and markets a product (Adtime) that has the same capabilities and uses the same processes and methods as K-Log. In the circumstances, the applicant cannot claim that K-Log is unique or protectable. In the circumstances, I remain of the view that K-Log's use and capabilities do

not constitute a trade secret or confidential information that the applicant can claim a protectable interest in. I am therefore of the view that the applicant does not have any confidential information or trade secrets that require protection by the enforcement of the terms of the restraint agreement.

[60] This position is confirmed by the applicant's attitude to Denise Thomas ("Ms Thomas"). Ms Thomas held an executive position reporting to the managing director, and was therefore employed at the same level as the first respondent. She had access to the same business information as the first respondent, and was the executive responsible for the technology and for the IBM account. On taking up employment with the applicant, Ms Thomas was also required to sign a restraint of trade agreement. The terms of the restraint would have, on the applicant's version, been enforceable against her at the time of her resignation in February 2010. This notwithstanding, on the respondents' version, the applicant has unconditionally waived the terms of the restraint agreement against Ms Thomas. Ms Thomas currently works for Quest, Kelly's direct competitor.

[61] Now although the applicant states, under reply, that Ms Thomas has only been released from her obligation under clause 3.3 of her restraint of trade agreement, and that it intends persisting against her vis- a- vis the balance of her restraint obligations, it does so in terms so vague that little weight can be placed on this allegation. I am of the view that if the applicant genuinely held confidential information or trade secrets that required protection, it is inconceivable that it would have allowed Ms Thomas to work for Quest, its

direct competitor in the Adcorp Group, without seeking to enforce the terms of the restraint agreement. It therefore follows that the applicant has no protectable interests that justify the imposition and enforcement of the restraint agreement against the first respondent. On this basis alone the restraint agreement is unenforceable and this application falls to be dismissed.

No Prejudice to Applicant's Interests

[62] Even assuming that the applicant has a protectable interest, under the test enunciated in *Basson v Chilwan at 767F-I*, a restraint agreement should only be enforced where the covenantee's interests may be prejudiced by the party that it seeks to restrain. A prejudice (or harm) requirement is met where an employee takes up employment with a direct competitor even if she undertakes not to disclose confidential information to her new employer (*BHT Water* at 57J-58B; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 20).

[63] In the present matter this consideration also arises under clause 3.3 of the restraint agreement, which prohibits the first respondent from taking up an interest in, or employment with, any entity that carries on "the same business or similar business to or alike the business of" the applicant. However, as demonstrated earlier in this judgement, the applicant and the third respondent are not competitors and do not carry on businesses that are the same, similar or alike. In the premises, first respondent's employment with the third respondent does not constitute a threat to the applicant's protectable

interests, such as they might be, because the two companies do not operate businesses that are the same, similar or alike. On this further basis the restraint agreement is unenforceable and the application must fail.

[64] For these reasons therefore, the application is dismissed with costs including the costs of two counsel. The applicant is also ordered to pay the wasted costs, including the costs of two counsel, occasioned by the postponement on 18 June 2010.

**F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

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DATE OF JUDGEMENT: 7 DECEMBER 2010