IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

(EASTERN CAPE, PORT ELIZABETH)

Case No.: 495/10

Date heard: 1 April 2010
Date delivered: 31 May 2010

In the matter between:

MMA SECURITY SERVICES CC t/a BROUBART SECURITY	**1st Applicant**
FIZIK INVESTMENTS (PTY) LTD t/a UMKHOMBE SECURITY SERVICES	**2nd Applicant**

and

BRIAN PAUL CALLANAN	**1st Respondent**
NATIONWIDE SECURITY	**2nd Respondent**

JUDGMENT

KROON, J:

Introduction:

[1] The applicants' notice of motion sought orders in the form of an interdict:

(a) implementing portions of a restraint of trade provision contained in a contract of employment concluded between the applicants, as employers, and the first respondent, as employee; in essence, restraining the first respondent from being concerned in any capacity in any business or undertaking, more particularly the second respondent, which competes in any manner with the applicants in the Port Elizabeth area within a period of 18 months from 28 February 2010;

(b) restraining the first respondent from enticing, soliciting or canvassing any of the customers or employees of the applicants away from the applicants, whether for his own benefit or otherwise, for a period of 18 months from 28 February 2010.

[2] During argument Mr *Pienaar*, for the applicants, intimated that the applicants were prepared to accept a limitation of the restraint referred to in paragraph 1(a) to activities engaged in by the first respondent in the Port Elizabeth area.

[3] The proceedings were launched on 23 February 2010 on a semi-urgent basis and notice was given that the application would be moved on 9 March 2010. Service of the application papers was effected on 23 February 2010. The respondents were requested to file their answering papers by 2 March 2010.

[4] Answering papers (by the first respondent) were, however, only filed during the afternoon of 8 March 2010. Accordingly, the matter was postponed

on 9 March 2010 to 1 April 2010 with the costs reserved. In the interim replying papers were filed.

[5] By letter dated 3 February 2010 the applicants' attorneys had advised the first respondent that unless he gave a written undertaking by 5 February 2010, that, in effect, he would not become concerned with the second respondent, or any other firm competing with the applicants, and that he would adhere to the provisions of the restraint clause, the applicants would launch interdict proceedings against him and the second respondent. A copy of the letter was forwarded by the attorneys to the second respondent on the same date and the threat of legal proceedings was repeated. In further correspondence the stance of the applicants was affirmed.

The parties

[6] The first applicant, a close corporation trading as Broubart Security, carries on the business of the provision of security services (including *inter alia* the supply of security personnel, security equipment, and armed response, monitoring and investigation services) through its various branch offices in Port Elizabeth, East London, Aliwal North and George. The areas serviced are the Nelson Mandela Metropole, the Kouga magisterial district, George, the Aliwal North magisterial district and East London and surrounding areas encompassing the Border-Kei region consisting of the former Transkei, Ciskei and Border areas.

[7] The second applicant, a company trading as Umkhombe Security Services, carries on a similar business to that of the first applicant and in the same areas.

[8] The two applicants are associated corporate entities, each is registered as a security service provider in terms of the Private Security Industry Regulation Act 55 of 2001, their joint administrative head office is situated at 151 Oxford Street, East London and their joint principal place of business within the jurisdiction of this Court is situated at 11 Lawrence Street, Port Elizabeth.

[9] The first respondent was previously employed by the applicants, he having commenced such employment on 1 December 2007 in the capacity of investigations/operations manager – Port Elizabeth and surrounds. As will appear more fully below, the first respondent is at present in the employ of the second respondent.

[10] The second respondent carries on a similar business relating to the provision of security services in direct competition with the applicants. More particularly, the applicants and the second respondent compete in the same market in the Nelson Mandela Metropole.

[11] The applicants recorded in their founding papers that the second respondent was cited as an interested party and no relief was being sought against it, save for an order of costs in the event of the second respondent opposing the application. While the second respondent filed an affidavit in

support of the first respondent's response to the application, it did not itself seek to oppose the application.

Relevant principles applicable to the relief sought

[12] The relief sought by the applicants is a final interdict, the requirements for which are:

(a) a clear right;

(b) an injury actually committed or reasonably apprehended;

(c) the absence of any other satisfactory remedy.

[13] Disputes of fact on the papers fall to be resolved by the application of the well-known *Plascon-Evans* principles.

[14] The approach of the Court when requested to implement a restraint of trade provision is conveniently analysed in *Omni Technologies*,[1] with reference *inter alia* to the earlier case of *Reddy*.[2] In short, the Court exercises a value judgment on its assessment of the facts seen in the light of both common law principles as well as constitutional values (the first essentially embodied in the maxim *pacta servanda sunt*, the second essentially reflected in the provision in s 22 of the Constitution that every citizen has the right freely to choose his occupation).

[15] In particular, paragraph 11(f) of *Omni Technologies* reads in part as follows:

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[1] *Omni Technologies (Pty) Ltd v Barnard and Others [2008] 2 All SA 207.*

[2] *Reddy v Siemens Telecommunications (Pty) Ltd (2007) SA 486 (SCA).*

'In applying these two principal considerations the particular interests must be considered. A restraint is against public policy and unenforceable if it would prevent a party after termination of his or her employment from participating in trade or commerce without a corresponding interest of the other party deserving of protection. Five questions require to be answered when the reasonableness of a restraint is considered (the fifth one being implied by the third).

(i) Does the one party have an interest that deserves protection after termination of the agreement?
(ii) If so, is that interest threatened by the other party?
(iii) In that case, does such interest weigh up qualitatively and quantitatively against the interest of the other party not to be economically inactive or unproductive?
(iv) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires the restraint to be maintained or rejected?
(v) Does the restraint go further than necessary to protect the interest?

The first respondent's employment with the applicants

[16] The main founding affidavit, deposed to by Mr Wood, a member of the first applicant and director of the second applicant, recorded that during the first respondent's interview for the position it was explained to him:

(a) what the successful candidate's functions would be and what qualities and characteristics he should have;

(b) that the position in question was a senior one in which the employee would be exposed to the trade secrets, trade connections and confidential information of the applicants;

(c) that accordingly the appointee (as per the norm with all senior personnel) would be required to sign a restraint of trade agreement, for the protection of those secrets, connections and information.

The first respondent signified his agreement with those stipulations.

[17] A formal employment contract was signed by the parties on 11 January 2008. The restraint provisions were contained in clause 12 which read as follows:

> '12. CONFIDENTIALITY AND RESTRAINT
>
> 12.1 The Employee admits that he/she will become acquainted with the Employer's trade secrets and confidential information during the period of its employment which will include:-
>
> (a) Knowledge and influence over the clients of the Employer;
>
> (b) The contractual relationships between the Employer and its clients;
>
> (c) The financial details of the Employer's relationship with its clients and suppliers;
>
> (d) The name of potential clients and their requirements;
>
> (e) Such other particulars with relation to the business of the Employer which are not readily available in the normal course of the business of a competitor of the Employer.

12.2 The Employee admits that if he/she is engaged or obtains an interest in any other firm which competes with the Employer, it will affect the interests and rights of the Employer.

12.3 As a result the Employee agrees that he/she will not within a period of Eighteen Months as from the date of termination of this agreement without the prior written consent of the Employer become employed or obtain an interest, directly or indirectly, in any capacity whatsoever, in any business or undertaking which competes or intends to compete in any manner with the Employer in the Nelson Mandela Metropole and George Area. Agreement will however not apply should the employee be retrenched.

12.4 For so long as this agreement is in force, and for a period of three years after termination for any reason whatsoever, the Employee shall not entice, solicit or canvass any of the customers or employees of the Employer away from the Employer, whether for his/her own benefit or otherwise.

12.5 The Employee acknowledges that the aforesaid restraint is fair in relation to its ambit, geographical area and duration."

[18] An annexure to the agreement set out the job description of the first respondent's position. It was *inter alia* provided that one of his functions would be to promote the applicants' investigation services to existing and prospective clients of the applications. These services included the conduct of digital voice stress analysis (DVSA), a type of polygraph testing, a service that the applicants were the first to introduce in the Nelson Mandela Bay Metropole. The first respondent would receive training therein. The first

respondent was expected regularly to visit, and to build up a close relationship with, the customers of the applicants; hence, he was given full access to the applicants' client data base.

[19] During August 2009 the applicants undertook a restructuring of the applicants' Port Elizabeth branch. The first respondent was to be appointed operations manager who would focus on the retail clients of the applicants. Another employee was to be appointed operations manager to focus on the industrial/commercial clients of the applicants. Each operations manager would have a number of area managers, controllers and inspector who reported to him. The position of operations manager was a very senior position, subordinate only to the group operations manager, and the directors or members of the applicants. The operations manager would oversee and manage the entire operations of the applicants.

[20] A new contract of employment was signed by the first respondent on 17 September 2009, which reflected that the first respondent commenced his new position of operations manager on 1 September 2009. The restraint clause embodied in the contract was virtually the same as the clause in the earlier contract, save that the area of the restraint was now described as the Port Elizabeth area.

[21] The functions of the first respondent in the new position, as set out in the relevant job description, embraced *inter alia* the following:

(a) A major part of his daily tasks was to deal with the applicants' clients and his fellow employees;

(b) He was required to visit sites on a daily basis;

(c) He had to attend the management meetings of the applicants at the head office in East London. (Only the most senior personnel of the applicants attended these meetings and highly confidential issues were discussed at the meetings, eg business strategies, methods of delivery and improving services, marketing methods, the state of the applicant's business and the contractual relationship between the applicants and their clients);

(d) He had to be intricately involved in all investigations where incidents occurred;

(e) He was required to assess the performance of employees working under him;

(f) He, and not area managers, would attend to the liaising with clients.

It was the applicants' case that there functions were performed by the first respondent.

[22] Further allegations by Wood were the following: In his earlier capacity as investigations/operations manager and later as operations manager focussing on retail clients, the first respondent, in the course and within the scope of his employment with the applicants, had access to, and in fact gained intimate knowledge of, the applicants' customer data base, and

specifically the retail customer data base, in the Port Elizabeth area, including, in respect of each customer, the following information:

(a) the names and contact number of the clients;

(b) details of the pricing of the services rendered by the applicants;

(c) details of the customer's security requirements;

(d) the identity of the decision makers of the clients;

(e) critical costs limits for the applicants for services rendered in terms of existing contracts;

(f) the terms and conditions of the individual contracts, including the renewal dates thereof;

(g) any dissatisfaction expressed from time to time with the services rendered, the nature of the complaints, the ability and success of the applicants in addressing the complaints, and the impact thereon of the applicants' costs structures;

(h) the sites at which incidents occurred that might jeopardise contracts and the remedial steps taken;

(i) the nature and extent of the cost to company components;

(j) the income derived from services rendered;

(k) the critical control measures of all costs factors relevant to the efficient and economical rendering of such services;

(l) the staff employed by the applicants to render services, their salary structures, incentive and performance schemes, the terms and conditions of their employment, and their performance history.

[23] The extent to which the first respondent placed the above allegations in issue will be addressed later.

The first respondent's employment with the second respondent

[24] The first respondent took his annual leave from the applicants' employment from 18 January to 8 February 2010, but resigned in the interim and took up employment with the second respondent on 1 March 2010 in the capacity of operational manager.

[25] The answering papers make *inter alia* the following averments:

(a) The first respondent's duties in his employment with the second respondent are those of the project manager of a single customer, MTN, supplying security services at 280 MTN sites nationwide, with only four of the sites falling within the Port Elizabeth area; accordingly, 95 % of his work will be performed outside Port Elizabeth.

(b) The first respondent is nevertheless based in Port Elizabeth for logistical and practical reasons.

(c) MTN is not an existing client of the applicants.

(d) The second respondent renders services to MTN of the same nature as the applicants render to their clients.

[26] It is also alleged that if the first respondent were to be obliged to relocate from Port Elizabeth his wife would have to give up her employment in this city and seek replacement employment in the other venue.

The issues

[27] In his answering papers the first respondent essentially raised three defences:

(a) that the matter was not urgent so as to require it being heard outside the normal time periods prescribed in the rules;

(b) that the restraint invoked by the applicants is unreasonable;

(c) that the applicants have not demonstrated that they have a protectable interest.

Urgency

[28] In argument, the first respondent did not pursue the defence of an alleged lack of urgency save in the limited respect of the wasted costs occasioned by the postponement of the proceedings on 9 March 2010. In short, the contention was that the applicants, when launching the proceedings on 23 February 2010, were not justified in fixing 9 March as the date of the hearing and requiring the first respondent to file his answering papers by 2 March 2010; the applicants ought to have foreseen that the period allowed

would prove to be too short and that a postponement of the matter on 9 March would inevitably follow.

[29] Mr *Pienaar* referred me to numerous authorities to the effect that applications to enforce restraint of trade agreements are, by their nature, characterised by a measure of urgency. I agree with this approach, and I am persuaded that it is of application in this matter.

[30] It is not without some relevance that in correspondence which commenced on 3 February 2010 the first respondent was forewarned that the applicants intended to launch the interdict proceedings.

[31] The founding affidavit of Word comprised 40 pages, and the annexures thereto a further 75 pages. The answering affidavit was also 40 pages, with 40 pages of annexures.

[32] It may well be, as Mr *Pienaar* submitted, that the failure of the first respondent to adhere to the time frame stipulated in the notice of motion, was in part to be ascribed to the stance adopted by his attorneys in correspondence and by himself in the answering affidavit, that the matter was not urgent (a stance that was wrong). Nevertheless, I have some understanding of the first respondent's inability to adhere to the time frame stipulated. On the other hand, I am not persuaded that the applicants acted unreasonably in setting that time frame. In my view, a fair exercise of my discretion in the matter of costs, would be to hold that the wasted costs in question be costs in the cause.

The first respondent's undertaking

[33] As regards the relief set out in prayer 2.2 of the notice of motion (the relief referred to in paragraph 1 (b) above) reliance was placed on the first respondent's behalf on the fact that prior to the launch of the proceedings his attorneys had conveyed to the applicants' attorneys an undertaking that he would not entice, solicit or canvass any of the existing customers or employees of the applicants away from the applicants.

[34] The argument was therefore that while the first respondent consented to an order in terms of prayer 2.2., it had been unnecessary, in the light of the undertaking, for the proceedings to have been launched, and the applicants were accordingly not entitled to their costs.

[35] In my judgment, however, Mr *Pienaar* correctly submitted that the applicants were not obliged to be content with the undertaking. First, it is not to be gainsaid that in taking up employment with the second respondent, a direct competitor of the applicants, the first respondent already acted in breach of the restraint of trade stipulations. Second, as will be shown below, the first respondent is possessed of confidential information that could be utilized to entice customers and employees away from the applicants.

[36] In this regard the following comments in Reddy[3] are opposite:

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[3] Note 2 above, paras [20] *et seq.*

'[20]……Reddy is in possession of trade secrets and confidential information of Siemens. Moreover, shortly before his resignation from Siemens, he attended a training course updating his knowledge of the processes, methodologies and systems architecture developed by Siemens. Information of this kind, if disclosed, could be used to the disadvantage of Siemens. This is not a case such as *Basson v Chilwan* where an employer's application to assert a protectable interest in respect of customer connections against an ex-employee who had no such connections was dismissed. Reddy is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively, is obvious.

It is not that the mere possession of knowledge is sufficient, and this is not what was suggested by Marais J in *BHT Water* : Reddy will be employed by Ericsson, a 'concern which carries on the same business as [Siemens]' in a position similar to the one he occupied with Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist. The restraint was intended to relieve Siemens precisely of this risk of disclosure. In these circumstances the restraint is neither unreasonable nor contrary to public policy. I agree with the remarks of Marais J in *BHT Water*:

'In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the *bona fides* or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given…. In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant. Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the services of a competitor.'

[21] Public policy requires contracts to be enforced. This is consistent with the constitutional values of dignity and autonomy. The restraint agreement in this matter is not against public policy and should be enforced. Its terms are reasonable. What Reddy is required to do is to honour the agreement he entered into voluntarily and in the exercise of his own freedom of contract. While it is correct that his employment with Ericsson will be restricted, it remains a breach of his contractual undertaking. It follows that it is no answer to suggest that an undertaking would be sufficient to protect Siemens' interests and that less restrictive means could therefore achieve the same purpose as enforcing the restraint (s 36(1) *(e)*). Such an approach was followed by the High Court of England and Wales in the Queens Bench Division in *Gordian Knot Ltd v Kenneth Towers*.
However, in *The Littlewoods Organisation Ltd v Harris*
c d Scorer v Seymour Jones Freight Bureau (Pty) Ltd v Kruger and Another
Lord Denning MR remarked, and I agree with his observations:

> 'It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practical solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.'

Protectable interest

[37] It was the submission of Mr *Pienaar* that the applicants have shown an interest worthy of protection, at least in that the first respondent has built up customer connections and has acquired confidential information and trade secrets of the applicants (such connections, information and secrets constituting in law protectable interests[4]). Any contrary suggestion, in respect of someone who held a senior position in the applicants' organization for as long as the first respondent did, would, so the argument continued, make nonsense of logic.

[38] One averment made by the first respondent in response to the allegations made by the applicants may be given short shrift. He claimed that the issue of a restraint position had not been discussed with him, that he had not been permitted to read either of his contracts of employment (and was therefore unaware that he was subjecting himself to any restraint) and that he had been required simply to sign the contracts, the first because it was a standard contract, the second because it related to his promotion. The averment is untenable and, while adverting thereto, Mr *Scott*, for the

[4] See eg: *Bovidale Investments (Pty) Ltd t/a Nashua Western Cape v Nel* 2008 JDR 004 (C); *BHT Water Treatment (Pty) Ltd v Lesley* 1993 (1) SA 47 (W); *Value Logistics Ltd v Van Zyl* [2009] JOL 23613 (GNP); *MGK Bedryfsmaatskappy (Edms) Bpk v Trollip* [2006] JOL 18630 (T); *North Safety Products (Africa) v Nicolay and Others* [2007] 3 All SA 647 (C); *Startrap Systems (Pty) Ltd v Engelbrecht* [2006] JOL 18294 (W).

respondent, understandably intimated that it was not part of his argument that the first respondent was not bound by the restraint provisions. Similarly, it was not in dispute that the job descriptions referred to earlier applied to the first respondent's employment with the applicants.

[39] Counsel sought, however to support the first respondent's denials that he built up any connections with customers or acquired confidential information or trade secrets relating to the applicants' business. Counsel accepted that after the first respondent's promotion there was a greater chance that such events would have occurred, but he sought to emphasise that the first respondent had only held the more senior position for a period somewhat in excess of 4 months.

[39] The first respondent's averments invoked by counsel proceeded *inter alia* as follows:

(a) It was only during an investigation conducted by him after an incident had occurred at the premises of a client that he had any contact with any clients, and then only those that fell into a certain category, namely those that had periodical voice stress tests as part of their contracts. Such investigations, he estimated, had occurred a maximum of three times per month, and almost invariably there would be no interaction between him and the client in person.

(b) While, with the passage of time, he obviously became familiar with the sites of clients and who the managers were, he did not perform a marketing or liaison function, and no relationships developed between him and the customers.

(c) The visits he made to sites, and the subsequent reports compiled by him, were what he termed operational in nature and information relating to a particular incident was not confidential in nature, and was valueless.

(d) No data base of clients was made available to him, nor did he have any insight into any of the applicants' pricing mechanisms, nor was he exposed to any future business or strategic plans of the applicants.

(e) He had only attended one management meeting in East London, and the only matters discussed at the meeting were of a routine operational nature.

[39] Accordingly, so it was contended, the first respondent had not come by anything that could be regarded as a protectable interest; in short, he could not be, and was not, a threat to any business interest of the applicants.

[40] The averments and contentions cannot be accepted. In *Value Logistics*[5] it was said, correctly, that the criteria to be applied in deciding whether an employee has had access to customers and is in a position to build up particular relationships with customers, so that on his leaving his employer's service he could easily induce the customers to follow him to a new business, are essentially a question of fact. I further align myself with the approach reflected in the following passage from the judgment:

> 'Common sense should prevail that within the four years that the first respondent spent in the employ of the applicant he must have learnt of the style of entertainment offered by the applicant to its customers and must also have obtained trade secrets

[5] Note 4 above.

> as protectable proprietary interests of the applicant. The first respondent during that period must have fostered a close and ongoing relationship with the customer connections and built up extremely close relationships with the applicant's customers.'

[41] The comment may be made that even on his own version the first respondent had direct contact with at least some of the applicants' customers. There is no suggestion why such contact should not have been the foundation of a relationship. He also would have become aware of customers who, consequent upon an incident occurring, might have harboured some dissatisfaction with the applicants' service, and who would therefore have been susceptible to overtures to take their custom elsewhere.

[42] But the whole picture painted by the first respondent is an improbable one, and highly so. If his activities were in fact limited to the very occasional visits to a site for the purpose of investigating an incident and reporting thereon, one wonders what he did with the rest of his time. Even on his version of the nature of his activities it cannot be accepted that there was not close interaction between him and the client in question. He is vague as to what the content was of the one meeting in East London he admits attending, ie the discussion 'of a routine operational nature'. In this regard, it may be mentioned that he does not deny attending other meetings in Port Elizabeth. One queries, too, why the terms of his job descriptions, admittedly applicable to him, would not have been implemented and, in particular, those applicable to him after his promotion when he was to focus on retail clients, and, as it were, to head that department. Common sense dictates a finding that the first

respondent did develop the customer relationships and acquire the knowledge required to constitute protectable interests in the hands of the applicants.
(A comparison may be had with the approach in *Fidelity Guards*[6] where, in a somewhat similar matter, a denial by the employee of the acquisition of relevant knowledge concerning matters relating to his employer's business was held not to have the ring of truth and so against the probabilities that it fell to be rejected).

[43] It was argued on behalf of the first respondent that in the light of the *de facto* position that obtains (the first respondent being assigned to be project manager for a single client, MTN) it was not open to the applicants to contend that the prospect of his prejudicing the applicants' protectable interest in his present employment could not be excluded. I do not agree. The first respondent's loyalty is now owed to the second respondent and his bending to pressure by his present employers, which is not unlikely, is not improbable. It is against the risk of this happening that the applicants are entitled to invoke the relevant restraint provision.

Should the restraint be implemented?

[44] An allied argument on behalf of the first respondent was that the applicants' preparedness, signified during the hearing, to accept the first respondent's employment by the second respondent subject thereto that the first respondent is not so engaged in the Port Elizabeth area underlined the contention that it would not be proper for any restraint against the first respondent's being employed by the second respondent to be enforced. It

[6] *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SEC).

was said that being stationed elsewhere than in Port Elizabeth would not prevent the first respondent from acting together with the second respondent (if they were so minded) to the prejudice of the applicants. Therefore, the restraint had no virtue, and certainly did not weigh up against other considerations such as the first respondent having to relocate and his wife having to give up her present employment.

[45] The answer to the submission is that the first respondent, when employed by the applicants, was stationed in Port Elizabeth and it was in respect of the applicants' clients in the Port Elizabeth area that the applicants' protectable interests in the form of customer relationships, confidential information and trade secrets came into being; and, whether or not the first respondent could do some damage to the applicants even if he were employed by the second respondent elsewhere, it would be while he was working in Port Elizabeth that he would more effectively be able to prejudice the applicants' interest. If the applicants are prepared to restrict their protection to the extent in question, they are entitled to do so, and it is no ground to deny them any protection. It was not contended on behalf of the first respondent that he would not be able to obtain alternative employment if the restraint sought were to be enforced. If the first respondent opts to relocate in order to work for the second respondent and his wife has to leave her present employment, that would be an unfortunate result that must yield to the legal rights of the applicants. The questions referred to in paragraph 15 above are answered in the applicants' favour. The requirements for the grant of a final interdict have been met.

Order

[46] In the result, the following order is issued:

(1) The first respondent is interdicted and restrained from being employed or obtaining any interest, directly or indirectly, in any capacity whatsoever, in any business or undertaking, conducted in the Port Elizabeth area, more particularly the second respondent, which competes or intends to compete in any manner with the applicants in the Port Elizabeth area within a period of 18 months from 28 February 2010.

(2) The first respondent is interdicted and restrained from enticing, soliciting or canvassing any of the customers or employees of the applicants away from the applicants, whether for his own benefit or otherwise, for a period of 18 months from 28 February 2010.

(3) The costs of the application will be paid by the first respondent, including the wasted costs occasioned by the postponement on 9 March 2010.

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F KROON
Judge of the High Court

Appearances:

For the applicants:

Adv B J Pienaar
Instructed by:
Schoeman Oosthuizen Inc
Port Elizabeth
(Ref: Mr S Oosthuizen/cl/C00893)

<u>For the 1st respondent:</u>

Adv P W A Scott
Instructed by:
Fredericks Incorporated
Port Elizabeth
(Ref: Mr C Beyleveld/LK)