IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 2270/2010
Date Heard: 21 October 2010
Date Delivered: 7 December 2010

In the matter between:

HAWKWIND CC Applicant

and

SALOMIE GODDARD Respondent

JUDGMENT

EKSTEEN J:

[1] This is an application in which the applicant seeks to enforce a covenant in restraint of trade against the respondent. The applicant, Hawkwind CC, conducts a panelbeating business in Port Elizabeth under the name and style of "Auto Bodyworks". The respondent was employed by Auto Bodyworks in 2004 and she entered into a written contract of employment which included a covenant in restraint of trade. On 19 May 2010 the respondent left the employ of Auto Bodyworks of her own volition. The applicant accordingly now seeks to enforce the restraint of trade, albeit only partially.

[2] The application has a somewhat unusual history. Initially, in response to the applicant's founding papers in the application, which was launched as a matter of urgency, the respondent did not address the merits of the application but rather contented herself with an affidavit raising only a number

of points *in limine*. When the matter was called before Dambuza J the parties moved for an order by consent which was duly granted. After the granting of this order obtained by agreement between the parties the respondent continued to ply her business which is more fully set out below. The applicant contended that its attorneys had agreed to an order which was not in accordance with the instructions it had given and which was detrimental to it. The applicant's attorney of record recognised that it had erred in the understanding of its instructions and an application was accordingly moved to rescind the order given by Dambuza J. Chetty J rescinded the order and reserved the costs occasioned by the application for rescission. Subsequent to the rescission order the respondent filed further affidavits in which she has addressed the merits of the application. Replying papers have now also been filed.

[3] Thus the matter came before me. Before me the respondent persisted in only one of the points *in limine* which had been raised in her original affidavits. I shall revert to this aspect below.

<u>History of the covenant</u>

[4] The respondent was employed by Auto Bodyworks during or about 2004. She was employed as a "sales representative". Respondent alleges that her instruction upon employment was to do whatever was necessary to increase business for Auto Bodyworks, which included fostering sound relationships with brokers in an attempt to ensure that Auto Bodyworks was recommended to their insured clients who required motor vehicle repairs.

[5] This function is to be viewed in the context of the panelbeating business in Port Elizabeth. It is not in dispute that the panelbeating business in Port Elizabeth is an extremely competitive trade and there are at least 120 panelbeaters in the greater Port Elizabeth/Uitenhage area. Of these, the applicant says, and it is not disputed, probably 8 dominate the market. The applicant is one of those. Mr Mandel ("Mandel"), states that the bulk of the work done by the applicant is referred to it by insurance brokers. This is due to the fact that the vast majority of motor vehicles on the road are comprehensively insured. When a motor vehicle becomes damaged the owner submits an insurance claim. These claims are usually dealt with by insurance brokers. The insurance broker recommends a panelbeater to his client.

[6] Mandel says that brokers are able to "channel, for want of a better word, the instructions concerned" to a panelbeater with which he has a relationship. This phrase forms the subject of much dispute in the papers, the respondent denying that brokers have the ability to "channel" work to a particular panelbeater. The dispute is more apparent than real. It is not in dispute that brokers do guide their clients and do recommend to their clients which repairer should be used. They clearly do have a very considerable influence in determining where the work would be referred, which may impact significantly upon the income of a particular panelbeater. Indeed the respondent states that the relationships between the applicant and the brokers which have supported Auto Bodyworks have been established for the

main part, during her employment with Auto Bodyworks during which period such relationships have yielded substantial income.

[7] Upon taking up employment in 2004 as a “sales representative” with the mandate to foster such close relationship with the brokers the respondent signed a contract of employment. The contract signed in 2004 does not form part of the papers. The applicant contends that the contract contained a covenant in restraint of trade. The respondent does not recall such a clause. Whatever the position may have been in 2004 the original contract has been overtaken by events in that a revised contract was entered into between the parties in October 2008. The contract signed in 2008 does indeed contain a covenant in restraint of trade.

[8] The applicant now seeks to enforce the covenant. The essence of the applicant’s case is that the applicant has acquired considerable goodwill in the trade and in particular cemented relationships with brokers, which relationships are important for the reasons which I have set out above, if not essential, for the conduct of the applicant’s business. It is essentially this trade connection between the applicant and brokers that it is sought to protect.

Respondent’s point *in limine*

[9] The respondent asserts *in limine* that she was not employed by the applicant at all. She avers that she was employed by Mandel in a business of which she was advised that Mandel was the sole owner. The business was

known as Auto Bodyworks and she has consistently been employed by Auto Bodyworks. She denies that she ever concluded a contract of employment with the applicant, being Hawkwind CC, and accordingly she contends that she has not entered into a covenant in restraint of trade in favour of the applicant. The applicant, she argues, is a distinct and separate legal persona from Mandel and therefore the applicant has no *locus standi*.

[10] It is not in dispute that the applicant, Hawkwind CC, trades as "Auto Bodyworks" from 29 Kempston Road, Sidwell, Port Elizabeth. Mandel is the controlling member of the applicant, he holding 69% of the member's interest in the close corporation. It is not argued that Mandel also conducts another business in his personal capacity under the name and style of "Auto Bodyworks". It is abundantly clear from the papers that there is only one "Auto Bodyworks" and that the applicant was employed by this business. Indeed her contract of employment describes her workplace as being "the employer's premises at 29 Kempston Road, Sidwell, Port Elizabeth". It appears rather to be the respondent's case that she was always led to believe that Mandel was the sole owner of the business and that she was not aware that she was employed by a corporate entity.

[11] It is, however, common cause, as I have stated above, that the original contract of employment has been superseded by a written contract of employment which was subsequently signed by both parties in October 2008. The contract of employment refers to the "employer" as "Auto Bodyworks". The respondent is the employee. Auto Bodyworks, as I have said, is the

trading name of the applicant. *Ex facie* the contract of employment the applicant is employed as "company sales representative". In terms of clause 10 of the agreement she was afforded the use of a "company vehicle" and a "company cell phone". The restraint clause to which I shall revert in greater detail below, provides that the respondent "shall not … for the benefit of any … person be employed, solicit, interfere with or endeavour to entice from <u>the company</u>, … any person, client, … who at any time is or was a client of, … <u>the company</u> or delivered services for and on behalf of <u>the company</u>" (my emphasis). The contract of employment therefore indicates, at face value that Auto Bodyworks, which was the employer, was a corporate entity.

[12] The respondent has further annexed to her affidavit certain payment advices issued to her. Each of these payment advices reflects the "company" to be "Auto Bodyworks". Auto Bodyworks is the applicant. It is not in dispute that the applicant trades under the name and style of Auto Bodyworks. In my view it is abundantly clear that the respondent was perfectly aware in concluding the contract with Auto Bodyworks that she was contracting with the applicant. The fact that the agreement refers to her employer by its trading name does not detract from this.

[13] Finally, in her endeavour to establish that she did not contract with the applicant reliance is placed on section 29 of the Basic Conditions of Employment Act, 75 of 1997. Section 29 of the Basic Conditions of Employment Act provides that an employer must supply an employee, when the employee commences employment, with a number of details, including,

the full name and address of the employer. This, it is contended, the applicant failed to do. Section 29 of the Basic Conditions of Employment Act places certain obligations upon an employer. Failure to comply with those prescripts may result in the imposition of a fine upon the applicant in terms of the provisions of section 69 of that Act. It does not render the agreement void. I do not consider that section 29 is of any assistance in the enquiry as to whether the respondent in fact contracted with the applicant. I have no doubt that she did. The argument to the contrary is spurious.

The relief which the applicant seeks

[14] The covenant in restraint of trade which the applicant seeks to enforce partially is contained in clause 22.4 of the Contract of Employment concluded in October 2008. It reads as follows:

> "22.4 The employee shall not at any time, either for his/her own account or for the benefit of any other person, business, firm or company, be employed by, solicit, interfere with or endeavour to entice from the company or any of its affiliates, any person, client, firm or company or other associate who at any time is or was a client of, or dealt with the company or delivered services for and on behalf of the company. This clause will remain effective for a period of (24) twenty four months after termination of this agreement for any reason whatsoever."

[15] It is immediately apparent that this clause is extremely wide in its scope, it being, *inter alia*, unlimited in area. The applicant recognises this and in its original Notice of Motion it already sought to narrow it down so as to find application only in Port Elizabeth and Uitenhage.

[16] The order which was taken by agreement between the parties limited the application of the restraint even further. It read as follows:

> "1. That the respondent is restrained and interdicted from directly or indirectly conducting any business dealings related to the panelbeating industry with the brokerages referred to by the applicant in paragraph 20 of the affidavit of David Bernard Mandel until 4th of May 2011 insofar as such business dealings are conducted within the Magisterial District of Port Elizabeth."

[17] In paragraph 20 of the founding affidavit Mandel had listed by name a number of brokers with whom he contended that the respondent had formed a close relationship.

[18] In the application for rescission, however, the applicant gave notice of its intention to seek an order which is similar, in many respects, to that issued by Dambuza J, but seeking to set out a more extensive list of brokers. The order sought in that Notice of Motion reads as follows:

> "1. …
>
> 2. …
>
> 3. …
>
> 4. An order restraining an interdicting the respondent, for a period of (24) twenty four months, calculated from the 4th of June 2010, and within the Magisterial District of Port Elizabeth, either for her own benefit or for the benefit of any other person, from soliciting panelbeating work for any person from:
>
> 1. …
> 2. …
> 40. …".

[19] When heads of argument were filed prior to the hearing of the matter before me the applicant annexed to its heads of argument a draft order which it now seeks. The draft order narrows down the restraint still further reducing the duration thereof to 30 September 2011 and reducing the number of brokers on the list. The order which is now sought reads as follows:

"1. Until the 30th of September 2011 the respondent is restrained and interdicted from being employed by, soliciting work from, interfering with the applicant's relationship with, or endeavouring to entice away from the applicant the following brokerages:

1. ABEX Brokers
2. Absa Brokers
3. Alexander Forbes
4. Assest Insurance Brokers
5. AON
6. Ballast Insurance Brokers
7. Bonnie Slabbert Brokers
8. Bouwer Collins
9. Breakaway Brokers
10. Brian Kemsley Brokers
11. Broadrisk Services
12. Brolink
13. David Rensburg
14. DHL Supply Chain
15. Fanie du Preez Brokers
16. FCG
17. FNB Insurance Division
18. Glynis Baudin Brokers
19. Gorch & Associates
20. Hannes Scheepers Brokers
21. Indwe
22. Leonie Hunt Brokers
23. Linette Jacobs Brokers
24. Maxifinn
25. Meudene Steyn
26. Mutitt Insurance Brokers
27. Noel Harvey
28. PSG Consult
29. Robin van Rensburg
30. Scotrho Insurance Brokers
31. Skybound
32. Spectrum

33. Spectrum Brokers
34. St Francis Brokers
35. STB
36. Susan Brophy
37. Telesure/Auto & General
38. Walmer Insurance Brokers
39. Werner Vosloo Brokers

insofar as the activities of the abovementioned brokers relate to panelbeating work carried out or to be carried out within the Magisterial District of Port Elizabeth."

Legal enforcement of covenant in restraint of trade

[20] Covenants in restraint of trade have been held to be valid and enforceable unless they are unreasonable and contrary to public policy. (Cf ***Magna Alloys and Research (SA) (Pty) Limited v Ellis*** 1984 (4) SA 874; and ***Basson v Chilwan and Others*** 1993 (3) SA 742 (A) at 767B-E.) It has also repeatedly been held under the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) that a restraint that is found to be reasonably required for the protection of the party who seeks to enforce it is constitutionally permitted. (Cf ***CTP Limited and Others v Independent Newspapers Holdings Limited*** 1999 (1) SA 452 (W) at 468G-H; ***Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain*** 2001 (2) SA 853 (SE) at 861F-862G (SA); and ***Reddy v Siemens Telecommunications (Pty) Ltd*** 2007 (2) SA 486 (SCA) at 495D.)

[21] Customer goodwill is an asset of an employer and becomes a trade connection of the employer which is capable of protection by way of a restraint of trade (see ***Recycling Industries (Pty) Limited v Mohammed and Another*** 1981 (3) SA 250 (SE) at 258; ***Rawlins and Another v***

Caravantruck (Pty) Limited 1993 (1) SA 537 (A); ***Paragon Business Forms (Pty) Limited v Du Preez*** 1994 (1) SA 434 (SE) at 444; and ***Bridgestone Firestone Maxiprest Limited v Taylor*** [2003] 1 All SA 299 (N) 303i-304a).

[22] The ratio for this protection was set out Nestadt JA in ***Rawlins and Another v Caravantruck*** *supra* at 541C-F as follows:

> “The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business (Joubert *General Principles of the Law of Contract* at 149). Heydon *The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that the 'customer contact' doctrine depends on the notion that
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> 'the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket'.
>
> In *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires
>
> 'such personal knowledge of and influence over the customers of his employer . . . as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection . . .'. “

[23] Whether such a “customer contact” exists which may be validly protected by a restraint covenant is a question of fact – each case is to be decided on its own individual facts and circumstances (see ***Paragon Business Forms (Pty) Limited v Du Preez*** *supra* at 444H and ***Rawlins and Another v Caravantruck*** *supra* at 541G-H). It was sought in argument

before me to distinguish between brokers on the one hand and customers on the other. This distinction, in my view, is artificial. The brokers have, as I have set out before, a considerable influence in respect of the panelbeater to which work will be referred. They represent groups of customers and their goodwill is a valuable trade connection for any panelbeater.

[24] Once a covenant in restraint of trade is found to exist the onus rests upon the party seeking to avoid the consequences of its contract to show, judged upon the circumstances which exist at the time when the application is made, that the restraint was an unreasonable one and therefore against public policy. (See ***Magna Alloys Research SA (Pty) Limited v Ellis*** *supra*; ***Rawlins and Another v Caravantruck*** *supra*; ***Reeves and Another v Marfield Insurance Brokers CC and Another*** 1996 (3) SA 766 (A) at 775H-776F; and ***Townsend Productions (Pty) v Leech and Others*** 2001 (4) SA 33 (C) at 48B.)

<u>An interest worthy of protection</u>

[25] It may be accepted that where a covenant in restraint of trade serves exclusively to eliminate competition and does not have as its aim the protection of a legally recognisable interest worthy of protection the restraint would be considered unreasonable and thus contrary to public policy and therefore unenforceable. (Compare ***Automotive Tooling Systems (Pty) Limited v Wilkens and Others*** 2007 (2) SA 271 (SCA) at 277G-278B.)

[26] It is the applicant's case that the covenant in the restraint of trade is

aimed at the protection of its trade connections which arise from the fact that the respondent, as an employee, has had access to brokers and that she has built up a particular relationship with these brokers which now enables her to take advantage of the applicant's trade connections in her new employment. In ***Rawlins and Another v Caravantruck*** *supra* at 541 Nestadt JA held that whether this has been established is essentially a question of fact in each case, and in many, one of degree. He held at 541G-I:

> "Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left."

[27] It is not in dispute that the bulk of the work done by the applicant in its business is referred to it through the intercession of insurance brokers. This is so because the vast majority of motor vehicles on the road are comprehensively insured. On each occasioned that such a vehicle is damaged it is, as I have previously stated, inevitably referred to an insurance broker. For this reason the applicant contends that it is essential to maintain a close and friendly relationship with the brokers which support it and these relationships must be built up carefully and over many years by means of the usual sort of canvassing involving dinners, gifts and the like and the establishment of close personal relationships. These relationships are of the utmost importance to the applicant. Applicant states that there are seven or

eight top panelbeaters in the Port Elizabeth/Uitenhage area, all of which have the ability to produce excellent work and there is no doubt that they are able to compete with one another on an equal footing. In these circumstances there has to be some other element which would cause a broker to recommend one panelbeater rather than another and this is the personal relationships upon which the applicant relies.

[28] Whilst a great deal is made in the papers of the terminology employed by the applicant it is not in dispute that insurance brokers, by virtue of the position which they occupy vis-à-vis the insured and by virtue of their regular contact with the panelbeating industry are able to make recommendations to their clients and to guide their clients in respect of which panelbeater to utilise. This will be particularly so where the choice lies between seven or eight panelbeaters of equal competence as exists in the Port Elizabeth/Uitenhage area. Indeed the respondent herself states that the relationship between the applicant and brokers which have supported Auto Bodyworks have been established, for the main part, during the period that she was employed by Auto Bodyworks and that such relationships "have yielded substantial income".

[29] The respondent was employed by the applicant for a period of some six years. Throughout the duration of her employment she was a "sales representative and/or marketer". She acknowledges, as recorded earlier, that the sum total of her instructions from Mandel at the time that she took up her employment was "to do whatever was necessary to increase business for

Auto Bodyworks, which included fostering sound relationships with brokers in an attempt to ensure that Auto Bodyworks was recommended to their insured clients who required motor vehicle repairs”. She confirms that she proceeded to form such relationships with as many brokers as she could in order to create an awareness of Auto Bodyworks with brokers in Port Elizabeth. On her own version of events, as I have stated above, she acknowledges that the relationships which she established yielded substantial income.

[30] Respondent acknowledges too that she was encouraged to engage with brokers on as many levels as possible with the ultimate goal that Auto Bodyworks was the first name which entered the broker’s mind when confronted with a claim. It is not contested that the applicant encouraged the respondent to take brokers out for lunches to become familiar with their personal circumstances, the details of their birthdays and the like, to send them cards and gifts on their birthdays, to participate in sporting events with them and the like. Applicant contends that no effort was spared in attempting to bind the brokers concerned to the applicant. The applicant declares, and it is borne out by the respondent’s papers, that the respondent proved to be adept at her job.

[31] The evidence clearly establishes that the respondent had access to brokers and was placed in a position to build up particular relationships with those brokers and to acquire personal knowledge of and influence over such brokers. She was good at this. She interacted with them as frequently as possible over an extended period at the expense of the applicant. Her contact

with the brokers extended to every level of her professional and social life.

[32] In these circumstances I have no doubt that she has indeed formed an attachment with these brokers. The respondent acknowledges that she has formed "personal associations" with the brokers. This appears to be borne out by her acknowledgement that many of the brokers listed in the Notice of Motion have indeed contacted her to enquire as to what was transpiring and where she was currently working. This statement, in itself, in my view, goes a long way towards establishing that the respondent, by her contact with the brokers, has succeeded in forming a strong attachment to these brokers.

[33] I have referred above to the competitiveness of the panelbeating industry in Port Elizabeth/Uitenhage and in particular amongst the top seven or eight businesses. It is not in dispute that the other competitors also call upon brokers and endeavour to form an attachment in order to influence the recommendations made by such brokers. Indeed, the respondent is currently doing exactly that on behalf of certain panelbeaters. This necessarily places the applicant's trade connections at greater risk. The respondent states that she has attempted since leaving the employ of the applicant to interact with as many brokers as possible in an attempt to ply her trade. She states that she has advised most of the brokers in Port Elizabeth that she has commenced business as an independent representative. The applicant has annexed to its founding papers a pamphlet which, by the admission of the respondent, is being handed out by the respondent to brokers. The front page of the brochure reads as follows:

"APPROVED REPAIRERS & SAMBRA CERTIFIED.

DENYS EDWARDES

AUTOTRUST

AUTOSMART

DUNET

TECHNIBAKE

(REPAIRERS ALSO AVAILABLE IN THE KOUGA REGION)"

[34] On the second page of the brochure the applicant's name and particulars are reflected. Below that the following appears:

"AUTOMOTIVE APPROVALS ON WARRANTEE VEHICLES: MAJOR STRUCTURAL REPAIRERS AND SAMBRA CERTIFIED
GM
Opel
Delta
BMW
Mercedes-Benz
Honda
Hyundai
Chevrolet
Toyota
Ford
Mazda
SAAB
Peugeot
Landrover
Audi
Citroën
Seat
Cadillac
Volkswagen
Smart
Chrysler
Mitsubishi
Hummer"

[35] The applicant states that the wording in the heading of the document

”Automotive Approvals and Warranty (SIC) vehicles” advertises to whomsoever might read the pamphlet concerned that the applicant is able to obtain approval for the repairers of the makes of vehicles listed if the work is channelled to panelbeaters referred to in the pamphlet, namely, Denys Edwards, Auto Trust, Auto Smart, Dunet and Techni Brake, which are large panelbeaters which trade in direct competition with the applicant.

[36] The interpretation and objective which the applicant attributes to the pamphlet is admitted by the respondent. I think correctly. She further admits that she has formed relationships with the panelbeaters referred to in the pamphlet. It is also not in dispute that the respondent has been visiting insurance brokers with whom the applicant had a relationship through the respondent and with whom the respondent had dealt on behalf of the applicant while she was employed by it.

[37] In all the circumstances I am persuaded that the applicant has indeed established that these trade connections constitute a proprietary interest worthy of protection and that the present activity of the respondent threatens this interest.

[38] The matter does not however end there.

Reasonableness of enforcement of restraint

[39] Niehaber JA in ***Basson v Chilwan*** *supra* considered the reasonableness of the enforcement of a covenant in restraint of trade. He identified four questions which require consideration being as follows:

(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 interests 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 may be maintained or rejected?

Where the interests of the party sought to be restrained weighs more heavily than the interests to be protected, the restraint is unreasonable and consequently unenforceable.

[40] In ***Reddy v Siemens Telecommunications*** *supra* at 497-498 Malan AJA, considering the constitutionality of restraints with reference to these questions posed by Nienaber JA held as follows:

> "The common-law approach in balancing or reconciling the concurring interests in this manner gives effect to the precepts of s 36(1) of the Constitution:

> 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> *(a)* the nature of the right;
> *(b)* the importance of the purpose of the limitation;
> *(c)* the nature and extent of the limitation;
> *(d)* the relationship between the limitation and its purpose; and
> *(e)* less restrictive means to achieve the purpose.'
>
> An agreement in restraint of trade is concluded pursuant to 'law of general application' referred to in s 36(1). What is meant by this expression includes the law in the general sense of the legal system applicable to all which, in this case, consists of the corpus of law generally known as 'the law of contract' and which allows for contractual freedom and the conclusion of agreements pursuant thereto.
>
> The four questions identified in *Basson* comprehend the considerations referred to in s 36(1). A fifth question, implied by question *(c)*, which may be expressly added, viz whether the restraint goes further than necessary to protect the interest, corresponds with s 36(1)*(e)* requiring a consideration of less restrictive measures to achieve the purpose of the limitation."

[41] The first two questions posed in ***Basson v Chilwan*** *supra* have been dealt with above.

[42] The third question postulated by Nienaber JA in ***Basson v Chilwan*** *supra* encapsulates the fifth question which was set out by Malan AJA in ***Reddy v Siemens Telecommunications*** *supra*. I shall consider these two enquiries together.

[43] It is common cause between the parties that the covenant in restraint of trade couched as it is has been too widely drawn and is unreasonable. The applicant has from the outset recognised that the covenant, which does not

stipulate any particular area, requires limitation. The respondent, for her part, has in addition protested that the duration of the covenant is unreasonable in the circumstances of the case. This too the applicant now recognises. In the order which is currently sought by the applicant it does not seek to prevent the respondent from plying her trade generally, even in the Magisterial District of Port Elizabeth, but limits the relief which he seeks to a number of specified brokers.

[44] On behalf of the respondent it is argued that thus narrowing down the scope of the covenant exceeds the powers of the court to sever unacceptable portions from the covenant. Reliant upon ***Sasfin (Pty) Limited v Beukes*** 1989 (1) SA 1 (A) at 16H-17H it is submitted that the general principle of severability is that it is not open to the parties to a contract to say to a court "take our agreement, such as it is, excise from it all that is bad, and retain all that is good, and provide us with a contract which is legal and enforceable, even though it might not be what we had in mind". The rule set out in ***Sasfin*** *supra* is a salutary one. It is unthinkable that the courts should not only tell the parties what they ought to have done but then make them do it by enforcing the court's idea of what the contract ought to have been. (Cf ***Christie****: The Law of Contract in South Africa* 5th ed p. 366.) In the case of covenants in restraint of trade, however, the court is required to assess the reasonableness of the restraint at the time the application is made when circumstances may be significantly different from what they were at the time of contracting. This may require a slightly different approach.

[45] Historically the courts have utilised the doctrine of severance in cases where a covenant in restraint of trade has been drawn unduly widely. (See for example ***Empire Theatres Co Ltd v Lamor*** 1910 WLD 289; ***Mohr v Le Roux*** 1915 EDL 383; and ***African Theatres Ltd v d'Oliviera*** 1927 WLD 122.) In ***New United Yeast Distributors (Pty) Ltd v Brooks*** 1935 WLD 75 at 80-81 Greenberg J stated:

> "In deciding whether different stipulations are or are not severable, the court will not carve out from an area which is too wide a portion which it holds would have been reasonable had the parties so agreed; it will not make a new contract for the parties as the act of severance must be the act of the parties and not of the court, but as was held in *Attwood v Lamont [1920] 3 KB 571 at p. 593* it will sever where the covenant is not really a single covenant but is in effect a combination of several distinct covenants."

[46] This approach was criticised by Didcott J in ***Roffey v Catterall, Edwards & Goudré (Pty) Limited*** 1977 (4) SA 494 (N) 507 where it is stated:

> "Thus tested, a covenant is severable when, for instance, it provides for a restraint in Durban and also throughout the rest of Natal, but not when it more simply imposes one throughout Natal; and the reason for this odd distinction is that, while in the former case the reference to the rest of Natal can be deleted by the notional blue pencil and the remainder of the parties' agreement left intact, that cannot be done in the latter case and, because the Court is powerless to redraft the contract, nor can anything else."

[47] In 1979 Botha J in the Full Bench decision of ***National Chemsearch (SA) (Pty) Limited v Borrowman and Another*** 1979 (3) SA 1092 (T) abandoned the classical rules on severability in favour of a new more practical approach which he justified as follows at p. 1116D:

> "The *ratio* of this approach I shall attempt to formulate as follows: when a restraint according to its terms as agreed upon is found to be unreasonably wide in its scope of operation, the Court can, in a proper case, enforce the restraint partially, by issuing an order incorporating the addition of such limiting words to the restraint as agreed upon as are appropriate to restrict its scope of operation to what is found to be reasonable."

[48] The approach of Botha J found favour in ***Magna Alloys*** *supra* and in ***Sunshine Records (Pty) Limited v Frohling and Others*** 1990 (4) SA 782 (A) at 794G-796D. It seems to me that the effect of this approach as formulated by Botha J is such as to eliminate the distinction between severance (without adding words) and carving out (by adding words). The latter is no longer condemned as making a contract for the parties. ***Sunshine Records v Frohling***, *supra*, post dates the decision in ***Sasfin v Beukes,*** *supra* and I accordingly consider this approach to retain its validity in matters relating to covenants in restraint of trade.

[49] I pause to mention, however, that Botha J in ***National Chemsearch*** *supra* did add at p. 1117A as follows:

> "I imagine that when an unreasonable restraint is so formulated that it would require major plastic surgery, in the form of a drastic re-casting of its provisions, to make it reasonable, the Court will decline to perform the operation."

[50] The applicant herein seeks the partial enforcement of the covenant. In respect of the limitation of the area which the applicant seeks and the limitation of the duration of the period of the restraint very limited re-casting is

required. I do not consider that a variation of the duration of the operation of the restraint and the limitation of the area thereof constitutes “major plastic surgery”.

[51] In determining the reasonableness of the area and the duration of the restraint in this matter account should be had of the duration of the respondent’s employment, the nature of the business of the applicant and the nature of the respondent’s employment. These matters are fully discussed above. Having regard to the extent of her interaction with brokers, the duration of this interaction and the attachment which I have found to have been formed I consider that the duration of the restraint, as formulated, is indeed excessive. This the applicant recognises. The applicant seeks to enforce the restraint until 30 September 2011. I consider such a restriction in the scope of the operation of the restraint to be reasonable and I do not consider that it offends the intention of the parties or that it makes a new contract for the parties.

[52] The relief which the applicant now seeks is more limited than that set out in the restraint. The applicant seeks to restrain the respondent from soliciting work from certain specified brokers. In the founding affidavit on behalf of the applicant the applicant set out a list of brokers with whom it was alleged that the respondent had built a close relationship of the nature which I have discussed earlier herein and who had referred much of their work to the applicant. This referral it was alleged is vital to the applicant’s business.

[53] In the application for rescission of the order made by Dambuza J Mandel alleged that as a result of an oversight on the part of his attorney a number of additional brokers, which he listed in his affidavit, had been omitted from the list contained in the founding papers. It is accordingly the applicant's case that the attachment which I have set out above has been formed with these particular brokers.

[54] It has been held that where partial enforcement of the restraint is sought an applicant must lay a proper basis for the enforcement of a lesser restraint (see ***MacPhail (Pty) Limited v Janse van Rensburg and Others*** 1996 (1) SA 594 (T); and ***Sunshine Records v Frohling*** *supra* at 795I). This the applicant has done. On behalf of the respondent it is argued that, aside listing names of brokers and alleging a close relationship with those brokers, the applicant has not, on the founding papers, taken the court into its confidence by explaining in regards each alleged customer connection, the nature and extent of each relationship, its duration, the of cost fostering each relationship, time spent with each broker, the value of business referred to by that broker, whether or not the respondent has a strong personal influence over any of the listed brokers so as to be said to have them "in her pocket", what special broker requirements are known to the respondent, the extent of each customer connection and the like.

[55] The applicant, has in my view made a strong case in respect of the attachment which the respondent has formed with the brokers with which she had contact. I have discussed this aspect above. I consider that the applicant

could legitimately have held the respondent to her restraint in respect of all brokers with which she had dealt. For this it has made a valid case. The onus being on the respondent to establish the unreasonableness of the restraint which the applicant seeks to enforce it was for her to show that she never acquired any significant influence over these specific brokers. This, save to the extent which I set out hereafter she did not do.

[56] Before I turn to the respondent's specific response to specific brokers it is appropriate to deal with one broker which the applicant now lists in the order which it seeks. It seeks to interdict the respondent from being employed by or soliciting work from or interfering with the applicant's relationship with, *inter alia*, Absa Brokers. Absa Brokers does not appear on the list of brokers which the applicant specified in its founding affidavit nor does it appear in the list of brokers which it later contended were erroneously omitted. No case whatsoever is made out to interdict the respondent from dealings with Absa Brokers.

[57] The respondent, addressing the specific brokers set out in the extended list annexed in the rescission application states that three of the entities listed there are not brokers at all. She specifies AIG, Brolink and Zurich. These entities she contends are insurers. The applicant in its replying affidavit offers no response, however, AIG and Zurich have now been excluded from the list of brokers set out in the draft order which the applicant now seeks. In my view, accepting the respondent's averments, as I must do respondent has shown that the enforcement of the restraint in respect of

Brolink is unreasonable.

[58] The respondent contends that David Rensburg and Susan Brophy have been listed merely because Mandel "has discovered that (she) has recently canvassed doing business" with them. It is, however, significant that the respondent fails to deny that she had formed an association with these two persons in the sense which I have set out above. I do not accordingly consider that the respondent has shown that the enforcement of the restraint in respect of these two brokers is unreasonable.

[59] The respondent avers that she cannot recall ever having dealt with DHL Supply Chain and that they were unknown to her. This assertion by the respondent stood unanswered by the applicant. In respect of DHL Supply Chain the respondent has accordingly shown convincingly that the enforcement of the restraint in respect of this broker could only be aimed at eliminating competition and would therefore be unreasonable and unenforceable.

[60] In respect of the brokers FCG and PSG Consult the respondent alleges that these entities have not referred any work to the respondent for some period. In response, in the rescission application, Mandel states:

> "It is correct that the brokers referred to herein have not, of late, referred work to the applicant. Nonetheless, I respectively submit that the restraint applies to them in any event bearing in mind the presence of the phrase 'at any time is or was a client of, or dealt with the company ….' therein".

[61] This admission is indeed indicative of the fact that these two brokers are not trade connections and in this respect the applicant has no proprietary interest worthy of protection.

[62] Broadrisk, the respondent alleges are assessors, not brokers. This is not in dispute. This distinction does not assist the respondent. Respondent herself in seeking to deny the extent of the influence of the brokers states that "brokers do guide their clients and do recommend to their clients but it is the insured client/insurance assessors who make the decision of which repairer to utilise". In the result, far from discharging the onus to show that it would be unreasonable to enforce the restraint in respect of Broadrisk she rather confirms the significance of assessors. She does not deny an attachment to Broadrisk.

[63] Respondent alleges that Meudene Steyn has been her personal friend and broker since 1999 and therefore applicant has no interest worthy of protection in respect of this broker. This does not seem to me to be sufficient to discharge the onus resting on respondent to show that it would be unreasonable to enforce the restraint in respect of Meudene Steyn. Even though Meudene Steyn may have been known to the respondent as a broker prior to her employment she may nevertheless during her employment, and because of it, form an attachment to her and acquire an influence over her which she did not have before. (Compare ***Rawlins and Another v Caravantruck*** supra at p. 542G-H.)

[64] Finally, the respondent avers that the applicant has not made out any case whereupon I could find that there is a worthy and protectable interest in regard any of the persons or entities listed in the rescission application as having been omitted from the original list in error. I do not agree. The applicant states in the rescission application:

> "As a result of an oversight on the part of, or mistake made by the applicant's attorney … the following brokers … were not referred to in paragraph 20 of my abovenamed affidavit."

[65] The reference to the abovenamed affidavit is reference to the founding affidavit. The same case is accordingly made in respect of those brokers as is made in the founding affidavit.

[66] I do not think that there is any other aspect of public policy having nothing to do with the relationship between the parties which justifies the rejection of the restraint.

[67] In all the circumstances I am of the view that, save in respect of Absa Brokers, Brolink, DHL Supply Chain, FCG and PSG Consult the applicant is entitled to the relief which it seeks.

Costs

[68] In view of the conclusion to which I have come above the applicant is clearly entitled to its costs of the application. The costs of the application for rescission were reserved.

[69] The application for rescission came about in consequence of an error on the part of the applicant, alternatively, the applicant's attorney. The necessity for bringing an application for rescission was accordingly occasioned by the conduct of the applicant itself or its attorney. In those circumstances I do not consider that there is any basis upon which the respondent should be ordered to pay the costs occasioned by the application itself. In view, however, of the conclusion to which I have come above it seems to me that the opposition to the application for rescission was not justified. It would accordingly be appropriate that the respondent be ordered to pay the costs occasioned by the opposition to the application for rescission.

[70] In the result the following order is made:

1. The respondent is interdicted and restrained, within the Magisterial District of Port Elizabeth, until 30 September 2011 from being employed by, soliciting work from, interfering with the applicant's relationship with, or endeavouring to entice away from the applicant the following brokerages:

1. ABEX Brokers
2. Alexander Forbes
3. Asset Insurance Brokers
4. AON
5. Ballast Insurance Brokers
6. Bonnie Slabbert Brokers
7. Bouwer Collins
8. Breakaway Brokers
9. Brian Kemsley Brokers
10. Broadrisk Services
11. David Rensburg
12. Fanie du Preez Brokers
13. FNB Insurance Division
14. Glynis Baudin Brokers
15. Gorch & Associates
16. Hannes Scheepers Brokers
17. Indwe
18. Leonie Hunt Brokers
19. Linette Jacobs Brokers
20. Maxifinn
21. Meudene Steyn
22. Mutitt Insurance Brokers
23. Noel Harvey
24. Robin van Rensburg
25. Scotrho Insurance Brokers
26. Skybound
27. Spectrum
28. Spectrum Brokers
29. St Francis Brokers
30. STB
31. Susan Brophy
32. Telesure/Auto & General
33. Walmer Insurance Brokers
34. Werner Vosloo Brokers".

2. The respondent is ordered to pay the applicant's costs in the application.

3. The respondent is ordered to pay the costs occasioned by the opposition to the application for rescission brought under case no. 2589/2010.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv A Beyleveld SC instructed by Boqwana Loon & Connellan, Port Elizabeth

For Respondent: Adv Ronassen instructed by Richard Lawrence Attorneys, Port Elizabeth

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