



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 1283/2021
Heard: 20/08/2021
Delivered: 17/09/2021

In the matter between:

KURUMAN RADIATORS CC

Applicant

and

**DEBBIE O' DONOVAN
BSSC RADIATORS (PTY) LTD**

First Respondent
Second Respondent

JUDGMENT

Mamosebo J

- [1] This application came before me as a return date of a rule *nisi* granted on 29 June 2021 in respect of an urgent application brought by the applicant, Kuruman Radiators CC, in which it sought to enforce a restraint of trade covenant against the first respondent, Ms Debbie O'Donovan, and the second respondent, BSSC Radiators (Pty) Ltd.
- [2] Lever AJ granted the rule *nisi* on 29 June 2021 on an *ex parte* and urgent basis on these terms in relevant part:

"1. The respondents are called up to show cause, if any, on 20 August 2021 at 09:30 why the following order should not issue:

- 1.1 That the first respondent be interdicted and prohibited, for a period of 18 months from 1 June 2021, and within a radius of 200km from Kuruman, to accept and hold any employment with any person, firm, group, partnership or association whatsoever, including the second respondent which directly or indirectly competes with the business of the applicant and/or carries on a business similar to that of the applicant;
- 1.2 That the first respondent be interdicted and prohibited from performing any of her duties of her employment with the second respondent during the period and within the area as stated in the preceding paragraph;
- 1.3 That the first respondent be interdicted and prohibited from directly or indirectly disclosing any confidential information or other facts with respect of the business of the applicant, to any other person or business, including the second respondent;
- 1.4 That the first and second respondents be ordered to pay the costs of this application, to be determined on the return date or extended return day of this application, jointly and severally, the one paying the other to be absolved pro tanto.

2. Pending the final determination of this application:

- 2.1 The first respondent is interdicted and prohibited from performing any of her duties in terms of her employment with the second respondent in respect of any clients operating within a radius of 200km from Kuruman;
- 2.2 The first respondent is interdicted and prohibited from directly or indirectly disclosing any confidential information in respect of the business of the applicant, to any other person or business, including the second respondent."

[3] The matter came before me on the return date of 20 August 2021. On the issue of urgency, I hold the view that the applicant had to persuade the Court on urgency first when Lever AJ considered the application before the interim order was granted. Even more

importantly, is that the respondents were subsequently afforded the opportunity to file opposing papers and to fully prepare their cases before the matter was finally determined. This eliminates prejudice on either party to present its case. I deem it unnecessary to entertain the issue any further. I therefore proceed to deal with the merits of the application.

[4] The issues for determination are the following:

- 4.1 Whether the applicant has proven the existence of a restraint of trade and, if so, has it been infringed?
- 4.2 Whether the first respondent has shown that the enforcement of the agreement would be unreasonable and contrary to public policy;
- 4.3 Whether the proprietary interest contended for by the applicant weighed against first respondent's rights is sufficient to render her unemployed;
- 4.4 Whether the first respondent can be characterised as a competitor of the applicant and to what degree.

[5] It is common cause between the parties that there are disputes of fact. The correct approach to be adopted has been articulated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹. The Rule holds that when factual disputes arise in circumstances where the applicant seeks final relief, a final order can be granted in favour of the applicant only if the applicant's averments, admitted by the

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (AD) at 634H – 635C

respondent, together with the facts alleged by the respondent justifies such an order.

[6] Now the background facts. The applicant employed the first respondent on 26 October 2015 as a Sales and Office Assistant. Two years later, and in July 2017, she was promoted to the position of Sales Manager. Her contract of employment is marked "KR1". Due to an unfortunate incident involving another employee divulging confidential information of the applicant to a competitor in 2019, a decision was taken for all employees to enter into a confidentiality and restraint of trade agreement. The applicant concluded this agreement marked "KR2" with the first respondent on 30 July 2019.

[7] The relevant terms of the confidentiality and restraint of trade agreement reads:

"2.1 In consideration of the benefits accruing to the employee in terms of this agreement and in the interest of the protection and maintenance of the employer's confidential information, the employee undertakes to the employer that:

2.1.1.a) He shall not during his employment by the employer or at any time thereafter, either himself utilise and/or directly or indirectly divulge and/or disclose to any third party (except as required by the terms and nature of the employee's appointment/employment with the employer) any of the employer's confidential information.

2.1.1.b) RESTRICTIONS. The employee undertakes that he/she shall not, at any time during his/her employment and for a period of 72 months from the termination date of this contract ("Termination Date"), directly or indirectly engage in any business in the geographical area (Northern Cape) in competition (direct competitors) with the company and this industry (Radiators and Battery Specialists)."

- [8] The founding papers do not specify the exact dates but merely state that about nine months ago the first respondent gave the applicant verbal notice of resignation and took up employment with a company IST Hadco, a supplier of general mining supplies. This aspect is not in dispute. However, the applicant qualifies this employment by adding in its founding papers that IST Hadco is not its competitor. The first respondent took up employment with the second respondent on 01 June 2021 but the date on which second respondent made her an offer of employment is not specified.
- [9] On 04 June 2021 the first respondent sent a whatsapp message to Mr Christian Matthys Grobler, managing member of the applicant and deponent to the founding affidavit, that second respondent appointed her as Area Sales Manager. The whatsapp message, "KR3," reads:

"More Carine, Naledi, Christian. Ek wil jul net, uit respek vir julle, sodat julle dit nie deur ander monde en stories hoef te hoor, laat weet dat ek het 'n baie goeie werksaanbod en pakket by BSSC Radiators gekry as Area Sales Manager. Ek het dit aanvaar. Op my ouderdom om so geleentheid te weier sal baie onnosel wees. Nou kan ek weer my kennis en dit waarin ek goed is, ten volle benut. Dit is 'n besigheidsbesluit wat vir ons gesin baie goed is en baie deure oopmaak. Ek glo jul verstaan." (Loosely translated: Morning Carine, Naledi, Christian. I just want to inform you, out of respect for you, to avoid to hear it through the grapevine, that I got a very good job offer and package from BSSC Radiators as Area Sales Manager. I accepted it. At my age to refuse such an opportunity would be very foolish. This will enable me to fully utilize my knowledge and abilities. This is a business decision that is advantageous for our family and opens many doors. I trust that you will understand).

- [10] On 10 June 2021, Mr F Engelbrecht ("Engelbrecht") of the firm Engelsman Magabane Inc, on the instructions of Mr Grobler, addressed a letter of demand, marked "KR4", to the first respondent affording her opportunity to resign from second respondent within 3 days and not to disclose the applicant's confidential information to

any third party, failure to resign would result in the applicant approaching the High Court for an interdict on an urgent basis.

- [11] Having been provided by Engelsman Magabane Inc with the requested documents, attorneys for the respondents LVH Attorneys on 21 June 2021 in a letter marked "KR7", makes it plain that the clients dispute the assertion of the existence of a protectable interest and would therefore not give any undertaking as demanded by Engelbrecht. It is then that this triggered the applicant's approach to this Court on an urgent basis for a rule *nisi*.
- [12] By virtue thereof that the applicant is seeking to enforce a contractual right in restraint of trade it bears the *onus* to prove the existence of a contract and the infringement of such a right for it to succeed in obtaining a final interdict. See *Basson v Chilwan and Others*². The applicant has provided both the first respondent's employment contract "KR1" and the restraint of trade agreement "KR2".
- [13] Mr Van Niekerk SC, counsel for the applicant, submitted that while the first respondent is not really disputing that the contract was entered into, she has also in effect offered contradictory denials to the assertions by the applicant. He points out that at para 25 of the heads of argument their counsel wrote: "*In this case there is no dispute that the first respondent concluded a restraint of trade agreement with the applicant...*" He invoked the authority of *Grancy Property Limited v Manala and Others*³ and borrowed the remarks by Petse JA that the first respondent was seeking to envelope her case in a fog, which hides or distorts the reality.

² 1993 (3) SA 742 (A) at 776H – 777B

³ [2013] 3 All SA 111 (SCA) paras 19 and 20

- [14] This is what the applicant avers at para 27 of its founding papers relating to the existence of the agreement:

"In 2019 and as a result of an unfortunate experience with another employee divulging confidential information of the applicant to a competitor, it was decided that all employees of the applicant must enter into a new confidentiality and restraint of trade agreement. This agreement was entered into by the applicant and the first respondent on 30 July 2019 and a copy of which is attached as Annexure "KR2"."

- [15] In the first respondent's answering affidavit, paras 3, 4, and 5 the following response is gathered:

- "3. The applicant relies on a restraint dated 30 July 2019 (KR2) which would seek to sterilise me from employment for a period of six-years throughout the geographical region of the Northern Cape.*
- 4. Merely days before I left the applicant's employ I was presented with a new agreement which contained confidentiality and other undertakings which conflict with those on which the applicant relies. I am therefore advised that the contract on which the applicant relies in this application has been novated by a different agreement.*
- 5. I signed the superseding agreement but was not provided with a copy. The terms of the new document were far less onerous than those reflected in the document on which the applicant relies."*

- [16] At para 97 of her statement, the first respondent went on to say:

"I state that to the best of my knowledge, the agreement referred to in these paragraphs has been novated in the days before I resigned when we concluded a different agreement."

At para 96 of her answering affidavit a catchall denial statement is recorded that reads:

"Save as aforesaid, the allegations in these paragraphs are denied."

- [17] The first respondent's explanation gleaned from her answering affidavit is unconvincing. As correctly argued by Mr Van Niekerk, there is no express denial of the existence of a contract concluded between the parties. It is significant to note that she maintains that the subsequent agreement that she was furnished with, which had less onerous terms, novated the initial agreement. It is clear to me that the first respondent is contradicting her own version in as far as the existence of a contract is concerned. If an agreement does not exist as she has contended in her answering affidavit, then on what basis will a non-existent agreement be novated? Further, the first respondent has not furnished any substantiating evidence on which contract she was referring to whose terms, according to her, were far less onerous than those contained in "KR2".
- [18] The clear right that the applicant is relying on stems from the contract. I am satisfied that the applicant has made out a case of the existence of the restraint of trade agreement from which the clear right flows. I reject the version of the first respondent in this regard, which has failed to raise a real, genuine or *bona fide* dispute of fact regarding the agreement between the applicant and the first respondent.
- [19] The principle laid down in *Magna Alloys and Research (SA) (Pty) Limited v Ellis*⁴, and followed by the Courts in several other matters⁵, is that agreements in restraint of trade are valid and enforceable unless they are unreasonable and thus contrary to public policy. In other words, the restraint of trade must be reasonable for it to be enforceable. The onus of proving that an agreement in restraint of

⁴ 1984 (4) SA 874 (A) at 891 B-C

⁵ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA); *Basson v Chilwan* 1993 (3) SA 742 (A) at 762B - H; *Halsted and Co. (Pty) Ltd v Viljoen and Another* [2016] JOL 36580 (NCK)

trade is invalid lies with the person resisting the enforcement of such a contract, in the case before me, it will be on the first respondent.

[20] In *Basson v Chilwan and Others*⁶, Nienaber JA has identified four questions that should be asked when considering the reasonableness of the enforcement of a restraint:

- (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?

[21] The Supreme Court of Appeal in *Reddy*⁷ held that in deciding whether to enforce a restraint of trade, the following must be considered:

"[15] *A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim pacta servanda sunt. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values...*"

⁶ Basson (supra) footnote 5 at 767G - H

⁷ Reddy (supra) footnote 5 at para 15 and 16

- [22] Does the applicant have a protectable interest that is threatened by the first respondent? In *Den Braven SA (Pty) Ltd v Pillay and Another*⁸, Wallis AJ, then, made these pronouncements pertaining to a protectable interest:

"In considering the facts of a particular case it must always be borne in mind that a protectable interest in this form of customer connections does not come into being simply because the former employee had contact with the employer's customers in the course of their work. The connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business."

- [23] The applicant employed the first respondent as Sales Manager from 2017 to 2020. The evidence presented to the applicant's deponent, Mr Grobler, suggests that the first respondent was very adept at sales and had almost exclusive contact with the customers and, due to her impressive personality, had built a close relationship with them. She had also acquired full and confidential knowledge of each customer's details as well as their needs and requirements. It was further alleged that the nature of the relations between her and the applicant's customers was such that she could easily convince a customer to follow her to a competitor like the second respondent. These averments accord with the enunciation made in the *Den Braven* – case (supra).

- [24] The first respondent's response to these pertinent allegations is to deny that she had exclusive contact with the customers, a denial. Mr Whittington, in oral argument, submitted that the applicant has overrated his client's importance and significance. In any event, so the argument went, customer connections wane over time.

⁸ 2008 (6) SA 229 (D) at 236D - E

- [25] The other area where the first respondent refers to her contact with the applicant's customers is at para 47 where she stated:

"In this new position I was responsible for day-to-day sales in the office, liaising with clients and providing feedback on queries, quotes, and the progress of work done in the workshop. I also compiled sales reports for management and visited clients on site to establish, develop and maintain positive business and customer relationships."

Mr Van Niekerk submitted that when the applicant wrote in her whatsapp message that she can now once again do what she was good at, she was referring to her ability to foster and maintain customer relations.

- [26] It is common cause that the first respondent was a Training Coordinator within the mining industry prior to being employed by the applicant. She confirms in her answering affidavit that she 'cultivated a number of relationships' with businesses in the mining industry. She also says that during her employment with the applicant she made use of the contacts she had developed as a Training Coordinator. Google explains "*cultivating friendships*" as: "*to develop a friendship or relationship with someone, usually in order to get an advantage from it.*"

- [27] The pronouncements by the Court in *Den Braven*⁹ are relevant:

"His employment was a sales representative. Part and parcel of his duties was to find customers for the applicant's products. The fact that he did so and enjoyed some success does not enure to his advantage in seeking to resist the enforcement of the restraint undertaking. The customers that he procured by his efforts were the customers of the applicant and the trade connection established in consequence of his efforts was a trade connection between the applicant and the customers, not one between himself and the

⁹ Den Braven (supra) footnote 8 at para 237J – 238A

customers. Indeed, the fact that he was able of his own volition to identify new customers, approach them and secure their custom for the applicant is indicative of the existence of the type of trade connection that is protectable."

- [28] The applicant has also averred that the first respondent had access to confidential information while she was in its employ. At para 7 of her answering affidavit, the following is recorded:

"I left the applicant's employ some ten months ago, at the beginning of October 2020. I state that none of the information to which I may have been privy would still be of value at this time. Nor do I have any possible residual influence over any of the applicant's customers at this time, assuming I ever acquired some form of influence."

And at para 9 she adds:

"I deny that I have had any access to any of the applicant's proprietary information or that the second respondent is a direct competitor of the applicant."

- [29] At Para 14 of the Replying affidavit the applicant states:

"Even though the first respondent is indeed not a technician, engineer or designer and have not been involved in the design, assembly and installation of goods supplied by the applicant, she has in-depth knowledge of what exact component parts were sourced by her from the various suppliers of the applicant, in order for the applicant to be able to assemble a certain installation according to the requirements of a certain client of the applicant – this is indeed confidential information which is in possession of the first respondent and which could certainly be used to the advantage of a competitor like the second respondent."

- [30] The issue is not the first respondent's qualifications and expertise but rather, the confidential information that she has gained while in the employ of the applicant and the potential risk of availing it to the competitor. The first respondent had not filed any affidavit by any of the applicant's customers who had interacted with her while

she was still with the applicant that explains that they would not be influenced by their relationship with her to move their customer base to the second respondent.

[31] Mr Whittington, referring to para 14 of the replying affidavit, countered the allegation that first respondent possessed the technical knowledge and could reproduce confidential information as well as the technical knowledge regarding the installation and construction of a battery room by submitting that she has not acquired any form of formal training or qualifications. Counsel contended that her skills and abilities flow from her personality; that sales are sales which she is good at; that her skills and abilities are a part of herself and that she cannot be precluded from making use of them by a contract in restraint of trade and invoked *Aranda Textile Mills*.¹⁰

[32] First respondent is deliberately vague by stating that “*none of the information to which I may have been privy to would still be of value at this time.*” All this is within her personal knowledge and so is the phrase: “*Nor do I have any possible residual influence over any of the applicant’s customers at this time, assuming I ever acquired some form of influence*”. It is the applicant’s case that she will use the influence that she had on its clients to take them to its competitor. She has not dispelled the assertion.

[33] Mr Whittington submitted that the second respondent, BSSC Radiators (Pty) Ltd, is one of the suppliers supplying radiators to the applicant and therefore, the information that is used is also not confidential as it is already in the public domain.

¹⁰ *Aranda Textile Mills (Pty) Ltd v Hurn & Another* [2000] 4 All SA 183 (E) at para 33

- [34] First respondent has not expressly denied that she had contact with the applicant's clients. Her promotion merely two years into her employment with the applicant is demonstrable of her strong sales attributes coupled with her personality, which, both parties agree, served as an added advantage to her job. Clearly, this can only mean that she had established those customer connections while still employed by the applicant. The argument by her counsel that the relationship with her former clients had dissipated.

I find, however, that the first respondent had trade connections through customer contact that she can still exploit to the benefit of the second respondent. I further find that she must have had access to confidential information which she can use, coupled with her influence on the applicant's customers to the benefit of the second respondent.

IS THE SECOND RESPONDENT A COMPETITOR?

- [35] The restraint in the agreement is for her not to engage in any business in competition (direct competition) with the applicant. Before the matter was enrolled, there was correspondence between the parties. The letter by the first respondent's attorneys dated 21 June 2021 addressed to the applicant's attorneys is a good starting point. The numbered para 2 of the letter reads:

"While we note that BSSC Radiators (Pty) Ltd is a competitor of Kurad Kuruman Radiators CC ("Kuruman"), our client denies that Kuruman has any legitimate proprietary interest that could reasonably justify such an all-encompassing, overbroad, and onerous restraint of trade provision as is contained in the annexed employment and confidentiality agreements." (Own emphasis added)

In oral argument, Mr Whittington argued that the letter by the first respondent's attorney is not an unqualified admission but must be

assessed with the factual matrix. However, counsel was constrained to concede, correctly in my view, that there is an overlap between the two businesses. This concession therefore confirms that the two businesses are competitors.

- [36] The applicant has unequivocally asserted that the second respondent is a competitor. In its founding affidavit, the following appears at para 18:

"It has recently become known that the 2nd respondent is desirous to step up its business activities in the Northern Cape and specifically within the area of Kathu and Kuruman, which means that the 2nd respondent is indeed, as far as the cooling part of the applicant's business is concerned, in direct competition with the applicant..."

- [37] In her answering affidavit, specifically at para 85, first respondent says the following:

"I deny that it has been admitted that the second respondent is a competitor to the applicant."

If her stance is that the second respondent is not the applicant's competitor, and that she was no longer an employee of the applicant, since her resignation what had prompted her to send the applicant the Whatsapp message informing its members that she was employed by the second respondent? The submission by Mr Van Niekerk is correct that if the applicant is not a competitor then logically there was no reason for her to have informed the applicant of her acceptance of a job offer with the second respondent.

- [38] In oral argument, Mr Whittington referred this Court to paras 61 to 65 of the answering affidavit in substantiation that the nature of the businesses of the applicant and the second respondent are different. The second respondent has not even ventured into battery rooms,

which, as averred by the applicant, is a lucrative developing business for the applicant. There is therefore no competition in that regard as contended by the first respondent.

- [39] I am therefore satisfied that the applicant has discharged the *onus* of showing that it has a commercial interest deserving protection at the termination of the agreement and further that such interest will be prejudiced by the first respondent taking up employment with its competitor, the second respondent.

ONUS AND ENFORCEMENT

- [40] The *onus* was on the first respondent to show that enforcement of the agreement would be unreasonable. Mr Van Niekerk, invoking *Magna Alloy*¹¹, *Den Braven*¹², and *Halsted*¹³, argued that the first respondent has failed to show unreasonableness. Counsel asked the court to, in its discretion, enforce the restraint covenant in terms different from those initially agreed to by the parties.

- [41] Mr Whittington, in countering this submission, contended that the applicant bore the *onus* to allege and prove the existence of a contract and its breach in the founding papers but has failed to do so and, instead, tried to make its case in reply, which it is precluded to do. In substantiation of his argument, cited *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁴, where Wallis JA sounded the following caution:

"Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation

¹¹ (supra) at 896A - E

¹² (supra) at para 55

¹³ (supra) at para 48

¹⁴ (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) para 18

and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made."

[42] Mr Whittington submitted that the existing restraint agreement does not contain a severability clause, hence, Mr Van Niekerk's submission to this Court to sever the existing terms of the agreement. Counsel concluded that by doing so, the Court will be making a contract for the parties, which it is precluded from doing.

[43] There are essentially two areas in contention which in Mr Whittington's submission, result in the applicant asking the Court to adjust the restraint, namely, the geographical area which in the agreement covers the entire Northern Cape and the duration of the restraint which is 72 months. According to Mr Whittington, referring this Court to para 37 of the founding affidavit, argued that the applicant was aware that the terms were overbroad and therefore unreasonable. Since the applicant is seeking interdictory relief, the application must be based on the terms of the contract and that there is therefore no contract upon which the interdict can be confirmed. Counsel urged accordingly that the rule *nisi* not to be confirmed.

[44] The contention of Mr Whittington is misplaced. The correct approach is in *Den Braven*¹⁵ at para 54:

"[54] I confine my remarks to the question whether a restraint of trade agreement that is too broad in its terms can on those grounds be held to be contrary to public policy and unenforceable in circumstances where, within the four corners of the agreement, there are restraints clearly spelt out which are reasonable in nature and which are the only restraints that the court is asked to enforce. In my judgment in that situation the court should in accordance with binding precedent grant relief to the applicant. There is no basis in

¹⁵ Den Braven (supra) para 54

law for refusing to do so by holding the entire agreement to be unenforceable on the grounds of public policy. Such a finding is in my view contrary to the law as first articulated by Botha J in National Chemsearch (SA) (Pty) Ltd v Borrowman and Another [1979 (3) SA 1092 (T) and endorsed by the Appellate Division (as it then was) in Magna Alloys and by the Supreme Court of Appeal in a number of subsequent cases, of which Reddy v Siemens Telecommunications is the most recent. It is not appropriate in those circumstances to seek to apply the principles of severability applicable in other contractual situations as laid down in cases such as Sasfin v Beukes [1989 (1) SA 1 (A)]."

- [45] There is no public policy that makes this restraint unenforceable. Taking cue from *Reddy*¹⁶ I am now left with the responsibility of making a value judgment. First, I have already found that a restraint of trade agreement exists between the applicant and the first respondent. They must both comply with their contractual obligations. This means, the first respondent should live up to her contractual obligation of not working for a competitor within the specified timeframe and designated area. The second consideration is that all persons, which includes the first respondent should, in the interests of society, be productive and be permitted to engage in trade and commerce or the professions.
- [46] Taking into consideration that the employee is employed by the applicant's competitor in the position of Sales Manager, a position she held with the applicant, her knowledge of the applicant's clients, client requirements and needs cannot be overlooked. It is also significant that she had 'cultivated' customer connections and her influence on those customers cannot be downplayed. As much as the respondents' counsel may have repeatedly argued that the relationships have waned with time, in sales environments, relationships can be resuscitated. The second respondent knew

¹⁶ Reddy (supra) para 15

when it employed the first respondent that her attributes will help grow its business. The fact that they are competitors is not a neutral or unknown factor. There is no gainsaying that the knowledge and information that the first respondent has gained while employed by the applicant may probably be used to the advantage of the second respondent. With modern technology it is not farfetched that she may even have copied confidential information.

[47] In summary, I conclude that the applicant has succeeded to prove the existence of an agreement. The first respondent has breached the agreement by accepting the employment offer made to her by the second respondent, whom I find to be the applicant's competitor. The first respondent not only had access to the applicant's confidential trade information but also had contact with its customers. I have no doubt that she could easily influence them to follow her to her new employer. This weighed heavily against whether she would be rendered unemployed. It is my view that she holds strong attributes that make her employable elsewhere. The fact that after resigning from the applicant she was able to secure employment with IST Hadco, which is not a competitor, is an example. It is for these reasons that I regard her trade connections and the relationships she built with the applicant's customers as deserving of protection. The first respondent has failed, in my view, to show that the restraint is unreasonable.

[48] I do not agree with the submission by Mr Whittington that addressing the duration of the restraint and the geographical area amounts to making a contract for the parties or that the Court stepped into the arena. I am also of the view that the two instances do not form a basis in law to conclude that the entire agreement is unenforceable on the grounds of public policy.

[49] I however regard the period of the restraint as unreasonably long and will exercise my discretion to determine a period that I deem reasonable. A period of 12 months calculated from 01 June 2021 would be reasonable for the restraint. Subject to this qualification, the rule *nisi* stands to be confirmed.

[50] On the question of costs: Both counsel correctly confirmed that the costs of 29 June 2021 stood over for later determination. Those costs therefore form part of these proceedings. There is no reason why costs should not follow the result.

[51] Resultantly, I make the following order:

- 1. The first respondent is interdicted and restrained for a period of 12 (TWELVE) months from 01 June 2021, and within a radius of 200km from Kuruman, to accept and hold any employment with any person, firm, group, partnership or association, including the second respondent, which competes with the business of the applicant.**
- 2. The first respondent is interdicted and prohibited from performing any of her duties in terms of her employment with the second respondent during the period and within the area as stated in the preceding paragraph.**
- 3. The first respondent is interdicted and prohibited from directly or indirectly disclosing any confidential information with respect to the business of the applicant, to any other person or business, including the second respondent.**
- 4. The first and second respondents are ordered to pay the costs of this application, including the costs of 29 June 2021,**

**jointly and severally, the one paying the other to be absolved
*pro tanto.***



M.C.MAMOSEBO

**JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the Applicant:
Instructed by:

Adv. JG Van Niekerk SC
Engelsman Magabane

For the Respondent:
Instructed by:

Adv. Dean Whittington
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