IN THE HIGH COURT OF SOUTH AFRICA,

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 12726/2014

In the matter between:

SUPER GROUP TRADING (PTY) LTD APPLICANT

and

DAYALAN NAIDOO FIRST RESPONDENT

JOOSABS WHOLESALERS AND DISTRIBUTORS SECOND RESPONDENT

ORDER

(1) The applicant's application is dismissed with costs.

(2) Such costs to include all costs previously reserved and the costs of two counsel where employed.

JUDGMENT

SISHI J

[1] On 6 November 2014, the applicant brought an urgent application against the first and second respondents for a temporary interdict pending the adjudication of the applicant’s application for a final interdict, founded on a restraint of trade and confidentially agreement allegedly entered into between the applicant and the first respondent.

[2] On that day, the application came before Olsen J, who granted a consent order, adjourning the matter sine die and directed the respondents to deliver their respective answering affidavits on or before 24 November 2014, and reserved the costs of the day.

[3] On 25 February 2015, the matter was granted preference on the special opposed roll by the Acting Judge President.

[4] The matter thereafter came before me in the Motion Court on 23 April 2015 as an opposed application.

[5] Mr D Phillips SC, appeared on behalf of the applicant, Mr G Reddy appeared for the first respondent and Mr I L Topping SC appeared for the second respondent.

[6] As all the necessary affidavits had been filed. It was common cause between the parties that the issue of an interim relief was no longer apposite in the circumstances of this case.

[7] The relevant terms of the prayers sought in the Notice of Motion are set out as follows:

'1.1 For a period of one year commencing on 30 September 2014:

1.1.1 The first respondent be and is hereby interdicted and restrained forthwith from being employed by the second respondent.

1.1.2 The first respondent be and is hereby interdicted and restrained forthwith from directly or indirectly becoming employed by, or having any interest in, or being engaged with, any company, firm or business which competes with applicant in KwaZulu-Natal.

1.1.2 The second respondent be and is hereby interdicted and restrained forthwith from:

1.1.3.1 retaining the first respondent in its employ;

1.1.3.2 permitting the first respondent to represent it in any manner whatsoever, whether directly or indirectly, in soliciting business or servicing customers within the KwaZulu-Natal area."

Background

[8] The following facts are either common cause, alternatively, cannot be disputed by the parties on any reasonable grounds.

[8.1] The applicant commenced trading approximately seven years ago (approximately in 2007) as a distributor and supplier of various goods to convenient stores, bottle stores, and petrol station forecourt stores.

[8.2] The goods distributed and supplied by the applicant included products known as "dry goods" such as confectionery, snacks, chips and sweets as well as cold drinks and alcoholic beverages.

[8.3] The second respondent appeared to be conducting a similar business and in direct competition with the applicant.

[8.4] The first respondent commenced employment with the applicant on 20 July 2009 as a salesman. His employment with the applicant was terminated by his resignation which became effective on 30 September 2014.

[8.5] The applicant contends that the order is sought against the first respondent, the applicant's erstwhile employee, and the second respondent, a direct competitor of the applicant with whom the first respondent is employed, alternatively, for whom the first respondent acts as an agent.

[9] The applicant alleges that the first respondent's conduct has placed him in breach of the restraint of the confidentiality undertaking. Furthermore, the second respondent with full knowledge of the restraint and confidential undertaking has facilitated such breach.

[10] This is disputed by the first and the second respondent.

<u>The issues to be decided</u>

[11] The following are the issues to be decided:

1. Whether there was any contract of employment between the applicant and the first respondent, which included as one of its terms the restraint of trade.

2. Whether the first respondent was employed by the second respondent.

3. Whether the applicant has any proprietary interests warranting protection.

4. Whether the applicant repudiated or breached the employment contract with the first respondent.

5. Whether the first respondent was in breach of the restraint and the confidentiality undertaking.

[12] It is appropriate at this stage to deal with each of the sub-headings referred to above to determine whether the applicant is entitled to any relief.

<u>Whether there was any contract of employment between the parties which included as one of its terms the restraint of trade.</u>

[13] The written contract of employment between the applicant and the first respondent is annexed to the founding affidavit and marked “B”.

[14] Clause 17 of the employment contract dealing with the restraint provides as follows:

> ‘**RESTRAINT OF TRADE / CONFIDENTIALITY UNDERTAKING**
>
> In addition to the above paragraphs dealing with prohibition against disclosure of secrets and conflict of interest, you agree that in the nature of your employment you will have access to confidential information of the Company and will develop relations with the Group’s stakeholders. You further agree that the restraints set out in this clause are reasonable and necessary in duration, scope and areas to protect the Company’s proprietary information and business interests.’

[15] The confidentiality undertaking agreement entered into between the parties is annexed to the founding affidavit and marked “C”.

[16] Clause 2.1 of the confidentiality undertaking provides as follows:

‘I will not during the course of the employment/assignment or at any time thereafter, either use or directly or indirectly divulge or disclose to others (except as required by the terms and nature of my employment hereunder) any of the group’s trade secrets or confidential information’.

[17] Clause 1.1 of the confidentiality undertaking defines “Trade secrets” as follows:

‘1.1.1 know-how, processes and techniques;

1.1.2 knowledge of and influence over the group’s customers and business associates;

1.1.3 the contractual arrangements between the group and its respective business associates;

1.1.4 the financial details of the group’s relationship with its business associates;

1.1.5 the financial details (including credit and discount terms) relating to the group’s customers;

1.1.6 the names of prospective customers and their requirements;

1.1.7 details of the group’s financial structure and operating results;

1.1.8 details of the remuneration paid by the group to its various employees and their duties;

1.1.9 other matters which relate to the business of the group and in respect of which information is not readily available in the ordinary course of business, to a competitor of the group.’

[18] Although the first respondent initially challenged the authenticity of annexure “B” to the applicant’s founding affidavit, the employment contract, after inspection of the document by the first respondent and his legal team, the question of its authenticity was not pursued further in the papers by the first respondent.

[19] Indeed in the heads of argument, it has been submitted on behalf of the first respondent that for the purposes of this application, the first respondent accepts that annexure “B” and the addendum thereto annexure “C” of the applicant’s founding affidavit is the written contract of employment.

[20] Furthermore, it has been accepted that, but for the repudiation/breach of the employment contract on the part of the applicant, entitling the first respondent to cancel same, the first respondent would have been in breach of the restraint.

[21] In the light of these concessions on behalf of the first respondent, and all other relevant information on the paper, it can safely be concluded that there was such a contract which included as one of its terms the restraint of trade. I, accordingly, find that there was such a contract

<u>Whether the first respondent was employed by the second respondent</u>

[25] In the answering affidavit the first respondent describes himself as a self-employed male. He alleges that when he did not find suitable employment with adequate remuneration, he then decided to go into business

on his own account, by approaching entities that conduct business identical to that of the applicant and worked as a freelance sales person for such businesses.

[26] In explaining the above, he alleges that he did not intend to be employed by any of the applicant's competitors, but merely that he would purchase good/stock and supply such goods to convenient stores, petrol stations fore-court stores, bottle stores and tarvens, informal and spazza outlets and the like and enter into certain repayment terms with such suppliers.

[27] It has been submitted, correctly in my view, on behalf of the second applicant that the applicant puts up no direct evidence in support of such contention and relies on reports made by third parties that the first respondent was endeavouring to solicit business on behalf of the second respondent from its clients.

[28] The second respondent submitted that it sold goods to the first respondent subsequent to 1 October 2014 but denies that it employed the first respondent, in any capacity whatsoever, or that the first respondent ever represented it as its agent.

[29] Furthermore, the second respondent has substantiated its contention that it did not employ the first respondent by pointing out in the answering affidavit that it has traded in the "area of operation", referred to by the

applicant since 2003 and already has a representative working in that area. The applicant has on the papers not responded to these allegations.

[30] The first respondent on the other hand has also vehemently denied that he was ever employed by the second respondent or at any stage acted as its agent.

[31] The first respondent has also admitted that he approached stores and outlets which may be regarded as applicant's customers "albeit not exclusively" the applicant's customers and attempted to sell "in certain instances" and in fact sold "in other instances" goods that he had sourced from the second respondent. He also admitted that he, in fact, handed credit application forms of the second respondent to those customers to feel in, as he had explained that, this was a temporary measure and done to cater for the particular exigency he found himself in.

[32] Counsel for the second respondent submitted correctly in my view that no case has been made out against the second respondent based on unlawful competition. The applicant simply relies on the contention that the first respondent is employed by the second respondent and that such employment contravenes the terms of the restraint of trade agreement it concluded with the first respondent.

[33] The conduct referred to above does not make the first respondent an employee of the second respondent or its agent.

[34] The submission in the applicant's summary of argument, that it is common cause that the first respondent has, at some stage, been operating as an indirect employee or agent of the second respondent cannot be correct.

[35] Considering all the above, and what is contained in the affidavits, there is insufficient evidence to justify the conclusion the first respondent was either an employee or an agent of the second respondent.

[36] I accordingly find that the first respondent was not employed by the second respondent.

[37] Counsel for the second respondent has submitted correctly in my view that it would be proper for the application in so far as it relates to the second respondent to be dismissed with costs including the costs of senior counsel where employed.

[38] In the light of the above finding, this should be the end of the matter as the applicant's case appears to be premised on the assumption that there was an employer-employee relationship between the first respondent and the second respondent or agency relationship between the two parties.

[39] It has never been the applicant's case that the respondents are in breach of the restraint and the confidentiality agreement on the basis that the first respondent has opened up his business in direct competition with the applicant.

[40] In the event that I am wrong in the finding referred to above, I will proceed to deal with the other issues involved in this matter.

<u>Whether the applicant had any propriety interest warranting protection.</u>

[41] It is trite that in considering the reasonableness of the restraint agreement and whether it had been breached, the following four questions have to be addressed[1]:

(a) Does 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? and;

(d) Is there an aspect of public policy, having nothing to do with relationship between the parties that require that the restraint be maintained or rejected?

The above passage was cited with approval in *Den Braven v Pillay* and others[2].

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[1] *Basson v Chilwan & others* 1993 (3) SA 742 (A) at 767 G-H; and *Reddy v Seamens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA), para 16.
[2] 2008 (6) SA 229 (D) at para 4.

[42] The legal position where an employer seeks to enforce a restraint of trade agreement on the basis of a risk of harm to its trade connections and in particular its connections with its customers, has been authoritatively set out in the following terms:

> '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:
>
> > "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…'

> This statement has been applied in our Courts (for example, by Eksteen J in *Recycling Industries (Pty) Ltd v Mohammed and Another* 1981 (3) SA 250E at 256C-F). Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. 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.[3].

[43] In considering the facts of a particular case it must always be borne in mind that a protectable interest in the 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.[4]

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[3] *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D-H. See also *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA p434(SE) at 444 A-F; and *Nampesca (SA) Products (Pty) Ltd and Another v Zaderer and Others* 1999 (1) SA 886 (C) at 899B-900 C.

[4] *Walter McNaughtan (Pty) Ltd v Schwartz and Others* 2004 (3) 381 (C) at 390 C-D.

[44] Irrespective of the incidence of the onus, the court can only grant the applicant the relief it seeks, if the facts stated by the respondents together with the admitted facts in the applicants affidavits and the evidence on affidavits justify the order[5].

[45] The issue in this is whether the applicant has a protectable interest that is threatened by the first respondent by his conduct.

[46] In contending that the applicant had a protectable interest, it has alleged that its proprietary interest arises from the customer connections which the first respondent, was able to establish and enhance whilst in its employ. In this regard the first respondent has submitted that no evidence is produced to support this assertion.

[47] The type of goods distributed and supplied by the applicant to its customers and the type of business it conducts have been described above.

[48] The applicant’s business model is such that it operates by either simply supplying the goods or, in some instances, in terms of a contract whereby it is obliged to do so, not only supplying the goods, but also maintaining the point of purchase displays in the various stores, and setting up such points of purchase displays in respect of certain goods.

[5] Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (AD) at 634H – 635B.

[49] In such instances, where the applicant is obliged to maintain the point of purchase set up in the various stores, the obligation to maintain the store purchase point continues even if a particular store owner purchases the product, for which the point of purchase has been set up, from a source other than the applicant.

[50] The applicant operates all through out South Africa and supply in access of 10 000 stores of which 2 300 are in KwaZulu-Natal.

[51] Its business has grown from a turnover of approximately R1.1 billion in 2012 to a turnover for the last financial year of approximately R1.6 billion. KwaZulu-Natal contributes approximately 16 percent of the turnover.

[52] By the very nature of its business, namely, distributing to a vast and wide network of small retail outlets, the applicant is wholly reliant on its team of sales representatives to preserve, maintain and expand its customer base.

[53] Each sales representative is allocated specific region or area within South Africa.

[54] According to the applicant, on a day to day basis, a sales representative visits various stores to check up on stock requirements and is also the interface with the various customers in respect of any special requirements. The sales representative is also the source from which a customer will receive information about special offers or deals which may be

available. Indeed, any matter which needs to be addressed by the applicant for such customer is dealt with by the sales representative, including maintaining the point of purchase standard as required by the applicant's suppliers.

[55] These sales representatives are the only regular face of the applicant which each individual customer encounters.

[56] It is common cause that the applicant operates in a highly competitive environment as there are numerous sales outlets including the second respondent from where individual customers can source stock.

[57] As in the *SG Convenience* case[6], the second respondent is also involved in the retail and distribution business providing products directly to customers in various sectors of the market in direct competition with the applicant. The market within which the applicant and the second respondent operate is an extremely competitive environment, which competitiveness is exacerbated by the fact that customers do not enter into any direct purchasing arrangements with the retail distributors such as the applicant and the second respondent. Accordingly, there is no guarantee of a continued support by a customer nor is there an obligation on such customer to purchase from only one provider, albeit the applicant and the second respondent.

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[6] *SG Convenience (A Division of Super Group Trading (Pty) Ltd) v De Sousa and another* [2013] ZAGPPHR 165

[58] The customers in the area and industry were not exclusive to the applicant. Every single customer in the industry bought from anyone. The applicant has not provided any evidence that it had exclusive customers in the industry.

[59] Counsel for the first respondent referred to the *Den Braven* case *(supra)* and submitted that the facts of the instant case are distinguishable from the *Den Braven* case, as in *Den Braven* case, the first respondent was given an exclusive list of the customers of the employer. In the instant case, the first respondent was not given any of the employer's customers.

[60] It is not in dispute that the first respondent was an excellent salesman. According to the papers, he himself was poached by the applicant from Jubiter due to his excellent salesmanship qualities. The first respondent did not walk away with any of the applicant's customers. Some of these customers are customers he had brought with him from Jubiter.

[61] The applicant submits that the first respondent does not in any way at all adduce evidence to the fact that his association with such customers was not enhanced whilst he was employed by the applicant. In failing to do so, he failed to discharge the onus upon him to rebut, the applicant's assertion that the proprietary interest which arises from such customer connections, rests on the applicant.

[62] The first respondent on the other hand, has submitted that what is inescapable and significantly the applicant has been unable to gainsay, is that just about every one of the applicant's present customers (if not every single one of them) are also engaged as customers of most, if not all of, the competition. In my view, the first respondent's submission in this regard is correct.

[63] It has further been submitted on behalf of the first respondent that the nature of the interaction between the first respondent (as a salesman) and customers is such that, while admittedly familiarities developed, relationships encompassing fidelity and loyalty to the applicant (which is what the applicant contends for) is simply non-existent: which the applicant is unable to dismiss.

[64] On the enhancement of relationship between the first respondent and the applicant's customers, it has been submitted that the first respondent has adduced such evidence and has shown precisely that the applicant has not produced any evidence whatsoever to suggest:

(a) Relationships that allegedly are fostered between the salesman and the customers: and

(b) Such relationships were enhanced by the fact that the applicant being a particular salesperson's employer.

[65] It has been disputed, correctly in my view, that the first respondent has failed to rebut the applicant's assertion and contentions in this regard.

[66] In the light of the above, and in particular the fact that the customers in the industry were not exclusively those of the applicant therefore, the applicant cannot claim a protectable proprietary interest.

<u>Alleged repudiation / breach of the employment contract by the applicant</u>

[67] The first respondent has contended that the applicant unilaterally and unlawfully reduced his remuneration. The conduct of the applicant in this regard amounted to a repudiation or breach of the contract of employment,

[68] In terms of clause 7 of annexure “B” to the applicant’s founding affidavit, the employment contract between the parties, it was agreed that the first respondent’s remuneration was 3.5% of gross sales.

[69] The applicant has further admitted that this remuneration structure was unilaterally changed to 20% of net gross profit in accordance with the entitlement that the applicant contends were in terms of clause 7 of annexure “B”. Clause 7 of annexure “B” makes no such provision of the above.

[70] Clause 7 of the agreement further provides that the remuneration structure may be amended at any time according to the employer’s or employee’s requirements.

[71] Clause 1.2 of the same annexure “B” provides:

> “It is recorded that these terms and conditions may be amended from time to time in consultation with an employee, if deemed necessary, in the light of the company’s operational requirements”.

[72] There is no allegation anywhere in the entirety of the applicant’s papers that deduction in remuneration was consensual. Therefore, it can be safely concluded that the reduction in the remuneration was not consensual and contrary to the provisions of the agreement.

[73] There were multiple complaints by the first respondent about the reductions from his remuneration. The applicant does not state that the first respondent did not ever complain against the said reduction in remuneration. Instead, the applicant deals with this aspect by a series of bare denials concerning specific occasions of complaint and adding that it was entitled to effect such changes.

[74] The explanation for the reduction only comes in the replying affidavit.

[75] No consultation in terms of clause 1.2 of annexure “B”, to the agreement took place between the applicant and the first respondent prior to the reductions from his remuneration.

[76] The first respondent does not suggest that he was dismissed, constructively or otherwise. He has indicated a willingness to have continued in his employment with the applicant on terms contained in annexure “B”.

[77] The applicant has contended that the allegation that it repudiated the employment contract is an afterthought. It is not supported by the evidence adduced by the first respondent and would appear to be a manufactured defence. There is no evidence of any constructive dismissal, or any steps taken by the first respondent arising from such dismissal. The applicant contends that the so-called underpayment of the first respondent came about as a result of illegitimate and unlawful variation of his employment contract in terms of which the terms of that employment contract, arising from the abusive conduct of the first respondent and his colleagues in selling products below margin in order to boost turnover.

[78] According to the first respondent, his various complaints and willingness to remain in the applicant's employ in terms of the terms set out in annexure "B" are actions consistent with calling upon the applicant to comply with the terms of the employment contract.

[79] The applicant's refusal to do so is a repudiation/breach of the employment contract. The first respondent left the applicant's employment because his salary was reduced unlawfully and unilaterally. The first respondent was always entitled to cancel the agreement in those circumstances as he did.

[80] It is suggested that the first respondent did not cancel the agreement prior to or at the time of his resignation and that his attempt to do so *ex post facto* (his resignation) is impossible in law. The first respondent has

submitted, correctly in my view, that the second of those contentions is, with respect, incorrect in law. There is no reason and indeed no bar to the first respondent cancelling the agreement post his resignation.

[81] Resignation is merely an incidence of the employment relationships/contract. Termination of employment (whether by resignation or any other manner) does not necessarily depend upon a prior or contemporaneous cancellation of any employment contract. The said contract may very well, as so often it does, survive the parting of ways of the employer and the employee.

[82] That survival "of the employment contract" does not make it immune from cancellation where there has been a breach/repudiation "such as in the present case" or for any other valid reason.

[83] In *Drewtons (Pty) Ltd vs Calie*[7] Watermeyer JP expressed the view that an employer cannot enforce a restraint clause if he himself had repudiated his obligations under the contract of service.

[84] In *Cape Can (Pty) Ltd t/a Canon Western Cape v Van Nimwegen and another*[8] Van der Heerven J thought that this would not necessarily be the case in every situation.

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[7] 1981 (4) SA 305 C at 308 D-E
[8] 1988 (2) SA 454 C at 460 B-C

[85] In *Reevs v Marfield Insurance Brokers CC*[9], Scott JA inter alia concluded that:

> '… in appropriate circumstances, however, such conduct, e.g. the repudiation of the contract by the employer and the nature thereof, may well serve to tip the scales in favour of the conclusion that it would be contrary to public policy to enforce the restraint clause'.

[86] There is no doubt in my mind that the employer has breached or repudiated the contract of employment between the parties.

<u>Whether the first respondent was in breach of the restraint and the confidentially undertaking.</u>

[87] The applicant alleges that the first respondent since the termination of his employment with it, has been acting in breach of the restraint and confidentiality undertaking by being employed by the second respondent.

[88] In so far as the breach of the confidentiality undertaking is concerned, the first respondent has submitted, correctly in my view, that the suggestion in the applicant's heads of argument that the first respondent is in breach of the confidentiality undertaking "as spelt out in annexure "C" is unsustainable as, apart from anything else, not a single averment thereof is made in the applicant's founding affidavit or replying papers. Furthermore, the first respondent without demur has stated that he has not imparted any such information to third parties.

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[9] 1996 (3) SA 766(A) at 776 H-I.

[89] It is trite that a case has to be made in the founding affidavit and not in the replying affidavit nor can it be made in the heads of argument.

[90] The applicant has failed to make a case justifying the conclusion that the first respondent breached the restraint and the confidentiality undertaking.

[91] In the light of the above findings, it is not necessary to deal with the reasonableness of the restraint agreement.

[92] Considering all the above, I am satisfied that the applicant has failed to make out a case for the granting of the prayers sought in the notice of motion. Accordingly, the application is dismissed.

Costs

[93] Counsel for the first and second respondent submitted that the applicant's application should be dismissed with costs, and that in the case of the second respondent such costs to include the costs of two counsel.

[94] The applicant on the other hand submitted that the first and the second respondents should be ordered to pay the costs of the application.

[95] In my view, there is no reason why the costs should not follow the result in this matter.

<u>Order</u>

[96] In the circumstances, I make the following order:

(1) The applicant's application is dismissed with costs.

(2) Such costs to include all costs previously reserved and the costs of two counsel where employed.

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SISHI J

APPEARANCES

Date of Hearing	:	23 April 2015
Date of Judgment	:	25 August 2015
Applicant's Counsel	:	**D PHILLIPS SC**
Instructed by	**:**	**LEGATOR, McKENNA INCORPORATED** 21st Floor, Eagle Building 357 Dr Pixley Kaseme (West) Street **DURBAN** Ref: Mr Pilkington/fk/H.873 Tel: (031) 305 1571 Email: farhanak@legatormckenna.co.za
1st Respondent's Counsel	:	**G REDDY**
Instructed by	:	**ZUBEDA K. SEEDAT & COMPANY** **19/21 Hunt Road** **GLENWOOD, DURBAN** Tel: (031) 202-0031/2/3 Email: zseedat@mwebbiz.co.za
2nd Respondent's Counsel:		**I.L. TOPPING SC**
Instructed by	:	D K SINGH, VAHED AND PARTNERS 88 Harvey Road MORNINGSIDE, DURBAN Tel: (031) 303 9271 Ref: Mr Archary/J0059/0021