<u>FREE STATE HIGH COURT, BLOEMFONTEIN</u>

<u>REPUBLIC OF SOUTH AFRICA</u>

Case No. : 4696/2013

In the matter between:-

<u>BIDVEST MANAGED SOLUTIONS (PTY) LTD</u>	Applicant
and	
<u>MARQUE ANTHONY DAVID ARTHUR ASSUR</u>	1st Respondent
<u>GOLDEN DIVIDEND 402 CC t/a INDUSTROSERVE</u>	2nd Respondent

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<u>JUDGMENT BY</u>:	KRUGER, J
<u>HEARD ON:</u>	27 FEBRUARY 2014
<u>DELIVERED ON</u>:	6 MARCH 2014

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[1] Applicant seeks to enforce a restraint of trade against the first respondent. The second respondent is the new employer of the first

respondent. No relief is claimed against the second respondent and it has not entered an appearance to defend. Applicant conducts business in contract cleaning and associated business. First respondent's main responsibility as business development executive was the marketing of applicant's services.

[2] The first respondent signed the restraint undertaking on 14 July 2010. On that day the first respondent also signed an employment agreement with the applicant in terms whereof the first respondent was employed as a business development executive with effect from 1 August 2010. The restraint undertaking contains the following in the first paragraph thereof:

> "I shall not, either alone or jointly for the period during which I am employed by the company and for a period of 12 months after the termination of my employment with the company, for whatsoever reason ('the restraint period'):-
>
> 1.1 whether the employee, proprietor, partner, director, shareholder, member, consultant, contractor agent, representative, assistant or otherwise, and whether for reward or not, directly or indirectly;
>
> 1.2 anywhere in the FREE STATE and NORTHERN CAPE ('the prescribed areas');
>
> be employed by and/or engaged and/or in any way interested in any company, close corporation, firm, undertaking or concern operating in any part of the prescribed areas, which renders contract cleaning and or other services connected therewith and ancillary thereto and/or which renders contract cleaning services ('the prescribed services')."

[3] The restraint also prohibits the first respondent from enticing employees to leave applicant's service, and furnishing information to prospective customers of the company.

[4] The employment of the first respondent with the applicant was terminated on 6 September 2013 after he was found guilty of serious misconduct at a disciplinary hearing. No details of this misconduct are given in the founding affidavit. In the answering affidavit the first respondent says that he was not guilty of any serious misconduct and his employment was unlawfully terminated and the applicant acted in bad faith. He took the matter to the CCMA and at the time of filing the answering affidavit the proceedings before the CCMA were still pending. In the replying affidavit, filed on 17 January 2014, applicant acknowledged that the alleged unfair dismissal was referred to the CCMA. The application to enforce the restraint, with which I am now dealing, served before CJ Musi J on 30 January 2014 and he deemed it necessary to obtain more details of the CCMA hearing, and postponed the matter, granting the parties leave to file further affidavits and directing them to file supplementary heads of argument.

[5] The first respondent filed a supplementary answering affidavit on 5 February 2014, stating that the arbitration in the CCMA took place on 15 January 2014 and that the arbitrator handed down her award

on 23 January 2014, which is attached to the supplementary answering affidavit.

[6] In the Award details are given of an incident between the first respondent and the human relations officer of the applicant (one Goosen) during which the first respondent pushed Goosen against the wall in the reception area and started squeezing his neck during an altercation between them and told Goosen that he did not need the job. According to the Arbitration Award, the first respondent testified at the CCMA that Goosen used abusive language towards him, and he was provoked, and he then shoved Goosen against the wall in the reception area. The incident occurred in the presence of three people. According to the Award the first respondent acknowledged that his actions were inexcusable but he was provoked.

[7] Applicant filed a supplementary replying affidavit in which the deponent points out that first respondent pleaded guilty at the disciplinary enquiry and that although he relied on provocation he unequivocally admitted that his conduct was wrong and inexcusable. The applicant is taking the arbitration award on review, and the documents in support of the review application are attached to the supplementary replying affidavit. First respondent filed a second supplementary affidavit setting out that he has made application to vary the Award at the CCMA because calculations were based on

incorrect figures. The matter was argued before me on 27 February 2014.

[8] In argument Mr Louw, for applicant pointed out that it is common cause that the first respondent made contact with important clients of the first respondent. Southern Sun Hotels was one such instance, where first respondent was seen talking to the representative of Southern Sun by one of applicant's employees. That meeting is not disputed by the first respondent but he denies that he canvased the business of Southern Sun. In the founding affidavit the allegation is made that he canvassed business and enticed employees away from the applicant. Applicant mentions Thelma Jantjies, applicant's contract manager for Southern Sun, and says that the first respondent suggested to her that she seriously consider leaving the employ of applicant. A supporting affidavit of Thelma Jantjies is attached, but first respondent denies that he contacted or had any discussions with Jantjies. In argument Mr Pienaar for first respondent suggested that Jantjies is still employed with the applicant and therefore had no option but to sign the supporting affidavit. Mr Pienaar seems to overlook the fact that his submission presupposes that the applicant invented the discussion and imposed upon Jantjies to commit perjury. That is an allegation which is so lacking in credibility that it can be rejected on the papers.

[9] Our law on restraint of trade is comprehensively set out in **Magna Alloys and Research (SA) Pty) Ltd v Ellis** 1984 (4) SA 874 (A) at 897F-898E. The onus is on person alleging that he is not bound by a restraint to show that enforcement of the restraint is contrary to the public interest. It is not necessary for applicant to show that the first respondent has acted in breach of the restraint in order to qualify to have it enforced. The breach is relevant for the costs order and to show the need for the restraint.

[10] Mr Pienaar contended that the applicant does not have a protectable interest, with reference to **Experian South Africa (Pty) Ltd v Haynes and Another** 2013 (1) SA 135 (GSJ) par [39]-[46]. First respondent's case is that the information to which he had access while employed by the applicant is not confidential as it is all in the public domain. He says the needs of clients are in the public domain because they are set out in tenders. He also relies on The National Cleaners Association ("NCCA") documents. Mr Louw points out the NCCA is an employers' organisation that negotiates with unions. It is a voluntary body which has no legislative function to set out conditions of contract, it recommends a standard form of contract for its members. In response to first respondent's allegation that he did not receive in-house training, applicant in reply attaches emails confirming that first respondent attended sales schools as well as sales team building training. The important one is training on costing. The fact that the first respondent did not have the final say on costing does not mean that he did not know the applicant's

methods and procedure to arrive at costing. In my view the applicant has a protectable interest.

[11] The first respondent says he was not on equal footing with the applicant when he was asked to sign the restraint agreement. Mr Louw points out that the first respondent worked in Information Technology before he took up employment with the applicant. He needed a larger income because of his personal expenses, and was willing to accept a salary which was R7 000 per month more than he had been earning. There is no indication that first respondent was forced to take up employment with the applicant. He signed the restraint agreement about two weeks before he started work. The restraint is worded in clear terms and he must have known, as an experienced person, what he was letting himself in for. There is no merit in the submission as to unequal footing.

[12] Mr Pienaar submitted that the area of the restraint is too wide. In the answering affidavit the first respondent says his area of responsibility was within the Free State which excluded a number of towns he mentions. As for the Northern Cape he says he was responsible for the Northern Cape but did not do marketing in certain areas he names. In reply applicant says:

> "This allegation is correct. However, several of the Applicants' clients whom First Respondent serviced and to whom he marketed Applicant's services and products, have operations or business interests in the towns

> referred to. First Respondent did in any event for instance visit clients in Kimberley. Given the circumstances, First Respondent cannot expect the Court to '*trim*' the area of the restraint."

Applicant goes on to say:

> "For the above reasons, the area cannot be '*trimmed*' and Applicant does not have to run the risk of First Respondent filching at Applicant's customer base by being allowed to operate in certain towns which fall in the area which he agreed would form part of the restraint."

Mr Pienaar could not refer me to a case where certain towns had been excluded from the operation of a restraint in similar circumstances. The courts will in limited circumstances apply the so-called "blue pencil" test and delete portions of a restraint which are too wide (See **The Restraint of Trade Doctrine** by J.D. Heydon (1971) 280). The court will not write a restraint for the parties. The point here is, as to the Free State, that the restraint defined the area as the Free State, not only certain towns. Towns are not islands that exist separately and independently from each other, as the applicant points out in reply. It is normal that a restraint be defined in terms of a province, or a specific distance from the applicant's business. If for instance a restraint says business may not be conducted in an area 100 kilometres from a certain town, the fact that the applicant has not done business in a town, say 50 kilometres from the applicant's business will not cause the court to exclude that town from the operation of the restraint. Similarly where the area has been defined in the contract as a province, there is no basis to exclude certain towns from its operation.

[12] The main thrust of first respondent's attack is that he was unlawfully dismissed, and in those circumstances the applicant cannot rely on the restraint. **Reeves and Another v Marfield Insurance Brokers CC and Another** 1996 (3) SA 766 (A) dealt with a restraint in respect of an employee (Reeves) whose services had been terminated because he refused to sign an agreement containing a restraint provision. After leaving the employ Reeves immediately set about establishing a business of his own. Scott JA referred to the rule of English law that wrongful dismissal puts an end to any restrictive covenant and found that that rule does not form part of our law (at 773B-774I). In **Magna Alloys and Research (SA) (Pty) Ltd v Ellis** (*supra*) the Appellate Division rejected the English doctrine that a covenant in restraint of trade is prima facie invalid. Since then, even after the coming into operation of the Constitution, it has consistently been held that a party who seeks to escape the enforcement of restraint of trade bears the onus to show that its enforcement will be against public interest. Similarly the fact that the restraint was terminated wrongfully does not put an end to the employment contract in South Africa. In **Reeves** the Appellate Division mentions two factors which would influence the court not to enforce a restraint, namely where the wrongful termination is

fraudulent, e.g. where the employee was hired with the sole object of imposing a restraint upon him, or where the employer acts in bad faith (at 775C-D). In the **Reeves**-case the court analysed the restraint clause before it, and stressed the importance of the words "ceases to be employed" as indicating an intention to operate once the employment relationship no longer exists, and found that the words "for any reason whatsoever" make it clear that the circumstances underlying the cause of termination are irrelevant to the operation of the restraint provisions (at 771J-772B). In the restraint under consideration in this case, the wording is "after termination of my employment with the company, for whatsoever reason". There is no indication that wrongful termination is excluded. In this case it is under dispute whether the termination was wrongful. There is no indication in the award whether the first respondent informed the Arbitrator at the CCMA of his restraint, which indicates that the restraint was irrelevant when the applicant terminated first respondent's employ. There is no suggestion that the applicant acted fraudulently or *mala fide* in terminating the employment, i.e. with a specific view to the enforcement of the restraint.

[14] There is no reason why the restraint as prayed for in the notice of motion should not be enforced.

[15] **ORDER**

1. An order is granted in terms of paragraphs 1 to 5 of the Notice of Motion.

2. The first respondent is ordered to pay the costs of this application.

A. KRUGER, J

On behalf of the applicant:	Adv. M.C. Louw Instructed by: Hugo & Bruwer Attorneys BLOEMFONTEIN
On behalf of the first respondent:	Adv. C. D. Pienaar Instructed by: Hugget Hendriks Inc. BLOEMFONTEIN

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