

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

IN THE NORTH GAUTENG HIGH COURT – PRETORIA
(REPUBLIC OF SOUTH AFRICA)

1/7/2013

June

DATE: 6 May 2013

1/07/2013

DATE

SIGNATURE

CASE NO: 31878/2013

In the matter between;

NORTH SAFETY PRODUCTS (AFRICA) (PTY) LTD

APPLICANT

and

MADELEINE CLARKE

1st RESPONDENT

RONDO INDUSTRO (PTY) LTD

2ND RESPONDENT

JUDGMENT

N V KHUMALO AJ

INTRODUCTION

- [1] Applicant seeks in this Application final relief to enforce on an urgent basis by way of an interdict, a restraint of trade and confidentiality agreement against First Respondent, an erstwhile employee and her alleged current employer.
- [2] Applicant, as it is evident from the documents filed of record, is one of the largest retailers and a manufacturer of personal protective and equipment clothing in South Africa and Africa and has been conducting the business since 1956 with branches around Gauteng, Kwazulu Natal, Western Cape and Port Elizabeth.
- [3] In Gauteng its Isando branch services also the African operations that extends throughout the continent spread across nine countries that includes Namibia, Malawi, Ghana, Kenya, Zimbabwe, Congo, Botswana, DRC and Madagascar.
- [4] First Respondent was for a period of 4 and half years employed at its Isando branch, first as an internal sales administrator and from 1 June 2010 as an Export Supervisor, servicing the export business until she terminated her employment on 28 March 2013.

- [5] Second Respondent is similarly a retailer, manufacturer and a supplier of Personal protective Clothing and Equipment with an export division as well that services clients in Africa which operations it is presently expanding to include countries serviced by the Applicant.

HISTORICAL BACKGROUND

- [6] On 22 August 2008 when First Respondent took up employment with Applicant as an internal sales administrator she concluded a contract of employment that incorporated a restraint of trade and confidentiality agreement.

- [7] In terms of some of the relevant provisions of the agreement, First Respondent agreed that she would not for a period of twelve months after the termination date of her employment:-

- [7.1] be concerned in any business which is carried on in the relevant area and which is competitive with any business in which the First Respondent was actively involved during the course of her employment and which is carried on by the Applicant on termination date. And would be considered concerned in the business if:

[7.1.1] she carried business as a principal or agent; or

[7.1.2] she was a partner, director, employee, secondee, consultant or agent in, of or to any person who carries on the business, or

[7.1.3] she had a direct or indirect financial interest (as shareholder or otherwise) in any person who carries on the business; or

[7.1.4] she is a partner, director, employee, secondee, consultant or agent in of or to any person who had a direct or indirect financial interest (as shareholder or otherwise) in any person who carries on the business.
(Clause 10.3)

- [7.2] directly or indirectly on her own account or on behalf of or in conjunction with any person, except on behalf of the Applicant, canvass solicit business or custom for goods and services of a similar type to those being manufactured and or provided by the Applicant at the termination date, and with which goods or services the First Respondent was actively involved in the course of her employment during the relevant period, from any person who has been any time during the relevant period a customer of the Applicant with whom the First Respondent was actively involved during the course of her employment during the relevant period. (Clause 10.3.2)

- [7.3] directly or indirectly on her own account or on behalf of or in conjunction with any person induce or attempt to induce any supplier of the Applicant's products with whom the First Respondent was actively involved in the course

of her employment during the relevant period to cease to supply, or restrict or vary the terms of supply to the Applicant or to cease to distribute any of the Applicant's products or restrict or vary the terms of the distributorship or otherwise interfere with the relationship between the supplier or distributor and the Applicant. (Clause 10.3.3)

[7.4] be entitled to make use of or divulge to any person, and would be obliged to use her best endeavors to prevent the use; publication or disclosure of any information of a confidential or secret nature:

[7.4.1] concerning the business of the Applicant and which came to the First Respondent's knowledge during the course of or in connection with her employment or her holding any office within the Applicant from any source within the Applicant.

[7.4.2] concerning the business with any person having dealings with the Applicant which is obtained directly or indirectly in circumstances in which the Applicant is subject to a duty of confidentiality in relation to that information.

[7.4.3] The obligations continue to apply after the termination of her employment contract without limit of time, ex lege.

- [8] First Respondent acknowledged that her position with the Applicant gave her access to and the benefit of confidential information vital to the continuing business of the Applicant and influence over and in connection with the Applicant's customers, suppliers, distributors, agents and employees in or with which the First Respondent was engaged or in contact with and acknowledged and agreed that the provisions of clause 10 were reasonable in their application to her and necessary but no more than sufficient to protect the interests of the Applicant (clause 10.3.6)
- [9] The relevant area to which the restraint was applicable was defined in the agreement as the geographic boundaries within which the First Respondent was working and could extend from territory at branch level to national boundaries (clause 10.2.2)
- [10] On 1 June 2010, she was promoted to Export Supervisor with the terms and conditions of her employment including the restraint of trade and confidentiality agreement remaining in force. She then serviced Applicant's export clients under the management of, John Whitfield ('Whitfield'), the branch manager assisted by Theresa Veal.
- [11] In terms of the revised conditions of her employment, her job entailed maintaining weekly personal contacts, via telephone and e-mail with her existing clients and dealing with all customer queries and export documentation. Following up on and dealing with walk in clients, processing or soliciting new business by way of dealing with queries for quotes. Preparing detailed monthly sales reports, customer

movement reports, all status, daily status and weekly total backorder reports. Following up on all new accounts in respect of the export operations as well as accordingly maintain and service the Applicant's existing client.

- [12] She tendered her resignation on 11 March 2013, terminating her employment with effect from 5 April 2013 and stated in her exit interview document that she completed on 28 March 2013, her last working day, that the part of the job she enjoyed most was "winning the customers trust over the past 4.5 years of employment." Attempts by Applicant to retain her were unsuccessful.
- [13] On 8 April 2013, one Wido Bartsch, a managing director of Safe Wear Namibia, one of the five export clients that First Respondent serviced during her employment with Applicant that was being supplied with PPE products by Applicant without a service level agreement for its performance of one of its contracts with Rossing, sent an e-mail to First Respondent's previous e-mail address at Applicant. In the e-mail Bartsch confirmed that he is comparing prices as provided by the First Respondent and the Applicant.
- [14] Subsequently, Safe Wear Namibia placed a hold on the order for the protective shoes it had placed with Applicant through First Respondent for the month of April 2013. On 12 April 2013, Bartsch cancelled the remainder of its monthly order for April.

APPLICATION

- [15] Applicant alleges that First Respondent has, in breach of the terms of the restraint of trade and confidentiality agreement,
 - [15.1] taken up employment with the Second Respondent on 8 April 2013 as Export Manager.
 - [15.2] during the course of such employment exploited her relationship with a client of the Applicant by persuading the client to trade out commodity items for items that a competitor, the Second Respondent could supply at a reduced price, having developed a very close friendship with the clients during her employment with Applicant in particular the buyers with which she was the Applicant's point of contact with such clients. Specifically that she was able, because of the relationship she had with Safety Wear Namibia to ascertain on enquiry the tender price of the items supplied to Rossing in order to provide a competitor, that is, Second Respondent with a competitive advantage over the Applicant.
 - [15.3] utilised and disclosed confidential information obtained during her employment with Applicant relating to the product baskets sold to the specification of a client, Safe Wear Namibia and information on the sale of its

Hazmat Combination Canister, the client that buys it and the price list, as proven by the e-mail.

[16] Applicant further alleges that Second Respondent

[16.1] was by letter on 11 April 2013 and a telephone call to its managing director on 16 April 2013 made aware of the restraint against First Respondent's employment, as a result its continuing to facilitate the continued breach by First Respondent constitutes unlawful and or unfair competition.

[16.2] is unfairly competing with Applicant by utilising confidential information obtained by First Respondent during her employment with Applicant to canvass Applicant's most valuable customers, to wit Safe Wear and exploiting customer connections which the First Respondent enjoys with Applicant's customers in circumstances where Applicant has a proprietary interest that it sought to protect by way of a restraint of trade agreement concluded with First Respondent.

[17] As a result Applicant submits that it fears that First Respondent, in the employ of Second Respondent will severely affect its business as indicated by the hold placed by Safe Wear Namibia on their order and enquiries made to the supplier on the Hazmat canisters. Consequently Applicant seeks a relief:

[17.1] restraining and interdicting First Respondent for a period of twelve months commencing on 5 April 2013 from acting in breach of the relevant provisions of the restraint of trade and confidentiality agreement, to applicable in the area of Gauteng Province, Malawi, Zimbabwe, Botswana, DRC, Madagascar, Kenya, Congo and Ghana including any particular area forming part thereof.

[17.2] interdicting and restraining Second Respondent from unlawfully and or unfairly competing with the Applicant by inter alia:

[17.2.1] facilitating and or procuring the breach by the First Respondent of her contract of employment with the Applicant and in particular the agreement in restraint of trade and confidentiality undertakings contained therein.

[17.2.2] utilising and or divulging the Applicant's confidential information, including but not limited to:

[17.2.2.1] the identity of the Applicant's export clients and on-site operations;

[17.2.2.2] details of the products supplied to the Applicant's clients;

[17.2.2.3] cost price paid by the Applicant for goods sold and manufactured by it;

[17.2.2.4] sales price charged by the Applicant to clients for goods sold and manufactured by it;

[17.2.2.5] details of the contact person dealt with by the Applicant at its clients, including the names and contact particulars of any buyers and or safety officers employed by the Applicant's clients;

[17.2.2.6] details of Applicant's foreign suppliers and specification of goods purchased by the Applicant for supply to its various clients (local and international).

[18] Respondents deny urgency (dealt with hereafter) and further oppose the Application on the basis that:

[18.1] First Respondent is not employed by Second Respondent but by a company called Evrigard (Pty) Ltd ("Evrigard") with a contract of employment signed on 2 April 2013, also a competitor of the Applicant, likewise supplying general PPE to South Africa and African countries including Zambia Congo, Tanzania, Mozambique, Namibia, Zimbabwe, Mauritius, Swaziland, Nigeria and Ghana. The managing director of the Applicant, deponent to the founding affidavit, was informed on 20 March 2013 that First Respondent was joining a competitor and the name of the company disclosed to Whitfield on 28 March 2013. Since then Applicant was aware that First Respondent's employment was with Evrigard. Accordingly, Second Respondent has got no interest in the matter.

[18.2] On 16 April 2013, Myron from Second Respondent contacted Applicant to discuss another employee's employment who at the time had left the employ of Applicant to take up employment with Second Respondent and in respect of whom Second Respondent had received a letter of demand from Applicant, First Respondent was never mentioned.

[18.3] First Respondent was not exposed or privy to confidential information during her employment with Applicant nor did she establish any customer connections with any of the Applicant's clients so as to enable her to exploit any such information to attract business elsewhere or had personal knowledge of or influence over the customers to take advantage of the Applicant's trade connections. The five clients that she dealt with when she joined the export department were existing clients that had already established relationships with the Applicant. First Respondent therefore did not enhance Applicant's relationship with any of these clients such that they might follow her to a new employer.

- [18.4] She was not involved in establishing the identity of potential clients in Africa or procuring new business in Africa but the manager, Whitfield, was primarily seized with developing that customer base.
- [18.5] There was no product basket or a specific PPE product which was supplied to any clients of the Applicant on a regular basis, as all products were supplied on a demand basis. She was not privy to the product needs and requirements of any of the Applicant's clients that she dealt with. She recalled some products supplied to Safe Wear by Applicant and pricing on a select few but cannot recall the product basket supplied for the Rossing contract.
- [18.6] she was never responsible for sourcing any products for the Applicant from any suppliers, and therefore has no knowledge of the actual cost prices as per suppliers' invoices to the Applicant. Although she had access to Applicant's price lists which would reflect the Applicant's purported cost price and recommended selling prices, she was not in possession of Applicant's price lists. So she does not have any knowledge on the Hazmat canister pricing and admits being aware of a notice of price increase effective from 1 April 2013 that was sent to the purchasing department with the extent of the increase not mentioned, so nothing is confidential in that regard.
- [18.7] she was never involved in any tender processes nor was any tender awarded to the export department during her employment nor was she involved in any processing of orders and delivery of stock pursuant to a tender process.
- [18.8] what is stated in the exit document was not an acknowledgement of close relationships established with Applicant's clients but that it gave her the most job satisfaction that the customers could rely on her for fast efficient service delivery. p153
- [18.9] Bartsch contacted First Respondent on 5 April 2013 and enquired if she knew of any suppliers as he wanted to cancel Safe Wear Namibia's order for supply of safety boots that First Respondent handled during March 2013 whilst still employed by the Applicant, due to the delay by Applicant to deliver and informed her that Safe Wear Namibia received a non-compliance certificate from Rossing. Applicant did not have the shoes in stock. Bartsch advised her that he was procuring the boots from Protekta another PPE supplier and looking for other suppliers and asked for a price list, whereby she requested him to furnish her with a list of what he required. That is how she got to send Bartsch a price list.
- [18.10] in the work that she was meant to do as per her job description she was not required to follow up on walk in clients, prepare or consider monthly sales reports, movement reports and status or daily status reports but such reports were prepared by Veal, the assistance. The most contact with clients was through e-mails and in few instances by telephone.

- [19] First Respondent avers that Applicant's Application must fail as there is neither a proprietary interest nor confidential information that warrants the enforcement of a restraint of trade and confidentiality agreement and the area that it seeks enforcement is grossly unreasonable. She alleges that as Applicant has no protectable interest, the enforcement of the restraint will be unreasonable and contrary to public policy serving only to prevent competition and preclude her from being employed and earning a living. She is an unmarried mother with 2 small children to support, so the prejudice that she will suffer if the relief sought is granted far outweighs any prejudice which Applicant complains of if relief is not granted.

REPLY

- [20] Notwithstanding that the issues were at this stage narrowed down to specific contentions and that Applicant approached this court for a speedy resolution of the matter, it filed in response, a replying affidavit consisting of 76 pages with 89 paragraphs excluding annexures, exceeding the number of pages of the Founding and Answering Affidavits that together totalled 68. Most of the issues were argued and reargued long-windedly some speculatively and new matters raised.
- [21] As a result the Respondents have called upon the court to ignore the new matters raised in the Replying Affidavit. As there was no basis set out for such new matters or an explanation for the rehashing of some of the issues in the voluminous affidavit, in concurrence with Respondent's Counsel I set out to consider the Replying Affidavit ignoring the new matters and objectionable averments.
- [22] Briefly, Applicants make the following vital allegations in response:
- [22.1] That if First and Second Respondent's version is ultimately accepted that First Respondent is working for Evrigard the Second Respondent must be mulcted with Applicant's costs for having to institute proceedings against it in that it failed despite the receipt of the letter of demand per telefax to inform Applicant that in fact the First Respondent was employed by an associated Evrigard.
- [22.2] That First Respondent has failed to demonstrate that there is no customer connection or the confidential information of the ilk alleged by the Applicant in that:
- [22.2.1] First Respondent was the only point of contact for her five clients including Soft Wear Namibia who contacted her on her private mobile phone that Applicant never paid for the First Respondent to use for work purposes, and the only individual tasked to deal with and responsible to manage Bartsch and did so. The relationship was such that Bartsch immediately contacted First Respondent for assistance instead of continuing to wait for the backorder and dealt with her not

only on the outstanding order but other safety boots and then the entire list of safety products. Therefore First respondent cannot contend that there was no relationship.

[22.2.2] Whitfield identified export clients and sought to secure them for Applicant and once secured handed the clients over to the Second Respondent. In the case of the five largest export clients, First Respondent handled the clients from that point onwards developing a relationship with the clients. She was tasked with fostering a relationship with the clients. She would therefore be privy to the identity of potential export clients.

[22.2.3] Applicant is concerned with the customer connections that First Respondent forged with Applicant's clients as the five export clients are responsible for the 70% of the Applicant's turnover. The Applicant has already suffered a blow as a result of First Respondent's conduct with Bartsch having entered into negotiations with the First Respondent for the provision of products which Applicant has hitherto supplied to Safe Wear Namibia.

[22.2.4] First Respondent alleges not to precisely remember the product basket supplied to Safe Wear for the Rossing contract or all the prices charged. However clients serviced by First Respondent were supplied with a set of array of core products on a monthly basis, quantum might have changed but the core products supplied on a monthly basis did not.

[22.2.5] Through access to Applicant's Syspro accounting system that First Respondent admitted to have, she would have been able to view the Applicant's cost price and recommended selling price, showing Applicant's margins including those of the five clients that she serviced. Despite any fluctuations in the prices at which Applicant or any competitor could source the products, the first Respondent would be aware of the margin charged and accordingly the selling price to the Applicant's client. She was aware of the margin charged in respect of the Rossing contract by Applicant and what the cost price was for the items charged by the Applicant, despite any fluctuations in the price at which Applicant or any competitor could source the products.

[22.2.6] First Respondent had therefore access to confidential information that she can exploit for the benefit of the new employer, even though she contends the information to be available on enquiry, a competitor is spared the trouble and expense to make the necessary enquiries by virtue of First

Respondent's employment and the disclosure of the information to provide a springboard to Evrigard which is prohibited competition and a legitimate basis for enforcement of a restraint of trade.

[22.2.7] The work that First Respondent did was not purely administrative, processing sales, but she was responsible for sales on a daily basis, soliciting and receiving business. Contents of the reports supplied by Veal were discussed with First Respondents.

[22.2.8] Accordingly Applicant has a protectable interest in the form of customer connections but also of confidential information that Second Respondent is affecting through her employment with Evrigard and is entitled to the relief sought.

[23] At the start of proceedings Respondent moved for the Application to be struck off the roll, mainly on the basis that on 24 April 2013 Applicant set the matter down on the urgent roll without affording the Respondents a time frame within which to file its opposing papers and in a wrong format. It was prepared on that date to postpone the matter to a period of over a month without moving for a rule nisi or interim relief notwithstanding the alleged urgency. Its Replying Affidavit was also filed out of time, in spite of the soundness of the arguments advanced by the Respondents and due to the inherent urgency of the issues that are addressed by the Application I ruled the Application, urgent.

[24] As Applicant's seeks a relief of a final nature in an instance where there are disputes of fact, the *Plascon-Evans* approach is applicable, as a result the final relief will only be granted if the facts as averred by the Applicant and admitted by the Respondent together with the facts alleged by the Respondent justify such an order. See *Plascon- Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C.

[25] The question that arises is whether Applicant, under these circumstances, has a protectable proprietary interest warranting the enforcement of the restraint of trade and confidentiality agreement against the Respondents?

APPLICABLE LAW

[26] It is common law that contracts are valid and enforceable unless contrary to good morals (*contra bonos mores*) or against public policy and interest. Consequently a restraint of trade agreement (which is a restriction on a person's freedom to trade) is in principle legal and enforceable and will only be unenforceable if it is contrary to public policy or public interest, as affirmed in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 791. Prove of a greater public interest will nullify the agreement.

[27] It would be contrary to public policy if the restraint sought to be enforced imposes unreasonable restriction on a person's freedom to trade. Reasonableness therefore plays a vital role as one of the factors that determine if restraint is enforceable from the perspective of the circumstances that existed when the parties entered into the agreement and the situation prevailing when enforcement is sought. See *J Louw & Co (Pty) Ltd v Richter and Others* 1987 (2) SA 237 (n) at 243B-D

[28] A party that seeks to evade the enforcement of the restraint bears the onus to prove that enforcement of the restraint will be or is contrary to public interest; See *Magna Alloys and Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 776H-J to 777A-B where it is provided that:

“the covenantor seeking to avert the enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor is however not so bound if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade.”

[29] On the other hand the restraining party has got to satisfy only two requirements.

- [i] Invoke the provisions of the restraint agreement (establish protectable interest)
- [ii] prove its breach (prejudice of the interest)

So, he only has got to show what interest that affect his business needs protection and why he needs protection.

[30] Wherefore the relevant questions that has got to be answered, in determining the unreasonableness of the restraint sought to be enforced, according to *Basson* at 767G-H is:

[30.1] whether there is a proprietary interest that might be legitimately protected by the enforcement of the restraint? and

[30.2] if such interest is being prejudiced by the other party?

[30.3] If so, does such interest weigh up qualitatively and quantitatively against the interest of the other party that they should not be economically inactive and unproductive?

[30.4] Is there another facet of public policy that has got nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

- [31] The restraint would be regarded as unreasonable and consequently unenforceable according to Malan AJA in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at 497E-F,

“if the interest of the party sought to be restrained weighs more than the interest to be protected. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interest.”

And at 498D-F he adds a fifth question to *Basson*’s four questions stating that:

“whether the restraint goes further than necessary to protect the interest, correspond with s 36 (1) (e) requiring a consideration of less restrictive measures to achieve the purpose of the limitation. The value judgement required in *Basson* necessarily requires the determining whether the restraint or limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.”

PROPRIETARY INTEREST

- [32] For the enforcement of the restraint agreement Applicant relies on the customer connections that it alleges First Respondent had developed through relationships with Applicant’s customers and the access she had to confidential information relating to the Applicant’s business and customers, buyers and suppliers that it alleges First Respondent and Second Respondent are exploiting for the benefit of the Second Respondent.

- [33] As pronounced in *Sibex Engineering Services (Pty) Ltd v Van Wyk AND Another* 1991 (20 SA 482 (T) at 502D-F those are the two kinds of proprietary interest that can be protected by a restraint of trade agreement. Sibex explains the two as follows:

[33.1] The first kind consists of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the “trade connection” of the business, being an important aspect of its incorporeal property known as goodwill.

[33.2] The second kind consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as “trade secrets”.

- [34] Nestadt JA in *Rawlings and Another v Caravan Truck (Pty) Ltd* 1993 (1) SA 537 (A) at 541C-D explains an employee’s relationship with customers with reference to Heydon’s “*The Restraint of Trade Doctrine*” (1971), and states that:

“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."

Heydon continues to state that "customer contract" doctrine is depended 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."~~

Nestadt then proceeds to quote with approval *Morris (Herbert) Limited v Saxelby* [1916] 1 AC 688 (HL) at 709 where it was said 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..."

- [35] With regard to information that is confidential, it must be of a kind that is relevant to the trade or industry, useful and not of public knowledge and property, known only to a restricted number of persons or a close circle and be of economic value to the person seeking to protect it (see *Townsend Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33v (C) at 53J-54B). Whether information constitutes a trade secret is a factual issue. The Applicant only need to show that there is secret information to which the Respondent had access, and which, in theory, the Respondent could transmit to the new employer should he desire to do so.
- [36] The onus is upon the First Respondent to indicate that, the information is not confidential either for being in the public domain or easily accessible to the public and obtained not within the context of a confidential sphere or of no economic value to the Applicant's business
- [37] It is not contended that the First Respondent was the point of contact for at least, the five major customers of the Applicant that she serviced as Export Supervisor. Her contract of employment required her to have a weekly contact with these clients telephonically or by e-mail. Evidence confirms that there was interaction somewhat daily with some of these customers either by e-mail or telephone as set out in her job description, which interaction Applicant submits created the customer connection and a relationship it alleges to have become very close and thus exploited. First Respondent rejects the submission saying she only serviced these customers by processing their orders telephonically and making sure that delivery of the orders as placed takes places in time, alleging that there was little or no personal contact with the clients and her job was more administrative than managerial and deny as well that her job included soliciting new business or identifying potential or securing export clients. She puts that and the maintaining of the relationship with clients on her manager Whitfield's responsibility.
- [38] Whitfield accepts that he was responsible to secure clients and but for one client, they were all on being secured passed on to be serviced by First Respondent. He

admits to have been tasked with identifying potential export clients. He goes further to indicate that in the case of one client in particular, Safe Wear Namibia, First respondent was to deal directly with its managing director Bartsch, exclusively. He then states that the customer connection that was created was close and confirmed by Bartsch's conduct of immediately contacting First Respondent 4 days after she left, seeking to do business with her new employer. Applicant cannot take the matter any further than that. No other manner of interaction with clients could be proven beyond what was claimed by First Respondent. In view of the fact that the export clients were foreign based, it is unlikely that regular personal contacts would have taken place. Hence its logical that it was not part of First Respondent's job description. It therefore also makes sense that Whitfield, as the manager confirms that he was tasked with securing export clients. Whitfield also conceded that even the reports that were alleged in the Founding Affidavit to be prepared by First Respondent were in fact prepared by the assistant Veal.

- [39] I therefore do find merit in First Respondent's contention that without the personal contact, the interaction with the export customers as alleged by e-mail and telephone call on the orders and supplies to be delivered did not on its own create the "customer trade" envisaged by Hayden, of serious attachment that could lead to First Respondent inducing these customers to follow her at her current employer.
- [40] Applicant then argued that First Respondent's statement in the exit document that "winning the customers trust over the past 4.5 years of employment" is the part of the job she enjoyed most is an indication of the closeness of the relationship she has developed with the customers. The comment can relate to a lot of things, maybe personal skills related, reflecting on how First Respondent measured her success or performance in the job or can be customer related as indicated by First Respondent, 'to be trusted that she can do her job', but cannot with certainty be said to be a measure of how close or advanced her relationship with the customers has developed to assume attachment to the extent that they will follow her to her new employment.
- [41] The issue of Bartsch, one of the export clients is raised as proof of the relationship developing to that kind of customer connection and also that First Respondent had used the relationship and information held in confidence to solicit information and business from Safe Wear Namibia. Although Applicant does not require proof, when seeking to enforce a restraint agreement it is sufficient to show that First Respondent had access to secret information which he could give to the new employer. See *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others* 2004 (4) SA 156 (W) at 166I to 167C. The First Respondent should have gained knowledge of the information during the time of her employ with Applicant.
- [42] Prior to addressing the issue of the whether or not First respondent had confidential information or customer connection that she used as alleged, the circumstances under which First Respondent was contacted by Bartsch become critical. Both parties agree that Bartsch had an order that was outstanding that was handled by

First Respondent during her final month in Applicant's employment. Bartsch was in constant contact with the First Respondent enquiring upon the order as it was delayed. There was no commitment from Applicant on the date of delivery of the outstanding order and Safe Wear Namibia was in receipt of a non-compliance notice from its major client Rossing. Applicant's Whitfield does not dispute these allegations as well as First Respondent's assertion that Applicant did not have the order in stock for some time but argue instead that notwithstanding the delay Bartsch should have waited. Bartsch's contact of First Respondent must be appraised in that factual context, mainly that he was following up on an overdue delivery that First Respondent was handling, and thereafter saw an opportunity to get assistance from First Respondent to salvage Safe Wear' contract with Rossing. Therefore the contact was not as a result of an attachment the customer had to the First Respondent nor was he induced by the First Respondent.

- [43] Now what is still to be answered is whether First respondent had information that was confidential about Safe Wear and others, gained during her employment with the Applicant that she could use to give her current employer an advantage against Applicant, taking into consideration that this is a factual issue.
- [44] First Respondent has claimed that she was not privy to the product needs and requirements of any of the Applicant's clients that she dealt with. She was not responsible for sourcing any products for the Applicant from any suppliers as a result did not have knowledge of the actual cost prices and the margins of the Applicant. She however confirmed that to be able to view the Applicant's purported cost price and recommended selling price, showing Applicant's margins including those of the five clients she serviced, she would have had to access the information through Applicant's Syspro accounting system. She states that she recalled some products supplied to Safe Wear by Applicant and pricing on a select few but cannot recall the basket products supplied for the Rossing contract. She personally did not have the actual cost pricing in her possession and did not know the pricing on Hazmat's canister however argued that such information was readily available to the public as it can be supplied on request and in that instance can hardly be regarded as confidential. Respondent's Counsel argued that in the context of the thousands of different products that are supplied by the Applicant it is understandable if First Respondent would not recall the cost of some of Applicant's products supplied even to the five clients, especially, as admitted by Applicant, that prices do fluctuate.
- [45] Applicant argues, based on the mere admission by First Respondent that she could have had a view to its cost pricing by accessing its Ssypro system, that First Respondent had information about its pricing and of the product baskets requirement of each client because except for the change in quantity, the core products supplied that customers ordered regularly, remained the same. It is hard to defend that argument when it is considered against First Respondent's Counsel's argument on the list of products available and the background of Bartsch's e-mail. The e-mail refers to the list of products Safe Wear required immediately and the list of the total items that was pending to be sent to First Respondent. Bartsch already had in the e-mail Applicant's prices for the items he required. That is the

information, that is according to Applicant, confidential which First Respondent could use to the advantage of her current employer. I disagree, Bartsch's e-mail, in fact confirms that the information on pricing is already in the public domain and known to the customers against whom Applicant fears First Respondent would use to benefit her current employer. Also by the fact that it is available on Applicant's Syspro system means it can be made available to the public on enquiry. The fact that First Respondent was to be sent a list of what Safe Wear Namibia's requirements confirms also First Respondent's allegation that she was not privy and could not recall what were the product needs or product basket supplied to Safe Wear or each of the export clients including prices. If First Respondent had knowledge of the product basket supplied to Safe Wear to fulfil its Rossing contract, she could have just utilised that knowledge and disclosed it to her current employer, instead of awaiting a list. The cost price to Rossing is also included by the customer as a reminder not a reply to a request by First Respondent. Therefore Applicant's allegation that First Respondent took advantage of the relationship to get such information is not substantiated. Bartsch indicates that he is comparing the prices, which is healthy competition. The purpose of a restraint of trade should not be to stifle lawful competition or be oppressive to third parties by playing the hands of the customers, limiting their choices to a business that is failing to deliver. See *Humphreys v Laser Transport Holdings Ltd and Another* 1994 (4) SA 388 (C).

- [46] Under the circumstances there is no confidential information privy to First Respondent useful for the carrying on of the Applicant's business that if disclosed, could be used by current employer, to gain a relative competitive advantage. The interaction by e-mail was not through First Respondent taking advantage of a developed friendship or confidential information known to Applicant but distinctively as a result of Applicant's failure to deliver on its services. The 'trade connection' in accordance with *Sibex* has not been established.
- [47] First Respondent's Counsel also argued that notwithstanding that there is no protectable interest, the First Respondent was based in Isando working with only 5 clients based in Africa, seeking to enforce the geographical extent of the restraint that goes beyond national boundaries that is effectively stopping her from being employed in South Africa for a period of 12 months, particularly in Gauteng where she lives is senseless. She is also a single mother with 2 small children. The enforcement of the restraint of trade would be grossly unfair and contrary to public policy and the prejudice to the First Respondent far outweighs the alleged interest sought to be protected. Which was met by Applicant's counter-argument that the injury it will suffer is also enormous as a result of the fact that the export clients that First Respondent serviced that Applicant might lose if restraint not enforced were responsible for 70 % revenue of the business. Since the Applicant failed to establish a clear right in a proprietary interest to be protected I deemed it unnecessary to further consider the contentions herein as there is no reason for the enforcement of the restraint.
- [48] The Applicant has therefore failed to establish a proprietary interest deserving to be protected by the enforcement of the restraint of trade. The First Respondent has

discharged the onus to prove on a balance of probabilities that under the circumstances it would be unreasonable and contrary to public policy to enforce a restraint where there is no protectable interest.

[49] Applicant has prayed for a relief against Second Respondent as the employer of the First Respondent and for costs against it lest I find it not to be the employer. First Respondent does not carry the onus to prove the *locus standi in judicio* of the Second Respondent but has attached an offer of permanent employment by Evrigard that First Respondent signed in acceptance. He who alleges must prove. The onus therefore rests with the Applicant to prove that Second Respondent is the correct party to be sued. Applicant instead refers to First Respondent's conduct of replying to a letter it alleges to have sent to the Second Respondent's fax number, even though the letter was also sent by e-mail to First Respondent's, as proof that First Respondent employed by Second Respondent. It also filed a confirmatory affidavit by one of its employees who alleges that she phoned Second Respondent's business and was put through to First Respondent and it was indicated to her that First Respondent works there. The employee does not allege speaking to First Respondent nor does she divulge the name of the person she spoke to. Such mere assertions are not sufficient to discharge the onus. See *Southern Pride Foods (Pty) Ltd V Mohidien* 1982 (3) SA 1068 (C). The Second Respondent was also not required to reveal its defence to the Applicant before litigation. I therefore find that Applicant failed to discharge the onus upon him to establish if the Second Respondent is the right party to be sued. As a result the costs must follow the event in accordance with the general rule.

[50] For these reasons therefore;

[50.1] The Application is dismissed with costs;

[50.2] The Applicant is ordered to pay the wasted costs occasioned by the postponement on 24th April 2013.

N V KHUMALO

JUDGE OF THE HIGH COURT NORTH GAUTENG

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