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

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

CASE No: 1738/12

Date: 18 January 2013

HALSTTED & CO (PTY) LTD **APPLICANT**

AND

RUDI DAVID VILJOEN **1ST RESPONDENT**

WORKWEAR DEPOT **2ND RESPONDENT**

JUDGMENT

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[1] The dispute in this case involves the putting into operation of a restraint of trade agreement. The first respondent was employed by the applicant since 1997 after he completed matric. His first position was that of a driver/general assistant for eight months. During the year 2000 he was appointed Store Manager. During September 2001 he was appointed SalesRepresentative, a position he held until July 2006 when he was appointed Branch Manager of Halsted, Kimberley. During 2010 the first respondent was appointed Area Manager, for the Northern Cape Province and the Vryburg area. The applicant is conducting the business of selling among others, overhauls, protective clothing, chemicals, hardware, cleaning equipment, brushware and toilet and paper products.

[2] On 01 April 2004 at Kimberley, first respondent singed a document bearing the title *"Amendment of Letter of Employment Application (Additional Clauses)"*which is in effect a restraint of trade agreement.('Annexure A'). According to the applicant the first respondent signed an additional document titled *"Confidentiality Agreement of Halsted and Co. (Pty) Ltd."* ("Annexure B"). The first respondent denies that he signed Annexure B, an issue which also requires determination.

[3] It is common cause that on 27 March 2012 the first respondent resigned from his employment with the applicant. His last working day was 26 April 2012. He took up employment with the second respondent and is presently holding the position of Area Manager and is based in Kimberley. On 30 April 2012 and 5 May 2012 the applicant sent two letters to the first and second respondents respectively, warning the first respondent that it would not hesitate to enforce the restraint of trade and the confidentiality agreements in the event of the first respondent breaching their terms. On 07 May 2012 first respondent's attorney of record responded to the letter addressed to his client and indicated that first respondent acknowledged that he had signed a confidentiality clause and undertook to abide by the contents thereof and furtherthat he shall not reveal any information regarding the business methods of the applicant.

[4] On 22 May 2012 second respondent's attorneys also wrote a letter to the applicant stating that second respondent did not intend to request confidential information from first respondent and further placed on record that it disputed that the documents in issue constituted enforceable and consequently binding restraints of trade.

[5] On 10 October 2012 the applicant launched these proceedings against the respondents on urgent basis seeking an order *inter alia,*on the following terms:

(a) That first respondent be called upon on 23 November 2012 at 10h00 to advance reasons why the following order should not be granted:

(i) that the first respondent be interdicted and prohibited for a period of 36 months from 27 April 2012 and within the Northern Cape Province, to accept any employment with any person, firm, group, partnership or association whatsoever, which directly or indirectly competes with the business of the applicant and/or carries on a business similar to that of the applicant.

(ii) that the first respondent be interdicted and prohibited from directly or indirectly disclosing any confidential information or other facts with respect to the business of the applicant, to any other person or business;

(iii) that the first respondent be ordered to pay the costs of the application;

(iv) that the second respondent be ordered to pay the costs hereof, jointly and severally with the first respondent, only in the event of the second respondent opposing this application.

(b) that the above orders serve as an interim order with immediate effect pending the finalisation of this application.

[6] On 12 October 2012 the matter was placed on the urgent roll before ***Phatshoane J.*** The matter became opposed andwiththe consent of the parties it was postponed to 02 November 2012 without an interim order being made. The determination of costs of that day was reserved. The respondents filed their opposing affidavits subsequent to the postponement. The applicant also filed its replication. During argument counsel for the respondents referred me to an unreported decision of the Witwatersrand Division of the High Court[1] and undertook to provide me with a copy thereof a few days after the hearing of the matter. My decision on the application was consequently reserved.[2]

[7] The respondents have challenged the urgency with which this matter was brought. They contended that the matter was not urgent, alternatively, that if there was any urgency, same was self-created. The respondents

[1]Paragon Business Forms (Pty) Ltd v Yanasak: Case no: 20317/92
[2]Unfortunately, after waiting for a few weeks I have not been provided with a copy of the judgment counsel referred me to. It appears that the respondents have encountered some difficulties in obtaining a copy of the judgment. However, the facts and the reasoning of Leveson J in arriving at his decision in that case have been adequately summarised by Leach J in Paragon Business Forms (Pty) Ltd v Du Preez 1994(1) SA 434 (SE) at 442 I-444D.

contended that the applicant (on its own version) became aware alreadyat the beginning of May 2012 that the first respondent was, in breach of the restraint of trade agreement by beingemployed by the second respondentand that he was already having contact with its clients in the Northern Cape Province. However,goes the contention, the applicant chose to bring this application on extremely urgent basis after five months of it having been aware of the first respondent's engagement with the second respondent. Furthermore, even if it could be accepted that the applicant only became aware of the first respondent's breach of the agreement it waited a further two weeks before it brought this application. It was therefore contended that the matter should not be entertained as urgent and should either be dismissed or struck off the roll on that basis.

[8] The applicant's response to the respondents contention on urgency is simply that it was initially under the impression that the first respondent was employed as Branch Manager of the second respondent's Welkom branch and/or as Regional Manager in the Free State, in which event the applicant would in all probability not have brought an application to enforce the restraint of trade agreement since the first respondent would not have been in breach thereof. The applicant would have been satisfied with the respondent's undertaking not to breach the confidentiality agreement.

[9] According to the applicant itonly became aware that the first respondent was employed in Kimberley when the first respondent's motor vehicle was seen by Shane Ivan Davis (the Managing Director of the applicant and deponent to the founding affidavit) parked in front of the second respondent's *"depot"* in Kimberley. Davis took photographs of the motor vehicle as proof of what he observed. There were also rumours at the time that the second respondent was opening a branch of its business in Kimberley.

[10] I am not persuaded by the submission that the applicant delayed in instituting these proceedings. The restraint agreement is restricted to the Northern Cape province and there is no evidence suggesting that the applicant was aware or ought to have been aware that the first respondent was employed within this province. Therefore, taking up employment outside the area specified in the restraint agreement is not a contravention. It is also not a contravention of the restraint agreement for the first respondent to honour unelicited orders received from inside the restricted area.[3]

[11] Even if it were to be found that the urgency was self-created, the applicant was not granted an interim order on the day the matter was first placed on the roll. The respondents were granted an opportunity to file opposing papers and they took advantage of the opportunity. This explains why they were fully prepared to present their cases on the day the matter was heard. None of the parties can legitimately claim that they were prejudiced in presenting their cases. I therefore proceed to consider the merits of the application which were fully argued before me.

[12] Since the applicant wants a final order, where there are disputes of facts same would be considered on the basis of the approach adopted in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd***[4] that where there are disputes of facts a final order can be granted only if the facts

[3] Ekock& Co v Ekock 1928 WLD 121; Wolmer v Rees 1935 TPD 319
[4] 1984(3) SA 623 (AD); See also National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at para[20].

averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent justify such order.

[13] The restraint agreement that is the subject matter of this application reads:

> *"Amendment of Letter of Employment Application(Additional Clauses). On termination of your employment with Halsted and Company (PTY) Ltd, you will immediately return to Halsted and Company (PTY) Ltd all documentation and other property of Halsted and company (PTY) Ltd, which may be in your possession, including list of customers, clients or written information regarding the business of Halsted and Company (PTY) Ltd, and you undertake not to retain or make any copies thereof for any purpose.*
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> *You will not, either before, during or after termination of your employment with Halsted and Company (PTY) Ltd, use for your own benefit or that of any person, firm or company, any confidential information relating to the affairs of Halsted and Company (PTY) Ltd, which may have come into your possession, or which you were or become aware of whilst in the employ of Halsted and Company (PTY)Ltd.*
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> *As an employee of Halsted and Company (PTY)Ltd, by reason of association and service, you will acquire knowledge of Halsted and Company(PTY)Ltd trade secrets, sources of supply, patents of trade, business methods, suppliers and clientele. Such knowledge could be advantageous to the competitors of Halsted and Company (PTY) Ltd.*
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> *You therefore undertake:*
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> *(1) Not to directly or indirectly, either as principal, agent, partner, representative, shareholder, director or employee be associated with, interested in, (which expression includes, inter alia, the loan or*

advancements of money to you), interest yourself in any firm, company, person or group carrying on business in competition with that of Halsted and Company (PTY)Ltd and/or any company or firm or undertaking which it may now in the future control or with which it may become associated; and

(2) Not to knowingly solicit, in competition with Halted and Company(PTY)Ltd, a customer or any person who, as at the date of termination of your employment, is or was a customer of Halsted and Company(PTY)Ltd; and

(3) Not to commence business on your own account, enter into any partnerships, accept a position as director of any group, accept any employment with any person, firm, group, partnership or association whatsoever, which directly or indirectly competes with business of Halsted and company (PTY)Ltd and/or carries on a business similar to that of Halsted and Company (PTY)Ltd.

(4) The restraint shall endure for a period of 36 months from date of termination of your employment. This restraint is extended to the Northern Cape.

You, in acknowledging the receipt of the amendments, agree that the above restraints are reasonable in all respects."

[14] As a general rule a provision which attempts to restrain an employee after termination of the contract of employment from taking up new employment is in conflict with public policy if the effect of the restraint would be unreasonable[5]. The test for determining the reasonableness or otherwise of a restraint is based on the broad interests of the community on the one hand, and the interests of the contracting parties themselves on the other hand. The broad interests of the community entail that agreements should be abided and at the same time unproductivity should

[5]Magna Alloys and Research(SA)(Pty) Ltd v Ellis 1984(4)SA 874 (A) at 898 A-B; Basson v Chilwan 1993(3) SA 742 (A) 762 B-H.

be discouraged. In as far as the interests of the contracting parties themselves are concerned, two issues arise. The first is that it is unreasonable to prevent one party, after the termination of his/her contractual relationship with another, from participating freely in the commercial and professional community[6]. Secondly, it should be unreasonable not to protect a protectable interest of a contracting party against the other, where such protection would not offend public policy.

[15] In determining the reasonableness or otherwise of a restraint provision the following four questions are relevant[7]: (a) Is there an interest of the one party which is deserving of protection at the termination of the agreement? (b) Is such interest being prejudiced by the other party?(c) If indeed so, does such interest weigh up quantitavely and qualitativelyagainst the interest of the other party that the latter should not be economically inactive and unproductive? (d) is there another fact of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected. The fifth question could be: does the restriction go further than is necessary to protect the particular interest?[8]

[16] The principles that may be discerned from the authorities dealing with the legal position regarding the enforcement of restraint of trade agreements relevant to the facts of this case for trade secrets and connectionsmay be tabulated as follows:[9]

(a) The need of an employer to protect his/her trade connections arises where the employee has access to customers of the

[6]Econoflex (Pty)Ltd v Delport [2005] JOL 14434(T)
[7]Basson v Chilwan (supra) at 767 F-h.
[8]KwikKopy (SA) (Pty) Ltd v Van Haarlem 1999 (1) SA 472(W) 484 B-E.
[9]Den BravenSA(Pty) Ltd v Pillay and Another 2008 (6) SA 229 (D&CLD) at 235F-236E (para[6]); Walter McNaughtan (Pty) Ltd v Schwartz and Others 2004(3) SA 381 (C) at 390 C-D.

employer and is in a position to build up a particular relationship with the said customers so that when he/she leaves the employer's service he/she should easily induce the said customers to follow the employee to the new business where he/she is involved either as owner or employee;

(b) The relationship must be such that the employee acquires such personal knowledge of and influence over the customers of his/her employer as would enable him/her if the competition were allowed, to take advantage of his/her employer's trade connection.

(c) Whether the criteria referred to in (a) and (b) above are satisfied is essentially a matter of fact in each case, and in many, one of degree.

(d) Factors relevant to be considered in answer to (c) above are: the duties of the employee, his/her personality; the frequency and duration of contact between the employee and the customers; the place where such contact takes place; what knowledge he/she has gained of the customers' requirements and business; the general nature of the relationship, 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; the type of product being sold; whether there is evidence that customers were contacted after the employee left.[10] The list is not exhaustive and it will depend on the circumstances of the case under consideration.

[10]Rawlins v Caravantruck (Pty) Ltd 1993(1) SA 537(A) at 541 G-I.

(e) The mere fact that the employee had contact with customers does not on its own bring about a protectable interest in the form of customer connections, but that the connection is such that it will probably enable the former employee to induce the customers to follow the employee to a new business.[11]

(f) A covenant of restraint is against public policy if it did not protect a proprietary interest but sought merely to exclude competition. Elimination of competitionis not a kind of interest which can be protected by a restriction of freedom of trade after the termination of a contract of employment. It would not weigh up against the prejudice which the other party will suffer if he/she cannot freely exercise his/her trade or calling.

(g) The parties' own view reflected in the agreement as to the reasonableness of the terms of the restraint agreement can never be decisive. The content of the agreement cannot itself be the exclusive measure of what is reasonable because that would result in the propriety of the agreement being tested against itself.[12]

(h) The reasonableness of the restraint is judged at the time of the adjudication of the dispute. There could be factors present at the time of adjudication which might not have been within the contemplation or present to the minds of the parties at the time of the conclusion of the agreement.[13]

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[11]Walter McNaughtan (Pty)Ltd v Swartz and others (supra) at 390C.

[12]Magna Alloys and Research SA (Pty)Ltd v Ellis (supra) 905B. Bonnet v Schofied 1989 (2) SA 156 (D) 160 B-C.

[13]Magna Alloys & Research SA (Pty) Ltd v Ellis (supra) 894 C-D; Alum-Phos (Propretory) limited v Spatz [1997]1 All SA 616 (W) 626b-c.

[17] It is important to note that agreements in restraint of trade are prima facie enforceable and an *onus* rests on the party seeking to avoid the restraint clause to prove that its enforceability would be contrary to the public interest.[14]Similarly, the *onus* of proving unreasonableness is upon the party seeking to avoid the enforcement of the restraint.[15]

[18] The applicant's case in support of the orders it is seeking is premised on the following: That the first respondent signed both Annexure A& B whilst employed by it. The first respondent is now employed by the second respondent in Kimberley, a direct competitor of the applicant in the Northern Cape. The first respondent is employed as Regional Manager in the Northern Cape in direct competition with the applicant. First respondent is utilising confidential information that he obtained during and as a result of his employment with the applicant to further the interests of the second respondent, including client lists, client's requirements, client required quantities and stock levels, the applicant's stock levels and supply base trends. It is further the applicant's case that the first respondent is actively promoting sales to the very same clients of the applicant that he met and got to know during his employment with the applicant and that the first respondent has failed to indicate to customers of the applicant that he is no longer employed by the applicant and instead when approached by them merely furnished them with quotations from the second respondent.

[19] The first respondent's response to the applicant's case is as follows. He admits that he indeed signed Annexure A but that he signed it under

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[14]Magna Alloys and Research (supra); Same; "Agreements in Restraint of Trade in South Africa Law" Butterworths: 6-11 (issue 11).
[15]Reeves v Marfield Insurance Brokers CC 1996(3) SA 766(A) at 776 A-C.

duress. He did not sign it freely and voluntarily as he was forced by the Managing Director of the applicant(Davis) to append his signature. He states that prior 01 April 2004, a day on which he signed Annexure A, he did not have a written employment agreement with the applicant. He only received an appointment letter. AnnexureA was presented to him by Davis who did not request him to sign the document but *"instructed"* him to sign it. He was not pleased to bind himself as stipulated in the document because the business of the applicant is the line of business that he understood very well and which he had extensive experience on. He would therefore not have voluntarily *"locked himself"* out of the employment market in that field and bind himself to work for the applicant only. First respondent avers further that he had no choice but to sign the document as he believed that Davis would make his working environment intolerable such that he would be left with no other option but to resign. He therefore had no option but to sign and bind himself as such.

[20] With regard to Annexure B the first respondents defence is that he did not sign the document and that the signature that appears therein is not his. He states that he was required by e-mail to sign the document and he refused to do so. The request was made shortly before his resignation. He further noticed that the document states that it was signed in Rustenburg and on that day he was in Kimberley and not in Rustenburg. He avers that his signature has been forged.

[21] The first respondent further contends that if it is found that there is indeed a valid restraint of trade agreement which is, on the face of it enforceable, the applicant has not established a protectable interest which is in the public interest and reasonable. Furthermore, if it is found that the applicant does have a protectable interest, it has not been shown that the interest has been threatened by the first respondent or that it would not be threatened in the future. In the alternative, if it is found that the applicant's protectable interest has been threatened or likely to be threatened, the first respondent contends that the period of three years (36 months) for the protection of the applicant's rights is hopelessly unreasonable and should be limited to a period of nine months.

[22] The issues to be decided are whether (a) the first respondent signed Annexure A under duress; (b) whether the first respondent signed Annexure B; (c)If it is found that first respondent did not sign under duress whether his signature of Annexure A gave rise to a valid restraint of trade agreement. (i) whether the applicant has established a protectable interest which is in the public interest and reasonable; (ii) whether the applicant's interest has been threatened by the first respondent or that it is likely to be threatened in the future, and (iii) whether a period of three years(36 months) for the protection of the applicant's rights is reasonable.

[23] I first deal with the issue relating to duress(*metus*). It is accepted in our law that a party who seeks to resist the enforcement of a contract on the ground of duress based on fear bears the *onus* of showing that he/she was induced thereby to conclude the agreement. He/she would not have concluded the agreement had it not been for the duress. The essential elements that must be established by such a party are that:[16]

(a) A reasonable fear that the threat might eventuate.

[16] See: Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 3058 and 306B, Paragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SE) at 439; National Scrap Metal (Cape Town)(Pty) v Murray & Roberts Ltd 2012(5) SA 300 (SCA) at para[21].

(b) The fear was caused by the threat of some considerable evil to the person concerned or his/her family.

(c) The threat was of an imminent or inevitable evil.

(d) The threat or intimidation was unlawful or *contra bonos mores*.

(e) The moral pressure exerted by the threat had caused damage.

[24] As pointed out, the first respondent admits having signed the agreement but contends that it was placed before him by Davis and who did not request him to sign it but specifically ordered ("beveel") him to sign it. That he was not satisfied to bind himself as such but he had no other choice but to sign the document. He feared that his refusal would have led to a situation where Davis would make his working conditions difficult to the extent that he would have to resign.

[25] In response to these allegations, Davis denies that he ordered, forced or coerced the first defendant to sign Annexure A. He stated further that Annexure A was signed by the majority of the applicant's senior personnel throughout the applicant's group who were privy to confidential information regarding the applicant's business.

[26] The issue whether the first respondent signed Annexure A under duress rises a dispute of fact. I have not been requested to refer the issue to oral evidence or trial for determination by the parties. Both parties are of the view that it is a matter that can be decided on the papers bearing in mind the relevant applicable legal principles. I agree and accordingly proceed to consider the issue, bearing in mind the party bearing the onus and the approach to be adopted where there are disputes of facts in motion proceedings where final relief is sought.

[27] The only pressure that was exerted on the first respondent (on his own version), is an order or instruction that he sign the agreement. There is no other evidence that he enquired from Davis what would happen should he not sign the document. He,on his own,harboured a threat that his employment conditions would be made difficult should he not sign. In my view, a person in the position of the first respondent who is the Area Manager and who has served the appellant for such a lengthy period of time, would not be intimidated into signing a contract that is against his rights by merely being ordered to sign without being told what the consequences would be should he refuse to sign. I find such fear,if it indeed occurred, to be unreasonable under the circumstances.

[28] Furthermore, the first respondent being a manager himself, should or ought to have been aware of his rights should the working conditions be made intolerable for him. In addition the threatin issue is in my view not enough to coerce a person in his positionto sign an agreement which is against his rights. It is noteworthy that the first respondent could refuse to sign Annexure B but agree to sign Annexure A. On both occasions it was only an instruction used to pressurise him and nothing more. It must be accepted that the first respondent had the opportunity to read the document and knew what its contents and consequences where.He however did nothing to contest the document until these proceedings were instituted by the applicant. Furthermore, a letter from his attorney of 7 May 2012 confirmed to the applicant that he regarded the document binding on himself and would abide by its contents. His defence of duress seems to be an afterthought.

[29] Even if it is accepted that he did fear that his working conditions would be made difficult because of his non-compliance with the instruction, such fear, in my view, was so unreasonable that it does not satisfy the requirement of fear or the anticipation of harm required to enable him to avoid the enforcement of the restraint agreement.The first respondent's allegations in this regard are so far-fetched that rejecting them merely on the papers is justified. I therefore find that the first respondent has failed to establish that he was forced or coerced to sign Annexure A, or that he did so under duress.

[30] It is opportune at this stage to deal with Annexure B. The first respondent denies having signed Annexure B and states that he was not in Rustenburg where it is alleged that the document was signed. By this denial, the applicant carried the *onus* to prove that the first respondent did sign Annexure B. In reply, the applicant denies the allegations made by the first respondent and reiterate that the first respondent did sign the document. An attempt was made by the applicant to rely on a letter written to the applicant's Attorneys to support the averment that first respondent signed Annexure B which is inadmissible as evidence. Davis does not state that he was present when the first respondent allegedly signed the agreement. He does not set out the circumstances in which the document was signed by the first respondent. Since the applicant bears the *onus*to prove that the first respondent signed the document, it has not succeeded in doing so and as such Annexure B cannot be relied upon by the applicant.The first respondent has explained that his initial admission that he signed the document was mistaken and has since ascertained that he made a mistake. He can therefore not be held to his mistaken view in light of his reasonable explanation.

[31] The protectable interest that the applicant is claiming and that require protection is that as a result of the first respondent's employment with the applicant, the former obtained knowledge of the applicant's stock levels, the applicant's mark-up, profit, sales figures and markets, and particulars of various clients in the Northern Cape province. He also obtained information relating to the circumstances, requirements, products and quantities required by such clients, to which the applicant delivers supplies. The applicant contends that the aforesaid information is confidential information regarding the applicant and constitutes protectable interest.

[32] In response to the above averments the first respondent states that after his appointment as area manager, he built up the applicant's business as a result of his personality, and the manner in which he conducted himself how he personally related with people. He also introduced retail outlets where clients could walk in and purchase whatever they wanted as opposed to a warehousing business as it was the case before. He stated further that when he took over, the turnover of the applicant's business was in the region of R10,5 million per year and when he left the annual turnover had risen to R45million for the Kimberley branch alone. He also as the branch manager extended the applicant's business to Kathu and Vryburg and also opened an agency in De Aar. He admits that he learnt some of the aspects of the business from Davis but that in the main the growth of the business was as a result of his personality and own initiative.

[33] First respondent avers further that the applicant's business is not a unique business as the applicant claims because it consist of sale of work wear, chemicals, cleaning material, toilet and paper products in the mine, agricultural and industrial sector. These activities are also undertaken by other entities in Kimberley such as Agricultural & Mining Distributors, Safety Sam, Ryamic, and Ntlo, as well as Reidera and Upington Industrial in Augrabis and Upington. Other entities selling some of the products are North Safety in Kathu, Built-it, GWK and Buco in Kimberley and Crag Trading in Kathu. These entities also supply JonssonWorkwear and have been doing so in the NorthernCape province even before first respondent took up employment with second respondent.

[34] The first respondent contended further that the applicant's business is not unique because as it is the case with all other businesses they buy the products from the suppliers, add up a markup for profit and sell to the prospective customers. He admits that he gained knowledge of the applicant's stocklevels, profit margins and sales figures but alleges that such information is not unique to the extent that it may help a competitor to unfairly impact on the applicant's sales. Furthermore, the customers that exist do not solely purchase the items they require from the applicant. Finally, first respondent contends that the applicant is not the sole supplier of the JonssonWorkwear in the Northern Cape Province.

[35] The applicant is also relying on the fact that the first respondent has acknowledged, or that the restraint agreement makes provision that the first respondents by being employed by the applicant would have access to confidential information and trade secrets of the applicant. A mere acknowledgment in the agreement that a particular information is confidential or would be considered as such and therefore protectable does not necessarily make such information confidential. It is incumbent upon the applicant to place facts before court from which it may be inferred that the information alleged to be secret is indeed secret. Therefore where there is nothing unique about a way the applicant is doing business or nothing unique about its sales methods, and its methods are those generally adopted in the particular trade or industry, such methods cannot be considered confidential and therefore protectable by a restraint agreement. For the information to be confidential it must have the necessary quality of confidentiality about it and it must not be something which is public property or public knowledge.[17]

[36] In my view, it is not sufficient to allege that the first respondent has access to the applicant's trade connections and customer lists. The important element that must be established is that the first respondent's connection with the customers is such that he has a personal influence with the applicant's customers such that when he leaves or has left, is in a position to induce them to divert their business to the new employer. Mere knowledge of who the customers are is not sufficient.

[37] It is common cause that the first respondent served a resignation letter on the applicant on 27 March 2012 in which he gave 30 days notice. His last working day was 26 April 2012. Prior his departure he requested Mr TRL Honiball, an employee of the first respondent to clean his computer notebook. According to the first respondent he did so in order to return the said computer to the applicant when he left and had a lot of personal information that he wanted removed. He denies that he requested Honiball to erase his windows profile as he did not even know what that is, him being layman when it comes to computers. According to the applicant attempts were made after the first respondent's departure to retrieve the information deleted by Honiball to establish *"what*

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[17]Telefund Raisers CC v Isaacs 1998 (1) SA 521 (c) 528; Petre&Madco (Pty) Ltd t/a T-Chem v Sanderson-KaSner 1984 (3) SA 850(W) 858 G-H

information was passed on to specifically the second [respondent], but without any success."

[38] It would be far-fetched to conclude that the first respondent passed any information from his computer belonging to the applicant to the second respondent solely on the applicant's suspicion. However, it would be difficult if not impossible for the applicant to prove that the first respondent passed over information to the second respondent. These would be matters that would naturally take place in the applicant's absence. The overall circumstances of the case must be considered in determining this aspect.

[39] The applicant alleges further that prior to his resignation, the first respondent ordered large quantities of JonssonWorkwear stock, increasing the applicant's stock levels by approximately 150% and thereby artificially increasing the applicant's sales figures in order to inflate the figure that he supplied to the second respondent. In response to this allegation, the first respondent denies that he ordered large quantities of Jonssonworkwear on behalf of the applicant as alleged. He states that orders were in the course of business made by Charlene Zondagh who was the new branch manager of the applicant in Kimberly. The latter used his discretion and did not request the second respondent's approval for the orders. The first respondent further denies that he was required to furnish any sales figures to the second respondent as doing so would have been immoral. He challenged the applicant to support all these allegations with particulars.

[40] In response to the applicantsnotes the averments that Charlene Zondagh is the person who did the orders on his own discretion without seeking the approval of the first respondent. The applicant then denies the rest of the response made by the first respondent. Whether this aspect is relevant will depend on the fundamental issue to be decided in this case. However, I am unable to find, on the basis of what the applicant alleges that the first respondent indeed ordered large quantities of trading stock for the applicant in order to artificially increase the applicant's sales figures.

[41] The other aspect relate to the order placed by Golden Falls Mining (Pty) Ltd, a client of the applicant during May 2012. The allegations are that Mr Brown phoned the first respondent to obtain a quotation for materials on 15 May 2012 and the latter informed him that he was not in office and would return his call. The first respondent later phoned Mr Brown and obtained information regarding the desired quotation from him. The following day on 16 May 2012 a quotation was sent to Mr Brown from the second respondent's Welkom Depot. Ms du Toit phoned Davis to enquire whether the applicant had changed its name when she saw the information on the quotation.

[42] In *casu*, the following factors are important. The first respondent has been in the employ of the applicant since 1997 after he completed matric. He worked his way up in the applicant's business until he became the Area Manager for Northern Cape Province and Vryburg in 2010. He became Store Manager in 2000 and from September 2001 he became a Sales Representative. From July 2006 to the year 2010 he worked as Branch Manager. In all these positions the first respondent was playing an important role in the business of the applicant particularly in the sale of the applicant's merchandise.

[43] During this period the first respondent must have obtained knowledge of the applicant's stock levels, mark-up, profit marging, sales figures and markets and clients. The first respondent admits that he gained knowledge of these aspects of the applicant's business. His involvement in the business contributed meaningfully to the growth of the business to extent that when he left it was making a yearly turnover of R45 million for the Kimberley branch alone. The knowledge and expertise in this kind of business was obtained whilst working for the applicant. His personality may also have played a factor, however, it required to be tested and sharpened in a business setup, which in this case, was the applicant's business. By virtue of his positions he had contact and was responsible to service the applicant's customers. Through this contact and service he must have acquired some influence on the applicant's customers.

[44] During the first respondent's employment at the applicant he must have acquired some form of training and exposure in the use and marketing of the merchandise sold by the applicant. This can only explain why he was such a successful salesman and area manager of the applicant. On the facts before me the first respondent had not worked at any place before being employed by the applicant. He was employed by the applicant when he was fresh from school with no experience in business. The applicant had been his only employer until employed by the second respondent. He was able to generate profits despite the fact that there were other competitors selling the same products. For him to generate profits, he would have developed a close relationship with the customers of the applicant for them to continue buying from the applicantand not from the competitor. He was in a somewhat influential position to them, such that he could induce them to follow him to his new employment. It is therefore not surprising that he could still be contacted telephonically after he had left the applicant's business for orders. The first respondent's employment with the applicant gave him the opportunity to have access to customers and built arapport with them which he would not have had the opportunity to build if he was not employed by the applicant.

[45] There is no doubt that the first respondent is now employed by the applicant's competitor in virtually the same position he occupied at the applicant. He is employed in the Northern Cape and based in Kimberley which is the restricted area in terms of the restraint agreement. First respondent's knowledge of the applicant's client lists, client requirements, client's required quantities and stock levels, applicant's stock levels and supply base trends, places him in a position that if such knowledge together with his connections with the applicant's customers is used in his new employment with second respondent, would be beneficial to the second respondent's business and detrimental to the applicant's business. The second respondent's denial that it has received any confidential information from first respondent about the applicant's business, or the assertion that it does not need such information to conduct its business is unreasonable and illogical. The second respondent is not a charitable organisation and should be conducting its business to make profit. It would not make sense for it to employ the first respondent who is known to it that he has worked for a competitor in the area, and not take advantage of his experience and knowledge of the dynamics of the business in the area. In all probabilities first respondent is utilising the said confidential information alternatively is in a position to utilise such information to the unfair advantage of the second respondent. The restraint agreement was intended for that purpose. It is ironic that the second respondent denies that it needs the applicant's trade secrets and confidential information whereas a sample of its employment agreement attached by the applicant to its replying affidavit as an Annexure recognises that it has trade secrets and incorporates restraint clauses against the disclosure and use of such information by its employees to the benefit of other persons and entities.

[46] In so far as the respondents rely on the decision in the *Yanasak* case, the following remarks by **Leach J** are in my view apposite:

> *"The argument advanced on behalf of the respondent is a fairly persuasive one, supported as it is by the judgment of Leveson J and the various authorities cited therein. However every case must be determined by its own particular facts and circumstances and, persuasive as the argument may be, there is one material feature in the present case which was seemingly not pertinent in the Yanasak case. During the course of his employment, and because of it, a salesman may form an attachment with and acquire an influence over his employer's customers, creating or enhancing, to adopt the phraseology of Nestadt JA in Rawlins and Another v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A), 'customer goodwill' which is at least in part an asset of the employer and becomes a trade connection of the employer capable of protection by way of a restraint of trade covenant- see Rawlins'case supra at 542. Where an employee has access to customers and is in a position to build up a particular relationship with customers so that when he leaves his employment's service he could easily influence them to follow him to his new business, there does not seem to me to be any reason why, in principle, a restraint should not be enforced to protect the employer's trade connections- see*

> *Recycling Industries (Pty) Ltd v Mohamed and Another 1981 (3) SA 250 (SE) at 258 and Rawlins's case supra at 541 and the cases there cited."*[18]

[47] I am of the view therefore, that the first respondent had access to the applicant's confidential trade information and had contact with its customers. He most probably build up a particular relationship with these customers such that he is in a position to easily induce them to trade with the second respondent. The relationship he build constitutes a trade connection of the applicant capable of protection. The respondent have in my view, failed to discharge the *onus* of proving the unreasonableness of the restraint.

[48] I am in agreement that the duration of the interdict to protect the applicant's interests is unreasonably long. This Court has a discretion to determine a period that would be reasonable under the circumstances. Given the circumstances of this case and the delay occasioned on behalf of the respondents, a period of 15 months calculated from 26 April 2012 would be reasonable. I know of no reason why costs should not follow the result. The same should apply to the second respondent who opposed the application.

In the result the following order is made:

1. **The First Respondent is interdicted and prohibited for a period of fifteen(15) months from 26 April 2012 and within the Northern Cape Province, to accept any employment with any person, firm, group, partnership or association what so ever, which directly or**

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[18] Paragon Business Forms (Pty) Ltd v Du Preez.(supra) at 443I-444D.

indirectly competes with the business of the Applicant and/or carries on a business similar to that of the Applicant.

2. **The First Respondent is interdicted and prohibited from directly or indirectly disclosing any confidential information or other facts with respect to the business of the Applicant, to any other person or business.**

3. **The First and Second Respondents are ordered to pay the costs of thisapplication, jointly and severally, the one paying, the other to be absolved.**

TLALETSI, J

NORTHEN CAPE HIGH COURT, KIMBERLEY

Appearances:

For the appellant: Adv Van Tonder

Instructed by: Duncan & Rothman Attorneys

For the respondents: Adv J Van Niekerk SC

Instructed by: Engelsman&Magabane Attorneys