

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – EAST LONDON**

E L: 2300/10
ECD: 1938/12
Date Heard: 21/8/12
Date Delivered: 18/9/12

In the matter between:

**BOOMERANG TRADE CC
t/a BORDER SHEET METALS**

APPLICANT

Versus

JASON GROENEWALD

1ST RESPONDENT

OMEGA HARDWARE

2ND RESPONDENT

JUDGMENT

SMITH J:

Introduction

[1] The Applicant brought urgent motion proceedings against the Respondents for an order interdicting and restraining the First Respondent ("Groenewald") from conducting business, or taking up employment, in contravention of a restraint of trade agreement.

[2] The Applicant specialises in the sale, warehousing and distribution of various rainwater products, including rainwater tanks and flashing for roofing, as well as corrugated-iron field toilets. It

operates throughout the Eastern Cape and particularly in the Fort Beaufort, Alice, Mt Frere, Sterkspruit and surrounding areas.

[3] The Applicant conducts its business in association with two other entities namely, Bitline SA 412 CC (trading as Metal Pro), through which the plastic goods necessary for Applicant's business is purchased, and Notefull 1152 CC (trading as DBM Enterprises) which manufactures and supplies the goods to the Applicant. Billy Anthony Gerretsen ("Gerretson"), who is the sole member of the Applicant and who deposed to the founding affidavit on behalf of the Applicant, is also a member of Bitline SA 412 CC.

[4] Groenewald was employed by the Applicant on 6 May 2008 and, according to the Applicant, signed an employment contract which incorporated a Standard Service Contract containing a restraint of trade agreement. The Second Respondent is the corporate entity through which Groenewald is conducting the impugned business operations.

[5] The application relates mainly to the Respondents' alleged manufacturing and distribution of water tanks to the Applicant's existing customers in a manner which, according to the Applicant, is in breach of the restraint of trade agreement. The Applicant alleges that the Respondents have used knowledge acquired during

Groenewald's employment with it to manufacture and distribute water tanks of similar design and sizes as those which it supplies, to its existing customers in contravention of the restraint of trade agreement.

Applicant's version

[6] Groenewald was employed by the Applicant on 6 May 2008 and had entered into an employment contract in the form of a "Letter of Appointment" which incorporated a "Standard Service Contract". The Letter of Appointment states the following in this regard:

"Further to this letter we refer you to the Standard Service Contract condition (a copy of which is included for your records.)"

[7] The Letter of Appointment was signed by Groenewald on 6 May 2008. The Service Contract, which he had apparently not signed, appears to have been designed as an annexure to the Letter of Appointment. It states in terms that:

"It is agreed and accepted that the following will form the basis of all employees/partners/directors/etc that enter into any form of employment contract with *Boomerang Trade CC 99/68088/23* or any of its subsidiaries that may be formed from time to time."

And furthermore that:

"COMMENCEMENT DATE AND VALIDITY OF THE CONTRACT

"This contract shall take effect on the time and date upon which the 'letter of appointment' is signed by both parties and will remain in force for an undetermined period as determined below:"

[8] Groenewald has admitted that he had signed the Letter of Appointment but denies any knowledge of the service contract and avers that he had only seen a copy thereof when it was provided to him by the Applicant's attorneys during July 2012.

[9] The restraint of trade agreement is contained in Clause 9.5 of the Service Contract and provides as follows:

"Trade Restraint

Upon termination of service all Employees will be bound to a 'restraint of trade' period of 5 (five) years.

The restraint of trade specifically prohibits the employee from conducting any work of a same or similar nature to the scope of works as conducted by the Employer from time to time, or to be employed by another employer that conducts any work of a same or similar nature to the scope of works conducted by the Employer from time to time within the geographical area of the Republic of South Africa with particular reference to deliveries within the Eastern Cape Area.

The restraint of trade also extends to any division, branches, subsidiaries, partnerships and relationships the Employer has with its suppliers and include, but not limited to the customer/client base and the products as supplied to the customer from time to time.

This restraint period also extends to the knowledge the Employee may have gained during his/her employment with respect to future projects and products the Employer wishes to include/add to there (sic) existing products base.

The restraint of trade period is necessary to prohibit the employer from using the information gained during the period of his/her employment to compete against the business of the Employer and conducting any business which may be harmful to the Employer.

This trade restraint is deemed necessary, but not limited to the protection of the customer base and scope of products of the business or the Employer in order to sustain viability of the business of the Employer.

The restraint period also extends to the confidentiality clause of this contract."

[10] The Applicant has conceded that the period of five years, referred to in the restraint of trade clause, is unreasonable and therefore seeks enforcement thereof only for a period of two years from the date of the court order.

[11] It avers that Groenewald's contract was partly written and partly oral and, in addition to the restraint of trade clause, the material terms thereof were, *inter alia*, that he would:

- (a) be the Applicant's sales representative;
- (b) visit customers on a regular basis in order to determine their requirements relating to the Applicant's products;
- (c) assess customers' credit worthiness with a view to set further prices, and to ensure that orders are only accepted from customers who are not in default; and
- (d) agree pricing of products with Gerretsen.

[12] The rainwater tanks sold by the Applicant are also manufactured and sold by a number of its competitors. The tanks are all manufactured using the same "roto-moulding" technique. The tanks are made from raw materials of which linear low density polyetherline, which is manufactured and supplied locally by Sasol Polymers, is the major component.

[13] The Applicant avers that there is only one method of roto-moulding, namely the process through which the raw material are

placed into a mould which is placed in an oven and turned on a bi-axle rotation mechanism. There are however different styles of roto-moulding machines; one of which is the so called "*rock and roll*" type which is being used by the Respondents.

[14] The fact that the water tanks are all manufactured by the same method have resulted in their volumes and sizes becoming standardised, and the competitive edge between the various competitors in this market therefore largely depends on the pricing of their products. The Applicant extends thirty days' credit to its customers, and pricing of the goods varies according to the credit worthiness of the customers. Those who have good credit records are given greater discounts.

[15] The Applicant claims that Groenewald has been able to build up intimate knowledge of its customers and pricing structures over the years. He has, during the course of his employment, visited customers on a regular basis and has thus acquired intimate knowledge of the nature of their businesses, the products they sold and their credit worthiness. He has also saved this information on his computer. Groenewald has also acquired knowledge of the manufacturing method used by the Applicant, the prices at which the raw materials are purchased, and from whom they were sourced.

[16] It appears that Groenewald had excelled at his duties; to the extent that his remuneration package was revised during October 2009, and his duties reorganised to enable him to learn more about the manufacturing of the rainwater tanks. At some stage he was also offered five percent equity in the business.

[17] Groenewald terminated his employment with the Applicant during May 2011. Gerretsen states that he had noticed at the time that Groenewald had saved the details of customers on his work cellular phone, including the contact details and payment terms which had been negotiated with them.

[18] At the time when he terminated his employment, Groenewald indicated that he would open a business for the sale of timber doors. However about six weeks after his resignation, Gerretsen discovered that Groenewald was selling field toilets to Applicant's customers. These toilets were however of a different specification to those supplied by the Applicant, and it was therefore of the view that Groenewald's conduct did not contravene the terms of the restraint of trade agreement.

[19] Again during September 2011 Gerretsen discovered that Groenewald had established a business for the manufacture and

sale of roto-moulded water tanks. Although the method of manufacturing was identical to that of the Applicant and its associated close corporations, the tanks were not of the same sizes and specifications as those marketed by the Applicant. It therefore also did not regard this conduct as being in breach of the restraint of trade agreement.

[20] Gerretsen claims that he had however recently discovered that Groenewald is now manufacturing and selling tanks which are identical to those marketed by the Applicant to Applicant's customers. Gerretsen has relied for his assertion in this regard on information provided to him by Groenewald's successor, namely Jarryd Greyvenstein.

[21] Greyvenstein has averred in his confirmatory affidavit that he had, through personal visits and telephone calls to Applicant's customers, established that Groenewald had approached them with a view of selling rainwater tanks which are identical in all respects to those manufactured and sold by the Applicant and its business associates. He annexed a list of customers and had marked those who Groenewald are alleged to have contacted.

[22] Greyvenstein further states that he has not been able to obtain confirmatory affidavits from Applicant's customers. The

Applicant has therefore applied for these hearsay statements to be admitted in terms of s. 3 of the Law of Evidence Amendment Act, 45 of 1988 ("the Act").

[23] The Applicant claims that Groenewald has been using his knowledge of: its customer base; customers' credit worthiness; the prices of raw materials (which have remained fairly constant); and manufacturing processes to develop his own manufacturing process, and to establish margins at which he could manufacture and sell the tanks to Applicant's customers at a profit. In addition, Groenewald's knowledge of customers' credit worthiness will enable him to also establish himself as the Applicant's competitor. This knowledge was acquired by Groenewald during the course of his employment and constitutes the Applicant's proprietary interests which are protected by the restraint of trade agreement.

Respondents' version

[24] Groenewald has effectively admitted that he had established a business for the manufacturing and sale of roto-moulded rainwater tanks in the same areas in which the Applicant operates. He has however denied that he had used any information obtained during the course of his employment with the Applicant to manufacture and market the tanks, and denied that he had approached any businesses which had been customers of the Applicant during the

time of his employment.

[25] Groenewald has also averred that there are vast numbers of different techniques through which the rainwater tanks are manufactured. He alleged in addition that the various types of raw materials which are being used in the manufacturing of the tanks are also fundamentally different.

[26] He asserts that the Second Respondent conducts its business strictly on a "cash on delivery" basis. The Second Respondent is a small family-run business and can therefore not afford to extend credits to its customers.

[27] He admits that he had a list of customers on his computer and that he had customers' names in abbreviated form on his cellular phones. He denies however that he had any information regarding their credit worthiness.

[28] Groenewald also denies that he had become aware of the manufacturing process through his employment with the Applicant. He claims that this information is in any event not regarded as a trade secret as it is also available on the internet and "other sources".

[29] He claims that the method for the manufacturing of the tanks used by the Second Respondent was developed by his father, and is unique to the Second Respondent. His father had devised the “rock and roll” oven used by the Second Respondent through a process of “trial and error”.

[30] He also states that his primary role, while in the employ of the Applicant, was that of sales representative. He therefore did not acquire any information regarding the Applicant’s customer base or method of manufacturing of the tanks during the course of his employment. He avers further that the information relating to credit worthiness of Applicant’s customers has no bearing on his business, because the Second Respondent operates on a “cash on delivery” basis only. The information relating to the Applicant’s customers cannot be a trade secret because one can easily source information relating to potential customers from hardware stores.

[31] Groenewald has blown hot and cold in his answering affidavit regarding the issue of whether or not the Second Respondent is trading in competition with the Applicant. His affidavit is replete with ambivalent statements in this regard, and one is left with the clear impression that his denial is based on the assertion that the Second Respondent is too small to compete with the Applicant. He, *inter alia*, states the following in this regard:

"The Second Respondent is not a direct competitor of the Applicant because it is substantially smaller than the Applicant."

And also that:

"I respectfully submit that customers are notoriously fickle. They will obtain stock from any supplier as long as it is at a favourable price to them. The Second Respondent supplies rain water tanks at a cost price in order to make a profit based on its own running costs and expenses."

Urgency

[32] The Applicant has brought the proceedings on a semi-urgent basis. The application papers were issued on 31 July 2012 and served on the Respondents the following day. The Notice of Motion stipulated truncated time periods, and the Respondents were required to file their notice to oppose and answering papers by 7 August 2012.

[33] When an applicant has departed from the normal time periods and has stipulated truncated time limits in its notice of motion, it must set out circumstances justifying the extent of the departure from the normal time limits, and why it claims that it could not obtain substantial redress at a hearing in due course. (**Luna Meubel Vervaardigers (EDMS) BPK v Makin and another (t/a Makin's Furniture Manufactures) 1977 (4) SA 135 (W)** at 137F-G).

[34] Mr *Brooks*, who appeared for the Respondents, has submitted

that the Applicant has failed to set out facts in his founding papers which justify the extent of its departure from the normal time limits. He referred in particular to the fact that it appears from Gerretsen's affidavit that the Applicant had been aware, as early as September 2011, that Groenewald had established a business for the manufacturing and sale of rainwater tanks. While it had at that stage decided not to take any action, (because it was of the opinion that the Respondent's conduct did not constitute a breach of the restraint of trade agreement), Gerretsen has averred that he had recently become aware that Groenewald is now manufacturing and selling water tanks of the same size and specification as those supplied by the Applicant. Gerretsen has however not stated when he had acquired this knowledge. There is, according to Mr *Brooks*, therefore no explanation as to the circumstances that rendered the matter so urgent that affidavits could not be obtained from the customers who the Respondents had allegedly approached.

[35] Mr *Patterson*, who appeared for the Applicant, on the other hand submitted that proceedings for the enforcement of restraint of trade agreements are inherently urgent.

[36] I agree with Mr *Paterson* that proceedings for the enforcement of a restraint of trade agreement are usually, by their very nature, urgent. They invariably seek to interdict ongoing unlawful action in respect of which an applicant continues to suffer financial losses

which are notoriously difficult to quantify, or to recover by way of action. (**Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another 2009 (3) SA 78 (C)** at 88J.

[37] Here the Respondents have admitted that they are indeed manufacturing and selling rainwater tanks in the same areas where the Applicant is conducting its business. If this conduct is indeed in contravention of the restraint of trade clause, the Applicant will continue to suffer unquantifiable (and perhaps irrecoverable) financial losses until such time as the impugned conduct is stopped.

[38] The truncated time limits stipulated by the Applicant in its notice of motion were therefore not unreasonable in my view. The Respondents were not unduly rushed into court, but were given reasonable notice, and in my view, sufficient time to file answering papers, having regard to the exigency of the matter.

[39] I am therefore of the view that the extent of the Applicant's departure from the normal time limits prescribed by the rules, was justified in the circumstances of this matter, and that the matter has properly come before me on an urgent basis.

Application to strike out

[40] The Respondents have applied for the whole of Jarryd

Greyvenstein's affidavit, as well as annexure J.G.1 thereto, to be struck out as inadmissible hearsay evidence.

[41] It is indeed common cause that the allegations contained in Greyvenstein's affidavit are hearsay material as they have not been confirmed by the customers who the Respondents were alleged to have approached.

[42] Inextricably linked to a determination of this application however, is the Applicant's request for the evidence to be admitted in terms of s. 3 of the Act. That section provides as follows:

"Hearsay evidence

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a)...

(b)...

(c) the court, having regard to -

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

iv) the probative value of the evidence;

v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

vi) any prejudice to a party which the admission of such evidence might entail; and

vii) any other factor which would in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the

interest of justice.”

[43] In **Metedad v National Employer's General Insurance Co Ltd 1992 (1) SA 494 (WLD)** at 498I-J, Van Schalkwyk J concluded that:

“This section invests the court with a discretion, to be judicially exercised in the interests of justice. It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission.”

[44] There are in my view several reasons why it would be in the interests of justice for the evidence to be admitted:

- First, regarding the nature of the proceedings; an important factor in favour of the Applicant is the fact that the evidence had been tendered in urgent proceedings. It is well known that applicants in urgent proceedings are often required to rely on hearsay evidence under circumstances where it would be difficult to obtain confirmatory affidavits from the primary source, and where the delay necessitated by the obtaining of such affidavits could defeat the purpose of the application. I am satisfied that in this matter also it would not have been feasible for the Applicant to wait until it had been able to obtain confirmatory affidavits from all, or a substantial number of the customers. The delay occasioned by such a

process would have resulted in further irreparable harm and irrecoverable losses suffered by the Applicant.

- Second, regarding the nature and purpose of the evidence; the evidence pertains to a number of customers and is relatively straight forward in its intended effect. The Applicant has alleged that the Respondents had approached the customers against whose names the marks appear on annexure J.G.1. It was therefore open to Respondents to put up a general denial.
- Third, regarding the probative value of the evidence; Gerretsen has stated that he has no reason not to believe statements by the customers, and has provided proof in the replying papers of tanks supplied by the Respondents to the Applicant's customers. In the event, as I have stated earlier, it is not entirely clear that the Respondents deny selling products to Applicant's clients. They seem to take the view rather that they are a small family-run business and therefore not able to compete with the Applicant.
- And finally, there can in my view be no prejudice to the Respondents if the hearsay evidence is admitted. As I have stated earlier, the evidence is fairly straight-forward in its intended effect, and it was open to the Respondents to simply deny having made contact with any of Applicant's customers.

[45] For these reasons I am of the view that the evidence should be admitted in terms of s. 3 of the Act, and that the application to strike out must therefore fail.

Existence of the restraint of trade agreement

[46] As I have stated earlier, Groenewald has denied any knowledge of the restraint of trade agreement. Where there are bona fide disputes of fact in application proceedings the general rule is that they should be decided on the facts stated by the respondent, together with the admitted facts in the applicant's affidavit. Essentially then, the disputes must be resolved on the basis of the respondent's version. (**Plascon-Evans Paints Ltd v Van Riebieck Paints 1984 (3) SA 632 (A)** at 623-5.

[47] A respondent is however not allowed to shelter behind patently implausible or bald denials. An uncreditworthy denial, or a palpably implausible version can be rejected out of hand, without recourse to oral evidence. (**Fakie N.O v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)**). See also: **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)**).

[48] Groenewald's assertion that he has no knowledge of the service contract which contains the restraint of trade clause, is in my view such a bald denial which can be rejected out of hand.

[49] The Letter of Appointment, which Groenewald admits having signed, makes clear reference to the Service Contract and specifically incorporates the terms thereof. It is similarly apparent from the contents of the Service Contract that it was designed to be an annexure to the Letter of Appointment.

[50] Groenewald must therefore have been aware of this fact when he signed the Letter of Appointment. He simply denied having ever seen or signed the Service Contract. He does however not allege that he did not read the contents of the Letter of Appointment, but chose instead to rely only on the fact that he had not signed it. As I have stated previously, the Service Contract was drafted in such a manner that it would be an annexure or addendum to the main employment contract. It would therefore not be surprising, in most cases, that it would not have been signed by employees. It would however nevertheless still be of application and binding on employees who have signed the Letter of Appointment, by virtue of the terms and conditions contained therein.

[51] In the circumstances I am of the view that Groenewald's bald denial in this regard cannot be upheld. I am therefore satisfied that the Applicant has proved the existence of the restraint of trade agreement which is contained in clause 9.5 of the Service Contract.

Breach of the restraint of trade agreement

[52] On his own version, Groenewald has been manufacturing and selling roto-moulded rainwater tanks, through the Second Respondent, in the areas in which the Applicant conducts its business.

[53] Groenewald's attempt to distinguish the tanks by reference to the manufacturing technique, which he claims is unique to the Second Respondent, is unconvincing and contrived. There can be no doubt that the processes for the manufacturing of roto-moulded tanks have become fairly standardized, and while there may be different techniques involved, they result in fundamentally the same product.

[54] As I have stated earlier, he has been rather coy in his affidavit regarding the issue of whether or not he had approached the Applicant's customers. In another of his seemingly deliberate ambivalent statements he alleges that:

"I have at no stage approached the Applicant's customers and attempted to compete with the Applicant. I have most definitely not used any information obtained during the course of my employment with the Applicant to gain an unfair advantage over the Applicant."

[55] Mr *Patterson* has in my view correctly submitted that Groenewald in effect therefore admits that he had approached the

Applicant's customers; albeit that he denies that he did so in competition with the Applicant, or that he had used the information which he had gained during the course of his employment to the disadvantage of the Applicant. He has also admitted that he has a list of the Applicant's customers on his computer.

[56] In my view the inference is ineluctable that Groenewald appears to have regarded Applicant's customers as fair game as long as he did not use information obtained during the course of his employment. This much is evident from the following statements in his answering affidavit:

"The Applicant's customer base cannot be regarded as a trade secret peculiar to my previous employment with the Applicant. It is not difficult to establish who supplies the various hardware stores in the Eastern Cape.

One merely has to ask the Hardware retailers who the suppliers are to obtain this information and they willingly part with this information as well as the cost price of various products."

And also that:

"The pricing of raw materials varies considerably depending on the supplier and in all likelihood the quantities of raw materials purchased by each manufacturer.

The customer base of different hardware store (sic) is easily ascertainable as well as the prices charged by the various suppliers as customers who readily provide this information."

[57] His assertion that the credit records of Applicant's customers are of no value to the Second Respondent, because it operates on a "cash on delivery" basis only, is also misleading. It is evident from annexure B.G.5 which of the customers paid cash and which were on 30 days' credit. This information would have been invaluable to

the Second Respondent in pursuance of its stated strategy to market only to customers who have the ability to pay cash on delivery.

[58] That the Respondents are determined to continue marketing their products throughout the Eastern Cape is evident from the following statement in Groenewald's answering affidavit:

"In any event, the terms of the alleged restraint of trade are unnecessarily restrictive. There is vast building expansion throughout the Eastern Cape. With this expansion comes an increased demand for rain water tanks particularly in the rural areas where it is vital for clean water to be captured and stored."

[59] I agree with Mr *Patterson* that the rationale for Groenewald's assertion that the Second Respondent is not competing with the Applicant in contravention of the restraint of trade clause is implied in his statement that "*the Second Respondent is not a direct competitor of the Applicant because it is substantially smaller than the Applicant.*" This is of course beside the point. If the Respondents are indeed manufacturing and supplying the tanks in the same areas in which the Applicant trades, it would amount to a breach of the restraint of trade agreement regardless of the size of the Second Respondent's business operations.

[60] I am therefore of the view that the Applicant has been able to establish that:

- (a) The Respondents are manufacturing and marketing roto-moulded water tanks of the same sizes and specifications as those manufactured and distributed by the Applicant and its associated business enterprises;
- (b) The Respondents are operating in the same areas where Applicant is conducting its business;
- (c) At the time of the termination of his contract of employment with the Applicant, Groenewald had information regarding the Applicant's customer base on his computer and cellular phone;
- (d) The Respondents are in fact marketing their products to the Applicant's customers, albeit that they seem to assert that they in doing so they are not using information obtained by Groenewald during the course of his employment, but rather through information obtained from various hardware stores; and
- (e) That during his employment with the Applicant Groenewald had gained knowledge regarding the Applicant's customer base, their credit worthiness, how to access raw materials and the method for the manufacturing of the rainwater tanks used by the Applicants.

Enforcement of the restraint of trade agreement

[61] In our law restraint of trade agreements are enforceable

where the applicant's protectable interests are infringed by the unlawful conduct, unless they are against public policy. The onus to prove that the enforcement of the restrictive condition would be against public policy lies with the party who asserts that fact. Each agreement must be considered in the light of its own circumstances to determine whether its enforcement would offend public policy.

(Magna Alloys and Research SA (Pty) Ltd v Ellis 1984 (4) SA 874 (A))

[62] With regard to the partial enforcement of a restrictive clause that would otherwise be unreasonable, Rabie CJ said the following in **Magna Alloys and Research (supra)** at page 898C-D:

(7) Aanvaarding van die sienswyse in (6) hierbo genoem, bring sekere gevolge mee, onder andere dat wanneer iemand beweer dat hy nie gebonde is aan 'n beperkende bepaling waartoe hy in 'n ooreenkoms toegestem het nie-

(a) ...

(b) ...

(c) die Hof nie daartoe beperk is om te bevind dat 'n beperkende bepaling in sy geheel afdwingbaar onafdwingbaar is nie, maar ook by magte is om te beslis dat 'n gedeelte van so 'n bepaling afdwingbaar of onafdwingbaar is"

(See also **Aranda Textile Mills (Pty) Ltd v Hurn [2000] 4 All SA 183 (E)**).

[63] Knowledge of a customer base and pricing structures are proprietarial information which can be protected by a restraint of trade clause. (**U-drive Franchise System (Pty) Ltd v Drive Yourself (Pty) Ltd 1976 (1) SA 136(D)**).

[64] In my view there can be no doubt that the information relating to the Applicant's customer base, its pricing structures and the method of manufacturing were proprietary interests which the Applicant was entitled to protect through a restraint of trade agreement. In **Rawlins and another v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) at 541D-F** Nestadt J held 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. (Joubert: *General Principles of the Law of Contract* at 149). Heyden: *The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that the 'customer contract' doctrine depends on the notion that

'the employee, by contract with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival, he automatically carries a customer with him in his pocket'.

In *Morris (Herbet) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires

"such personal knowledge of and influence over the customers of his employer... as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection..."

Conclusion

[65] There can be no doubt that Groenewald has, during the course of his employment with the Applicant, acquired knowledge and customer connections which has put him in a position to take advantage of the Applicant's trade connections, and to trade in competition with the Applicant.

[66] His attempts to play down the importance of his role in the Applicant's business, his connection with, and knowledge of the Applicant's customer base, are also unconvincing.

[67] In **Den Braven SA (Pty) Ltd v Pillay and another 2008 (6) SA 229 (D)** at 237-238, Wallis AJ (as he then was), in dealing with a denial by a sales representative that all the customer connections were established due to his employment with the applicant (and had asserted that in order for him to meet targets every month it was necessary for him to canvass new customers on his own), stated that:

"[T]his is beside the point. His employment was as sales representative. Part and parcel of his duties was to find customers for the applicants' products. The fact that he did so and enjoyed some success does not enure to his advantage in seeking to resist the enforcement of the restraint undertaking. Customers that he procured by his efforts were the customers of the applicant and the trade connection established in consequence of his efforts was a trade connection between the applicant and the customers, not one between himself and the customers. Indeed, the fact that he was able of his volition to identify new customers, approach them and secure their custom for the applicant is indicative of the existence of the type of trade connection that is protectable."

These remarks are in my view apposite to the facts of this matter.

[68] The Respondents have understandably not taken the point that the partial enforcement of the restraint of trade agreement in the terms sought by the Applicant in its Notice of Motion is untenable in law, or would amount to making a new contract for the parties. In the event, I am of the view that: first, the form of the

order sought by the Applicant is less restrictive than the terms of the agreement; second, that the order will not constitute a radical departure from the agreement; and third, there is no reason to believe that the terms of the restraint agreement were calculated to be unduly repressive towards the Respondents. The partial enforcement of the restraint of trade agreement sought by the Applicant would in my view therefore not offend any legal principles.

(Den Braven SA (Pty) LTD v Pillay and Another(supra))

Order

[69] For these reasons I am of the view that the Applicant has established that it is entitled to partial enforcement of the restraint of trade agreement, and the following order shall therefore issue:

(a) The First Respondent is interdicted and restrained from conducting any work of the same or similar nature to the scope of work as conducted by the Applicant, or to be employed by another employer that conducts any work of the same or similar nature to the scope of work as conducted by the Applicant, within the Eastern Cape, to the west of, and including the areas of Fort Beaufort and Alice, and for a period of two years from the date of this order;

(b) The First Respondent is interdicted and restrained from engaging in the business of selling plastic water tanks to the customer base of the Applicant as set out in annexure B.G.3 to the founding affidavit;

(c) The First Respondent is directed to withdraw all rainwater tanks similar to those sold by Applicant from any hardware store to which he may have delivered same within the area designated in prayer (a) above;

(d) The First Respondent is ordered to pay the costs of the application on the party and party scale.

J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate Paterson, SC
Attorney for the Applicant	:	Abdo and Abdo Attorneys 33 Tecoma Street Berea EAST LONDON Tel: 043 700 7900 Ref: Mr G Berndt/ssBE2146
Counsel for the Respondent	:	Advocate Brooks
Attorney for the Respondent	:	Wylde and Runchman Inc. Motorland Bulding Cnr of Oxford and Fleet Street EAST LONDON Ref: Ms T Wylde/bs/G11660

Date Heard	:	21 August 2012
Date Delivered	:	18 September 2012