



IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No: 10605/2011

In the matter between:

LONGFIELDS TRADING CC

Applicant

and

SHERRYL GAYLE BRADFIELD

First Respondent

NAKED SOLUTIONS 001 t/a
HEADWEAR 24 GLOBAL MANUFACTURERS

Second Respondent

JUDGMENT

SEEGOBIN J

[1] The applicant, Longfields Trading CC, carries on business as a manufacturer and supplier of hair accessories. It trades under the name “Chic”. The first respondent is Sherryl Gayle Bradfield. The second respondent is Naked Solutions 001 which trades as Headwear 24 Global Manufacturers.

[2] The business of Chic was originally owned by one Bruno Watzek (“Watzek”) who is the first respondent’s brother-in-law. Chic was started by Watzek some forty (40) years ago and from the outset the first respondent was employed by it as a buyer and sales executive. Some years ago Watzek sold the business to one Mark Tonkinson. In about mid July 2008 the applicant acquired the business

from its then proprietor, Longfield Sales and Marketing CC alternatively Tonkinson who controlled the members' interest in Longfield Sales and Marketing CC. The members' interest in the latter entity was sold to one Errol Anstey ("Anstey") and Roy Douglas Hockey ("Hockey"). The proprietor of Chic is now the applicant, controlled by Anstey and Hockey.

[3] The present application was launched as a matter of urgency on 21 September 2011. The applicant seeks interdictory relief against the first and second respondents in the following form:

- "1. A *rule nisi* do issue calling upon **SHERRYL GALE BRADFIELD** (*"the first respondent"*) and **NAKED SOLUTIONS 001 trading as HEADWEAR 24** (*"the second respondent"*) to show cause to this Honourable Court sitting at Durban on the day of **OCTOBER 2011** at **09h30** or so soon thereafter as the matter may be heard, why an Order should not be made in terms set out in paragraphs 2 to 8 (inclusive) of this Order.
2. The first respondent is interdicted and restrained, for a period of 3 (three) years commencing 24 August 2011 and terminating 23 August 2014, anywhere within the Republic of South Africa, and whether directly or indirectly and whether solely or jointly with any other person, from:
 - 2.1. carrying on; or
 - 2.2. being engaged, concerned or interested in or employed by; or
 - 2.3. soliciting business for; or
 - 2.4. being a proprietor of or director, shareholder, member or partner in; or
 - 2.5. acting as a consultant, trustee, manager, employee, agent, representative, partner, advisor, officer or in any other capacity to; or
 - 2.6. rendering any service to,

any business, person, company, close corporation, partnership, trust, body corporate or incorporate, association or other legal entity which

within the Republic of South Africa competes with or endeavours to compete with the applicant in relation to the applicant's clients, including, without limiting the generality of the foregoing, the second respondent, insofar as the second respondent continues to compete or endeavours to compete with the applicant in relation to the applicant's customers.

3. The first respondent is interdicted and restrained for a period of 3 (three) years commencing 24 August 2011 and terminating 23 August 2014 from, anywhere in the Republic of South Africa, canvassing, influencing or trying to persuade any customer of the applicant to take its custom elsewhere and/or to purchase the services and/or goods offered by the applicant from any other person/entity, including, without derogating from the generality of the foregoing, the second respondent, and, for purposes of the foregoing "*customer*" shall mean any person/entity listed in annexure "B" to the notice of motion.
4. The first respondent is interdicted and restrained, for a period of 3 (three) years, commencing 24 August 2011 and terminating 23 August 2014 from, anywhere in the Republic of South Africa, offering employment to or causing to be employed any person who was employed by the applicant at any time within the 2 (two) year period immediately preceding 24 August 2011.
5. The first respondent is interdicted and restrained from at any time utilising, divulging and/or disclosing, whether directly or indirectly, to any person any of the applicant's confidential information pertaining to the applicant's business.
6. The second respondent is interdicted and restrained from canvassing, trying to persuade or influencing any customer of the applicant, as listed in annexure "B" to the notice of motion, to transfer any of its custom to the second respondent in relation to any of the products sold or offered for sale by the applicant, as listed in annexure "A" to the notice of motion, or to offer to sell, or to sell any such products to any of the applicant's customers, as listed in annexure "B" to the notice of motion.
7. The second respondent is interdicted and restrained from utilising any confidential information pertaining to the applicant's business

communicated to the second respondent by or through the first respondent at any time.

8. The first and second respondents are ordered jointly and severally, the one paying, the other to be absolved, to pay the costs of the applicant's costs of suit.
9. The Orders in paragraphs 2 to 7 (inclusive) of this Order shall operate as interim orders with immediate effect.
10. Further, other and/or alternative relief."

Annexure A to the Notice of Motion contains a list of the following products:

Hair Clips
 Hair brushes
 Combs
 Hair attachments
 Hair bands
 Hair extensions
 Head Pieces
 Hair slides
 Hair grips
 Alice Bands
 Head Bands
 Hair accessories

Annexure B contains a list of the following customers:

Clicks

Foschini

Miladys

Edgars

Mr Price

Spar

[4] On 23 September 2011, the first and second respondents consented to certain interim relief being granted against them pending final determination of the matter. The parties further agreed on dates for the filing of papers. The matter was fully argued before me on 21 October 2011. The applicant was represented by Mr *Smithers SC* and the respondents were represented by Mr *Saks* and Mr *Pillay* respectively. The relief sought is final in effect. It is trite that a final order can only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify the order, and this applies irrespective of where the *onus* lies¹.

[5] The interdictory relief against the first respondent is for the enforcement of a restraint of trade agreement with the applicant while the relief against the second respondent is to restrain it from competing unlawfully with the applicant. The relief sought against the second respondent is founded in delict. The relief against both respondents is limited to a period of three (3) years, effective from 24 August 2011, the date on which the first respondent left the applicant's employment. It is common cause that the first respondent is now employed by the second respondent.

THE RESTRAINT

[6] The restraint clause relied upon by the applicant is contained in Annexure

1 Plascon-Evan Paints v Van Riebeeck Paints (Pty) Ltd 1984,(3) SA 623 (A) at 634 H – 635 B

“RH2” to the founding papers. “RH2” is a Letter of Appointment that was signed by the first respondent on 3 June 2008 at the time when the applicant acquired the business of Chic. The clause reads as follows:

“You shall not within a period of 3 (three) years after the Termination Date, whether directly or indirectly and either solely or jointly:

- carry on; or
- be engaged, concerned or interested in or employed by; or
- solicit business for; or be a proprietary director, shareholder, member or partner in; or
- act as a consultant, trustee, manager, employee, agent, representative, partner, advisor, officer or in any other capacity to; or
- render any service to; or
- lend or advance or bind yourself as surety for, any sum of money or otherwise assist financially, any business, person, company, close corporation, partnership, trust, body corporate or incorporate, association or other legal entity which within the Territory (the Republic of South Africa] competes with or endeavours to compete with the Company in relation to the Company’s clients.
- Canvas, influence or try to persuade any customer of the Company to take its custom elsewhere and/or to purchase the services offered by the Company from any other person/entity and, for purposes of the foregoing, “*customer*” shall mean any person/entity which has at any time prior to the Termination Date utilised or placed an order to utilise or negotiated to utilise the services offered by the Company; within a period of 3 (three) years prior to your Termination Date;
- Offer employment to or cause to be employed any person who was employed by the Company at any time within the 2 (two) year

period immediately preceding the Termination Date.

The restraints imposed on the Restrained Party in terms of this provision shall be deemed to be, in respect of each party thereof, entire, separate, severable and separately enforceable in the widest sense from the other parts thereof. An undertaking or restraint shall be deemed to be a separate undertaking or restraint notwithstanding the fact that it appears in the same clause, sub-clause or sentence as any other undertaking, or is imposed by the introduction of a word or phrase conjunctively with or disjunctively from or alternatively to other words or phrases.

The Restrained Party hereby acknowledges, agrees and records that he has given careful consideration to the restraints as provided for herein and that such restraints are fair and reasonable (after taking all relevant circumstances into consideration) and go no further than is reasonably necessary to protect the Protectable interests.

The restraints imposed upon the Restrained Party in terms of these provisions shall be deemed to have been imposed separately in respect of each of the countries, provinces, states or territories forming part of the Territory and the fact that it may not be valid or enforceable in respect of any one of such countries, provinces, states or territories shall not affect its validity or enforceability in the other countries, provinces, states or territories forming part of the Territory.

The restraints imposed upon the Restrained Party in terms of the provisions herein shall not preclude:

- The Restrained Party, after the Termination Date, from being engaged generally in any entity which carries on the business of a private equity fund, provided that he does not compete with or endeavour to compete with any investment or potential investment of the Company;
- The Restrained Party from holding, by way of *bona fide* investments, any shares, stocks, debentures, debenture stock or other securities of any company which is quoted and dealt with on any recognized stock exchange in the Territory and

which carries on any business which is similar to or will compete with or endeavour to compete with the Business, provided that such holding (which shall include any interest in any such holding) does not exceed 5% (Five Percent) of the total shares, stock, debentures, debenture stock or other securities of such company in issue, provided always that nothing herein contained shall permit the Restrained Party from directly or indirectly being actively engaged or concerned or interested in any way in the affairs or management of any such company.”

[7] The words “the Protectable Interests” as used in the above clause

“mean the Company’s goodwill, technical and business know-how, trade secrets, confidential information in connection with the Business and the Company’s intangible assets in general which are not readily available to a competitor of the Company in the ordinary, normal and regular course of business.”

IN LIMINE OBJECTIONS

[8] The respondents raised two preliminary objections to the application. The first was whether the contract (“RH2”) containing the restraint clause was a pre-incorporation contract and if so, whether it had been properly ratified or adopted by the applicant. The second concerned the effect of section 197² of the Labour

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- 2 **197. Transfer of contract of employment.**—(1) In this section and in [section 197A](#)—
- (a) “**business**” includes the whole or a part of any business, trade, undertaking or service; and
 - (b) “**transfer**” means the transfer of a business by one employer (“the old employer”) to another employer (“the new employer”) as a going concern.
 - (2) If a transfer of a business takes place, unless otherwise agreed in terms of [subsection \(6\)](#)—
 - (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
 - (b) all the rights and obligations between the old employer and an *employee* at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the *employee*;
 - (c) anything done before the transfer by or in relation to the old employer, including the *dismissal* of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
 - (d) the transfer does not interrupt an *employee’s* continuity of employment, and an *employee’s* contract of employment continues with the new employer as if with the old employer.
 - (3) (a) The new employer complies with [subsection \(2\)](#) if that employer employs transferred *employees* on terms and conditions that are on the whole not less favourable to the *employees* than those on which they were employed by the old employer.
 - (b) [Paragraph \(a\)](#) does not apply to *employees* if any of their conditions of employment are determined by a collective agreement.
 - (4) [Subsection \(2\)](#) does not prevent an employee from being transferred to a pension, provident, retirement or

Relations Act (“LRA”) on the contract.

SECTION 53 OF THE CLOSE CORPORATIONS ACT 69 OF 1984 (“THE ACT”) AND SECTION 197 OF THE LRA

[8.1] Section 53 of the Close Corporations Act provides that any contract in writing, entered into by a person professing to act as an agent or a trustee for a corporation not yet formed, may after its incorporation be ratified or adopted by such corporation as if the corporation had been duly incorporated at the time when the contract was entered into (s53(1)). Section 53(2) requires the ratification or adoption to take place in the form of a consent in writing of all the members of the corporation, given within a time specified in the contract or, if no time is specified, within a reasonable time after incorporation.

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- similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in [section 14 \(1\) \(c\)](#) of the Pension Funds Act, 1956 ([Act No. 24 of 1956](#)), are satisfied.^{53a}
- (5) (a) For the purposes of this subsection, the *collective agreements* and arbitration awards referred to in [paragraph \(b\)](#) are agreements and awards that bound the old employer in respect of the *employees* to be transferred, immediately before the date of transfer.
- (b) Unless otherwise agreed in terms of [subsection \(6\)](#), the new employer is bound by—
- i) any arbitration award made in terms of this Act, the common law or any other law;
 - ii) any *collective agreement* binding in terms of [section 23](#); and
 - iii) any *collective agreement* binding in terms of [section 32](#) unless a commissioner acting in terms of [section 62](#) decides otherwise.
- (6) (a) An agreement contemplated in [subsection \(2\)](#) must be in writing and concluded between—
- (i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and
 - (ii) the appropriate person or body referred to in [section 189 \(1\)](#), on the other.
- (b) In any negotiations to conclude an agreement contemplated by [paragraph \(a\)](#), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.
- (c) [Section 16 \(4\)](#) to [\(14\)](#) applies, read with the changes required by the context, to the disclosure of information in terms of [paragraph \(b\)](#).
- (7) The old employer must—
- (a) agree with the new employer to a valuation as at the date of transfer of—
 - (i) the leave pay accrued to the transferred *employees* of the old employer;
 - (ii) the severance pay that would have been payable to the transferred *employees* of the old employer in the event of a dismissal by reason of the employer's operational requirements; and
 - (iii) any other payments that have accrued to the transferred *employees* but have not been paid to *employees* of the old employer;
 - (b) conclude a written agreement that specifies—
 - (i) which employer is liable for paying any amount referred to in [paragraph \(a\)](#), and in the case of the apportionment of liability between them, the terms of that apportionment; and
 - (ii) what provision has been made for any payment contemplated in [paragraph \(a\)](#) if any *employee* becomes entitled to receive a payment;
 - (c) disclose the terms of the agreement contemplated in [paragraph \(b\)](#) to each *employee* who after the transfer becomes employed by the new employer; and
 - (d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of [paragraph \(a\)](#).
- (8) For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any *employee* who becomes entitled to receive a payment contemplated in [subsection \(7\) \(a\)](#) as a result of the *employee's dismissal* for a reason relating to the employer's *operational requirements* or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.
- (9) The old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.
- (10) This section does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence.

[8.2] Annexure “RH2” was signed by the first respondent on 3 June 2008 and by Anstey on 4 June 2008. The preamble to “RH2” reads as follows:

“As trustee of a company or close corporation still to be formed (The Company) under the terms of the Longfield Sales & Marketing CC (LSM) sale agreement signed by myself, Mark Tonkinson and Roy Hockey and witnessed by you, I hereby confirm the terms of your employment with The Company as agreed.”

[8.3] It was contended on behalf of the respondents that since Anstey concluded the contract as a trustee of a company or close corporation which at that time still had to be formed, the applicant was obliged to comply with the provisions of section 53 of the Close Corporations Act. It was further contended that the applicant had failed to allege such ratification or adoption and failed to put up such written report. The applicant on the other hand maintained that the contract was a *stipulatio alteri* as a consequence of which it did not need to comply with section 53 of the Act.

[8.4] The Longfields Sales and Marketing CC (“LSM”) sale agreement referred to above and which was witnessed by the first respondent, is Annexure “RH14” to the applicant’s replying affidavit.

[8.5] Annexure “RH13” to the applicant’s replying affidavit is the Memorandum of Agreement which was concluded when Watzek sold the business of Chic to Tonkinson and Hockey. This agreement will hereafter be referred to as “the Watzek Agreement”. It is significant to note that the first respondent was also a party to this agreement.

[8.6] In order to decide these arguments *in limine*, it is perhaps convenient to briefly examine the purpose for which the applicant was formed and how the agreements referred to above came into being.

[8.7] There can be no dispute about the following facts: The business of Chic was, until June 2006, owned by WATTAN ENTERPRISES (PTY) LTD, and controlled by Watzek. On 6 June 2006 Wattan sold the

business to Tonkinson in his capacity as a trustee for a close corporation to be formed or purchased. Tonkinson duly formed a close corporation called Longfield Sales and Marketing CC (“LSM”) in which Tonkinson and Hockey became co-members. The Watzek agreement (“RH13”) relates to the contract of sale of the business to LSM.

[8.8] There are certain salient features of the Watzek agreement which cannot be ignored:

[8.8.1] The first respondent initialed each page and signed this agreement on 6 June 2006.

[8.8.2] Clause 17 of the agreement contains a restraint of trade clause which relates to both Watzek and the first respondent.

[8.8.3] Clause 3 deals with the position of employees and provides as follows:

“Employees”

13.1 Unless otherwise agreed by an employee, all rights and obligations between the Seller and each of the persons employed by the Seller in connection with the business on the Effective Date (close of business on 28 February 2006) will continue in force on and after the Effective Date in accordance with the requirements of section 197 of the Labour Relations Act, 1995 as if there had been rights and obligations between the Buyer and the said employees ...”

[8.9] On 22 and 23 May LSM sold the business of Chic to Anstey in his capacity as trustee for a company or close corporation to be formed. The LSM Sale Agreement is Annexure “RH14” as mentioned above.

[8.10] The salient features of “RH14” are the following:

[8.10.1] The first respondent signed “RH14” as a witness.

[8.10.2] Clause 2 of the LSM Sale agreement contains certain

suspensive conditions to which the LSM Sale Agreement was subject. One of the suspensive conditions was that the sale agreement would be of no force and effect unless fourteen (14) days from the date of signature of the LSM Sale Agreement, or such later date as the parties may agree in writing, Anstey provided Tonkinson with confirmation that Anstey was satisfied that the first respondent would continue to be employed in the business after the effective date (1 July 2008) in terms of a written agreement of employment to the satisfaction of Anstey, and that her employment would be governed by a suitable restraint of trade. It was for this reason, so it seems, that the first respondent was requested to read and sign the LSM Sale Agreement as a witness.

[8.10.3] Clause 13 of the LSM Sale Agreement relates to the position of employees and provides as follows:

“13. EMPLOYEES

- 13.1 In accordance with section 197 of the Labour Relations Act 6 of 1995, as amended, the contracts of employment with employees of the Business will automatically transfer to the Purchaser.
- 13.2 The Seller shall be responsible for all liabilities to employees up to the Effective Date (1 July 2008) subject to the provisions of clause 7 above, and the purchaser thereafter.
- 13.3 The Seller and Purchaser agree that they shall effect a valuation as at the effective date (1 July 2008) of the leave pay, severance pay and any other payments accrued to employees as contemplated in section 197(a) of the Labour Relations Act 1995, as amended.
- 13.4 It is further recorded that the Seller and Purchaser have agreed herein that the Purchaser shall be liable for all payments of the amounts valued in terms of clause 13.3

and that the Sellers contribution is similarly recorded herein. The Purchaser shall meet any payments from its own resources.”

[9] From all of the above, there can be no dispute that the applicant was duly formed for the purpose of acquiring the business of Chic. Hockey and Anstey became co-members in the applicant.

[10] It seems to me, that the LSM Agreement of Sale was in fact a *stipulatio alteri* for the benefit of the applicant. In these circumstances, there was no need for the applicant to have complied with the provisions of section 53 of the Act. Furthermore, it seems to me that the first respondent was, at all material times, fully aware of her position both in so far as the Watzek Agreement is concerned as well as the LSM Agreement which she was asked to witness. There can be no dispute that the first respondent was a key employee in the business before and after it was sold to the applicant. In my view, she was fully aware of her rights and obligations which flowed from the agreements that were concluded relating to the sale of the business and the formation of the applicant herein.

[11] The first respondent's contentions that the terms of the restraint as contained in “RH2” were less favourable to her than those contained in the Watzek Agreement and that she was “duped” into signing the contract, ring rather hollow when one has regard to the role she herself played in the conclusion of the agreements referred to above. Additionally, the relevant agreements make full provision for the employees of the business and the effect of s197 of the LRA on them. No doubt, the first respondent would have raised objections and/or disputes concerning the terms of the restraint if she seriously believed that she would be prejudiced thereby. She did not. In my view, her current objections, raised as they are in this application, are rather opportunistic. The first respondent bore the onus³ of establishing that when she signed the

³ *Savvidies v Savvidies* 1986(2) SA 325 (T). See also, on duress in general: Kerr *The Principles of the Law*

contract ("RH2"), she did so as a result of misrepresentations, duress or being unduly influenced in some way or the other. The first respondent has failed to discharge the onus in this regard. I accordingly find that the technical defences raised by the respondents fall to be dismissed for the reasons set out above.

[12] I turn now to consider whether the applicant has made out a proper case for the interdictory relief which it seeks against the respondents. I commence by looking at the case made out against the first respondent.

CASE AGAINST FIRST RESPONDENT

[13] It is well established that restraint of trade agreements are enforceable unless, and to the extent that, they are contrary to public policy because they impose an unreasonable restriction on the former employee's freedom to trade or to work⁴. The onus of proving that the restraint is unreasonable and unenforceable rests upon the former employee⁵. The acceptable test is that set out in *Basson v Chilwan & Others*⁶ and is the following:

- (a) Does the one party have an interest that deserves protection after termination of the agreement?
- (b) If so, is that interest threatened by the other party?
- (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
- (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

of Contract 3rd Ed, 191. Christie The Law of Contract in South Africa 5th Ed, 309.

4 Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984(4) SA 874 (A) at 891 B-C

5 Magna Alloys *supra*. See also Den Braven SA (Pty) v Pillay & Another 2008(6) SA 229 (D & CLD) at 234 A-C

6 1993 (3) SA 742(A) at 767 G-H

In *Reddy v Siemens Telecommunications (Pty) Ltd* 2007(2) SA 486 SCA, a fifth factor was considered, viz whether the restraint goes further than necessary to protect the interest.

[14] The issue to be determined at the outset is whether the applicant has a protectable interest that is threatened by Mrs Bradfield's employment with the second respondent. In contending that it had a protectable interest the applicant relied on a risk of harm to its customer or trade connections and the risk of disclosure and use of confidential information.

CUSTOMER OR TRADE CONNECTIONS

The legal position where an employer seeks to enforce a restraint of trade agreement on the basis of a risk of harm to its trade connections and in particular its connections with its customers have been authoritatively set out as follows⁷:

“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 19). Heydon *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 the customer with him in his pocket’.

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

‘such personal knowledge of and influence over the customers of his

⁷ Rawlins and Another v Caravantruck (Pty) Ltd 1993(1) SA 537 (A) at 541 D-H. See also Nampesca (SA) Products (Pty) Ltd and Another v Zanderer and Others 1991(1) SA 886 (C) at 899 B-900C

employer ... as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employers trade connection ...'

This statement has been applied in our Courts (for example, by Eksteen J in *Recycling Industries (Pty) Ltd v Mohammed and Another* 1981 (3) SA 250 (E) at 256C-F). Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left ..."

[15] It should be noted that a mere contact that the former employee had with the employers customers in the ordinary course of their work, is not sufficient for a conclusive finding that a protectable interest in the form of customer connection had arisen: the connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business⁸.

[16] There is no dispute at all that the first respondent was a key employee of the applicant. According to the applicant, the first respondent was the face of the applicant insofar as the customers were concerned. In fact, she was integral to the applicant's business. She was the primary interface between the applicant and the applicant's major retail customers, viz Clicks, Mr Price, Edgars, Milady's and Foschini. Being the applicant's major retail accounts manager, the first respondent built up strong, ongoing relationships with the buyers of these retail customers particularly Clicks, which according to the applicant accounted for

8 Walter McNaughtan (Pty) Ltd v Schwartz and Others 2004.(3) SA 381 (C) at 390 C-D

approximately fifty five percent (55%) of the applicant's annual turnover and which utilised the applicant as its sole supplier of [its](#) hair accessories and related range for many years.

[17] The first respondent's answer to all this is to aver that the relationships she developed with the applicant's customers were already in place when the applicant purchased the business of Chic and employed the first respondent with effect from 1 July 2008. The thrust of this defence seems to be that the applicant had no customer connections to protect, because the customer connections were either part of the first respondent's general stock of knowledge, skill and experience that are personal to her, or the customer connections were the first respondent's personal customer connections and not the applicant's. As already mentioned, the first respondent was employed in the business throughout her working life, commencing some forty (40) years ago when the business of Chic was owned by Walton Enterprises, controlled by Watzek. As such, the relationships that the first respondent built up with Wattan's customers over the years were Wattan's customer connections and accordingly protectable at the instance of Wattan. No explanation has been advanced by the first respondent as to how or when Wattan's customer connections became part of the first respondent's general stock of skill, knowledge and experience, personal to her. What is apparent is that Wattan sold its business, including the goodwill to Tonkinson who, in turn sold the business (including the goodwill) to the applicant.

[18] The onus being on the first respondent to establish the unreasonableness of the restraint,⁹ it was for her to show that she never acquired any significant personal knowledge of or influence over the persons she dealt with as a sales person of the applicant, over and above that which previously existed. The first respondent has not done so.

9 Magna Alloys, *supra*. See also Rawlins and Another v Caravantruck (Pty) Ltd, *supra*, at 542F-543B

[19] The first respondent's further attack on the restraint was to say that price is more important than her skill or expertise or the relationship that she may have fostered with the applicant's customers. While price is no doubt an important consideration in the commercial world, it cannot be everything. Relationships such as those established by the first respondent with the applicant's customers, are generally built on trust and confidence which factors are substantially more important in ensuring loyalty to the applicant.

CONFIDENTIAL INFORMATION

[20] The test for confidentiality is an objective one¹⁰. In *Coolair Ventilator Co (SA) (Pty) v Liebenberg*¹¹ Marais J said the following:

"The difficult question in each case would be to decide which information gleaned by an employee is to be regarded as disclosable as being harmless or general knowledge and what items are confidential or secret. The dividing line may move from case to case, according to what is the general practice or convention in the category of trade or manufacturing in which the plaintiff falls, with particular reference to existing or potential competitors of his. If, however, it is objectively established that a particular item of information could reasonably be useful to a competitor as such, i.e. to gain an advantage of the plaintiff, it would seem that such knowledge is *prima facie* confidential as between an employee and third parties and that disclosure would be a breach of the service contract. If use has in fact been made of it in an effort to harm the business interests of the plaintiff the presumption will be even stronger that the employer and the employee, who would in the course of his employment obtain knowledge of it, intended it to be treated as confidential information not to be divulged to third parties."

[21] In order to claim an infringement of its proprietary interests and therefore the enforcement of a restraint, an employer need prove only that its erstwhile

10 Telefund Raiser CC v Isaacs 1998_(1) SA 521 (C) 523I. Also, Van Castricum v Theunissen 1993(2) SA 726 (T) 732 G-D. The mere *ipse dixit* of the applicant will not suffice to establish that information is confidential. Facts must be set up from which the conclusion can be drawn that something is indeed confidential or secret. See also Automative Tooling System (Pty) Ltd v Wilkens 2007_(2) SA 271 (SCA) 281B-D

11 1967_(1) SA 686 (W) 698 F-H

employee is potentially able to exploit its trade secrets or business connections in his or her new employment. The loyalty which the employees owe his or her employer will be sufficient to create the real probability that he or she will, consciously or unconsciously, do so.¹² In *Partserve Channel Support (Pty) Ltd v Rajap*,¹³ Mahlanya J said the following:

“The question whether the information which the applicant seeks to protect is confidential or secret information can be answered by stating the following. The first respondent admits that he had access to the applicant’s database including information about applicant’s customer purchases. He further admits that he was aware of the applicant’s full details when it came to profit margins, mark-ups and marketing strategy including stock levels at any given time. In my opinion, all the first respondent has admitted herein can be described as the applicant’s confidential information or knowledge and indeed proprietary interests. This information was obtained by him as a result of his position as an internal sales consultant with the applicant.”¹⁴

[22] There is no dispute in the present matter that during the first respondent’s employment with the applicant she was integrally involved in negotiating prices from and to the applicant’s suppliers. As a result of this she acquired detailed knowledge of the applicant’s cost structures, turnover, margins, volumes and the relative importance of each of its customers to the applicant’s business. In these circumstances it can hardly be suggested that the first respondent did not acquire confidential information which was not only useful to her but also was of economic value to the applicant.¹⁵ The first respondent herself admits in her answering affidavit that price is “everything” in the retail industry, which by its nature involves high volumes. In my view, a competitive price which affects profitability can only be achieved if one is possessed with confidential information which can be used in the bargaining process. Inasmuch as the respondents may wish to deny that the first respondent will not occupy a position similar to the

12 Turner Morris (Pty) Ltd v Riddell 1996,(4) SA 397 (E) 409J-140 A. Also, BHT Water Treatment (Pty) Ltd v Leslie 1993,(1) SA 47 (W) at 571 I-58D

13 [2005] J 13589 (W) p6

14 See also Poolquip Industries (Pty) Ltd v Griffin 1978,(4) 353 (W) 362 C-E

15 Townsend v Leech 2001(4) SA 33(C)

one she had with the applicant, their versions in the answering affidavits,¹⁶ although couched in veiled terms, leads to the inescapable inference that the first respondent will continue as a procurement and sales executive as she did for the applicant.

I accordingly find that the applicant has established that it has proprietary interests in the nature of the two dealt with herein that are worthy of protection.

It follows that I am satisfied that the applicant has discharged the onus of showing that it has a commercial interest that is deserving of protection at the termination of the agreement and that such interest will be prejudiced by the first respondent taking up employment with the second respondent and occupying a similar if not the same position as she previously held with the applicant. The only issue which remains to be decided insofar as the first respondent is concerned relates to the reasonableness or otherwise of the restraint.

REASONABLENESS OF RESTRAINT

[23] It is well established that public policy requires contracts to be enforced. This is consistent with the constitutional values of dignity and autonomy.¹⁷ The restraint agreement in this matter is not against public policy and no argument was advanced by the first respondent that it was. The only complaint from the first respondent is that the period of three (3) years is unduly long given her age (which was said to be sixty three (63)) and her ability to secure alternative employment. On this basis Mr Saks contended that given the nature of the business and dynamic nature of the fashion industry, a restraint of six (6) months would be reasonable in the circumstances. Given the nature of the first respondent's employment with the applicant, which related mainly to the sourcing and supplying of hair accessories and related products, I consider that the restraint period of three (3) years is a long time. The period of restraint should, for all practical reasons,

¹⁶ First Respondent's answering affidavit at page 97 (para. 1.1), page 115 (para. 82.1). Second Respondent's answering affidavit, page 136 (para. 58)

¹⁷ Reddy v Siemen's Telecommunications (Pty) Ltd *supra*

“not be longer than is necessary to enable the applicant to place a new salesperson in field in order to enable him or her to become acquainted with the products and the customers and to make it place to the latter that they are now the person with whom to deal on behalf of the applicant.”¹⁸

In the circumstances I consider a period of six months to be fair and reasonable given the nature of the applicant’s business herein. Since the applicant has not made out a case for the relief sought in paragraph 4 of the Notice of Motion, no such relief will be granted.

CASE AGAINST SECOND RESPONDENT

[24] As already pointed out, the relief sought against the second respondent stands on a different footing from that sought against the first respondent. Whereas the relief against the first respondent is founded in contract, the relief against the second respondent is founded in delict.

[25] It is well established that when an ex-employer seeks finally to interdict a third party on the ground that it is competing unlawfully, by employing an ex-employee who has breached a restraint, the ex-employer is required to prove that:

- a) It has confidential or trade secrets;
- b) The third party is making use of, or is likely to make use of, such information or trade secrets, either knowingly or innocently;
- c) It has a real right not to be placed with unfair competition – in deciding fairness, a court is entitled to look at the competing interests of the parties; and
- d) It has no other remedy.¹⁹

¹⁸ Per Wallis J in *Den Braven*, *supra* at page 263, para [55]

¹⁹ See generally *IIR South Africa v Hall (aka Baghas)* 2004 (4) SA 174 (W) at 180 C-G
See also *Kennitex Africa Limited v Coverite Limited* 1967(3) SA 307 (W) at 309 D-F

[26] In its founding affidavit the applicant relies on three pieces of evidence which the applicant contends leads one to the conclusion that the respondents are filching the applicants business. The three lines of evidence relied on are the following:

1. Mr Price email exchange of 27 July 2011 (“RH6”);
2. Edgars Kiddies Headband’s email exchange (“RH4”);
3. Clicks meeting scheduled for 28 September 2011 (“RH7”).

[27] According to the applicant, the Mr Price email exchange provides *prima facie* proof of an intention on the part of the first respondent to join the second respondent’s employment and to take the applicants customer, Mr Price, with her. The second respondent’s explanation pertaining to this email is to the following effect:

“The email referred to relates to our attempt to sell licenced merchandise, particularly the Marvel comic characters to Mr Price. Mr Price is however not keen on this merchandise. Mr Price [in relation to the licenced Marvel comic book merchandise] does not want to ‘come on board’.”

The applicant contends that a reading of this email suggests that the first respondent intended to bring a lot more than just one of the applicant’s customers with her. This further emerges from the reply sent by the member of the second respondent who suggests that Mr Price’s “coming on board” is not very important because it “really is only one customer”.

[28] Insofar as the issue relating to Edgars is concerned, the applicant contends that kiddies headbands were sought for the benefit of the second respondent. According to the applicant, in relation to at least two persons with whom the respondent dealt in the course of her employment with the applicant (viz Doris and Niki), the first respondent took active steps to conceal from the applicant, her

communication with the persons concerned. The applicant contends that the respondent's explanation that the kiddies headbands were being sourced for the benefit of the applicant is untrue because if it was true, there was no need for the first respondent to communicate with the applicant's employees on a "personal" basis.

[29] Insofar as the email relating to Clicks is concerned, the applicant contends that it is clear from the said email that the proposed meeting had everything to do with "hair accessories". The explanation provided by the second respondent with regard to this email is that a person by the name of Scholtz was to attend the Clicks meeting on the 28 September 2011 and not the first respondent. Mr Scholtz is in fact the second respondent's principle buyer/salesperson and the former head buyer for Mr Price. According to the second respondent Mr Scholtz is a well-known buyer and merchandiser for head gear and hair accessories. He has contacts with almost all the major retail chains and was the driving force behind the second respondent's initiative to enter the hair accessory market. On the basis of these emails and the explanations provided by the respondents, which the applicant does not accept, the applicant contends that it is clear that the first respondent was using her customer connections in order to solicit and take away customers from the applicant to the second respondent.

[30] According to the second respondent (and this is not disputed), it is the largest supplier of head wear and related accessories within the Republic of South Africa. In fact, the second respondent has branches located in Durban, Cape Town, Johannesburg and Port Elizabeth. It is also in the process of setting up a business unit in the United Kingdom. The deponent to the second respondents answering affidavit, Bevan Edgeley ("Edgeley"), makes the point that whilst the second respondent will enter the hair accessories market, the second respondent intends to source its products through its own efforts and not by targeting those products specifically marketed by the applicant. According to Edgeley, the second respondent employs approximately sixty (60) staff

members, the majority of whom are involved in the actual business operations of the company, including supply chain management, costing, sales and development, marketing, research and general administration. Unlike the applicant, the second respondent contends that its business is geared towards actual supply and delivery of products and not largely warehousing. There is no dispute that the second respondent does a turnover in excess of R90million and whereas the applicant does an annual turnover not exceeding R20 to R25million. The second respondent contends that in the course of its business it developed strong business connections within the retail and wholesale apparel and accessories sectors. It states that the second respondent does approximately R3million to R4million per month of business with the Mr Price Group. It further contends that as a result of its business operations, the second respondent has established strong working relationships with buyers, suppliers and other key personnel of various high profile customers including the customers listed by the applicant namely, Clicks, Foschini, Milady's, Edgars, Mr Price and Spar.

[31] According to Edgeley, he and Ambler-Smith took a decision almost two (2) years ago to enter the hair accessories market. That decision was motivated by the fact that they had access to the wealth of knowledge and skill possessed by Watzek who is his father-in-law. Watzek is regarded to be a pioneer in this field. The second respondent contends that Watzek's knowledge of this business far exceeds any information that the first respondent may possess. The second respondent contends that over the years it developed its own methodologies relating to price structures, turnover margins etc., and does not need to rely on such information either from the first respondent or the applicant. Additionally, any information which the second respondent requires in this market, it can obtain from Watzek directly. Watzek owes no fiduciary duty to the applicant in this regard.

[32] In the *IIR South Africa BV trading as Institute for International Research v Hall* case, *supra*, the court considered whether, on the facts, an interdict could be

granted against the ex-employee's new (but in that case erstwhile) employer in circumstances where, immediately upon learning that the ex-employee was subject to a restraint, the new employer had dismissed her. Despite the dismissal, the applicant nevertheless sought to interdict the second respondent from holding conferences organized whilst the ex-employee was still in his employ. The court held that, on the facts of that case, it could not. Schwartzman J held as follows:

"[20.1] An ex-employer having protectable confidential information gets the benefit of its contractual bargain against the ex-employee by obtaining an interdict against his or her continued breach of the restraint in taking up employment with a competitor.

[20.2] The competitors employment of the ex-employee with or without knowledge of the restraint cannot of itself amount to the delict of unlawful competition. Unlawful or unfair competition can only result if the new employer, through the ex-employee, uses either intentionally or innocently confidential information of the ex-employer.

[20.3] In such circumstances, the ex-employer is entitled to an interdict against unfair competition.

[20.4] An interdict is granted to prevent a future unlawful act, wrong doing or harm. The competitors' only 'unlawful' act or wrong doing was to employ a person bound by a restraint. This act did not result in the misuse of any confidential information of the ex-employer. Any harm that the ex-employee might have caused during the remaining period of restraint was obviated by the interdict granted against the ex-employee. To interdict the competitor from holding the two conferences appears to be nothing more than a punishment for unwittingly employing the person subject to a restraint. There is no public policy or legal requirement to justify such an order."

In the final result the court found that it had not been shown that, during the period of the first respondents employment with the second respondent, the first respondent had imparted any confidential information, or that the second respondent had used such information in the planning or production of the

fourteen (14) conferences, the holding of which the applicant sought to interdict.

In *Vital Administration CC v Irengo (Pty) Ltd*²⁰ Bertelsmann J said that

“as long as the third respondents principle aim was to benefit itself by enticing applicants employees to join its service, that object was lawful, even if the applicant might have suffered severely as a result thereafter”.

[33] While it may be accepted that the applicant and the second respondent are trade competitors, the size of the second respondent's business operations, its unique costing program developed by “iSync Solutions”, its annual turn-over, profit margins and volumes, in my view, far exceed that of the applicant. Additionally, I consider that the second respondent's access to Watzek who by all accounts is a pioneer in the business of acquisition, marketing and supply of hair accessories, places the second respondent in a completely different league from the applicant. There is no dispute that the second respondent has already established a strong business relationship with some of the major retailers such as Mr Price, Foschini, Miladys etc. The second respondent has made out a compelling case that it is not reliant on any confidential information or customer connections that the first respondent has acquired through her employment with the applicant. In my view, the applicant, on whom the onus rests in this regard, has failed to prove that the second respondent has solicited and/or taken away any of the applicant's customers by exploiting any information in possession of the first respondent. I further consider that interdicting the first respondent is enough and obviates the need to interdict her new employee as well. The case against the second respondent is at best highly speculative and does not justify the orders sought against it. It follows then that the application against the second respondent must fail.

ORDER

²⁰ [2004] 4 All 354 (T)

[34] For the reasons set out above, I grant the following order:

1. The first respondent is interdicted and restrained, for a period of six (6) months commencing 24 August 2011 and terminating on 24 February 2012, anywhere within the Republic of South Africa, and whether directly or indirectly and whether solely or jointly with any other person, from:
 - 1.1 carrying on; or
 - 1.2 being engaged, concerned or interested in or employed by; or
 - 1.3 soliciting business for; or
 - 1.4 being a proprietor of or director, shareholder, member or partner in; or
 - 1.5 acting as a consultant, trustee, manager, employee, agent, representative, partner, advisor, officer or in any other capacity to; or
 - 1.6 rendering any service to,

any business, person, company, close corporation, partnership, trust, body corporate or incorporate, association or other legal entity which within the Republic of South Africa competes with or endeavours to compete with the applicant in relation to the applicant's clients, including, without limiting the generality of the foregoing, the second respondent, insofar as the second respondent continues to compete or endeavours to compete with the applicant in relation to the applicant's customers.
2. The first respondent is interdicted and restrained, for a period of six (6) months commencing 24 August 2011 and terminating on 24 February 2012 from, anywhere in the

Republic of South Africa, canvassing, influencing or trying to persuade any customer of the applicant to take its custom elsewhere and/or to purchase the services and/or goods offered by the applicant from any other person/entity, including, without derogating from the generality of the foregoing, the second respondent, and, for the purposes of the foregoing “customer” shall mean any person/entity listed in annexure “B” to the notice of motion.

3. The first respondent is interdicted and restrained from at any time utilizing, divulging and/or disclosing, whether directly or indirectly, to any person any of the applicant’s confidential information pertaining to the applicant’s business.
4. The first respondent is directed to pay the applicant’s costs of the application.
5. The application against the second respondent is dismissed with costs.

| Date of Hearing : 21 October 2011

| Date of Judgment : 23 November 2011

| Counsel for Applicant : Adv. M Smithers SC

| Instructed by : Barkers Attorneys

| Counsel for First Respondent : Adv. Saks

| Instructed by : Hassan, Parsee & Poovalingam

| Counsel for Second Respondent : Adv. I Pillay

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