**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: J 2908/13

**SCHAUENBURG SYSTEMS PROPRIETARY LTD** **Applicant**

and

**HERMANUS CHRISTOFFEL GROBLER** **First Respondent**

**WILLBATT PRODUCTS CC** **Second Respondent**

**Heard:** **6 March 2014**

**Delivered:** **28 March 2014**

**Summary: Restraint of trade: Principles restated. An ex-employee who seeks to take up employment with a competitor must lay a basis for a conclusion to be made that the restriant undertaking is unreasonable, and therefore unenforceable. Mere say-so is not sufficient for a finding to be made that ex-employee not bound by restraint undertaking.**

**Practice and procedure: Non-joinder. Principles restated. - A party can only be joined to proceedings if it has direct and substantial interest in the proceedings. Even if a party has an interest in the outcome, this is not sufficient to sustain a plea of non-joinder.**

**JUDGMENT**

TLHOTLHALEMAJE, AJ

*Introduction:*

[1] This matter came before the court by way of an urgent application in terms of which the applicant seeks a final order in the following terms:

1.1 Interdicting and restraining the first respondent for a period of twelve (12) months, calculated from 1 January 2014 until December 2014, within the Republic of south Africa, directly or indirectly from;

1.1.1 Engaging in any work or other activity similar in any way to, or of the kind performed by the first respondent for the applicant, involving products or processes similar to or the same as the products or process with which the first respondent worked whilst employed with the applicant, namely the management services of a lamp room, and the supply of caplamps and rescue packs;

1.1.2 Being interested in or concerned with, in any capacity whatsoever, any person, company or association, organisation or concern which competes directly or indirectly with the applicant or its associated companies;

1.1.3 Offering employment to, or employ, or cause employment to be offered to or cause to be employed or solicit any employee of the applicant or its associated companies who was employed by the applicant or its associated companies at the date of the termination of the first respondent's employment on 31 December 2013 or at any time during the six months preceding such termination.

1.2 Interdicting and restraining the first respondent from revealing to a third party any confidential information pertaining to the business of the applicant or its associated companies, without prior written consent having been obtained from the applicant, including but not limited to information about its inventions, manufacturing process, financial affairs, method of design, distribution or procurement for any trade secrets obtained by the first respondent whilst in the employ of the applicant or its associated companies.

[2] The first respondent, (herein referred to as Grobler) has opposed the application on the following grounds;

(a) The application was not *bona fide*, and was an abuse of the court process.
(b) The restraint of trade agreement was not lawful and/or enforceable.
(c) The restraint of trade agreement was not entered into on equal footing (This point was abandoned during argument).
(d) The restraint of trade was vague and merely intended to prevent competition.
(e) The applicant did not have any trade secrets and/or confidential information that necessitated the application.
(f) The applicant did not have any proprietary and protectable interest which needed protection.
(g) He was not in breach of any of the provisions of the employment contract which he had with the applicant.

[3] The application initially came before the court on 9 January 2014, and a consent interim order was put in place pending the determination of this application on 6 March 2014. By agreement with the parties after the hearing of the application, the interim order was extended until the date of the delivery of this judgment.

*Factual background:*

[4] The applicant is part of the Schauenburg International Group of companies. It has its head office in Spartan, Johannesburg, and regional offices in Rustenburg, Thabazimbi, Fochville and Welkom. Its operations are extended throughout South Africa and it has customers nationwide and in other parts of Africa. The applicant is in the business of developing, sourcing and supplying safe and reliable health and safety equipment to its clients which mainly consists of mines. It also supplies equipment that detects the presence of gases and vapours. The applicant is known in the mining health and equipment industry as an “Original Equipment Manufacturer” or OEM.

[5] The applicant's business includes the development, source and supply of electronic health and safety equipment. These include safety enhanced caplamps, which is equipment which clips onto a miner's safety helmet in order to provide him/her with a lighting source, radio relayed monitoring, safety systems, radio communication, breathing apparatus and anti-collision products in respect of which the applicant is an "OEM" to the mines. The applicant's customers who purchase these products are mines in the Republic of South Africa, Zimbabwe and other African countries.

[6] The applicant's business further includes the management of a lamp room and asset management system. A lamp room within the mining context is an asset management facility where the mine stores its caplamps and breathing apparatus (rescue packs), controls the access and egress of the mine shaft and manages time and attendance of underground employees. By managing a customer's lamp room, the applicant provides qualified and trained employees to the mines to manage that lamp room. In this regard, the applicant will act as a temporary employment service.

[7] The applicant in offering lamp room management service to its mining customers also supplies the mines with various health and safety equipment but also manages such equipment to ensure that it complies with the health and safety requirements provided in the Mine Health and Safety Act 29 of 1996, which is safe and without risk to health and safety when used properly. To this end, the applicant has to employ highly skilled and trained technical staff to ensure the optimal functioning of its equipment. Furthermore, the applicant has to provide training to the employees of its mining customers on how to operate health and safety equipment, and to ensure that the lamp-room is well ventilated, has consistent power supply and communication systems. The applicant will further be required to utilise its lamp room and asset management software system and ensure that employees of its customers who do not have all the safety equipment are blocked by the system from proceedings underground, and further that employees return all equipment to the lamp room after their shift.

[8] The applicant has a system or process of developing and sourcing products before they can be supplied to customers. This includes undertaking substantial market research, investigation and development in respect of the degree of demand for any equipment and replacement products. The applicant further works closely with manufacturers of its products in China and Ukraine to develop, enhance or replace products. The applicant's employees, including Grobler whilst he was still employed, acted as representatives to liaise with the manufacturers regarding product specifications, capability, quality, and pricing in order to facilitate the development of the products. Such employees were also from time to time required to travel to China and Ukraine for liaison and meetings with the manufacturers.

[9] Once a sample of a particular product had been developed the applicant would then implement its testing to ensure that it met the relevant health and safety requirements in South Africa. The applicant's further contention was that the results of this research process are highly confidential and constituted proprietary information in its hands, and was further generated by its own staff at its own costs. That information also gave it a competitive advantage in the market place.

[10] Grobler was initially employed by the second respondent. He then moved to Willard Batteries, a company that provided battery equipment, rescue packs, caplamps and gas detection instruments, as well as provide lamp room management services to the mines. He managed Willard's lamp room management services. At the time, the applicant also supplied Willard Batteries with health and safety products, who in turn sold these to its mining customers.

[11] The applicant's Operations Director, Timothy Nelson, who deposed to its founding affidavit, encountered Grobler whilst he was an employee of Willard Batteries. At some point the applicant sought to recruit someone to set up its lamp room management offering, and by some coincidence, Grobler approached the applicant for employment. He then took up employment with the applicant as its Product Manager in terms of a contract of employment concluded on 4 May 2010.

[12] Grobler upon his appointment had reported directly to Nelson. He was responsible for the applicant's lamp room division, and also managed its caplamps and rescue packs. His main functions as can be gleaned from his job description included[1];

- "To manage and take full responsibility on a day-to-day basis of the Schauenburg Lighting products and associated products.
- The duties will include the day-to-day management of the facility, personnel, logistics and product development.
- Management reports, statistics and cost management will be a major priority.
- The duties will include International and Local travelling on a regular basis.
- Sales and business development targets must be achieved.
- Lamproom services and integration with the LMS/AMS systems must be established and modelled to a sustainable and operational business."

[13] Grobler's further responsibilities included;

- Setting up the applicant's lamp room management division and thereafter managing the division.
- Negotiating and concluding contracts with customers for the provision of lamp room management services.
- Recruiting, training and managing the temporary employment service employees who would be provided to the applicant's customers to manage its lamp rooms.
- Preparing budgets for the lamp room division and monitoring the division's adherence thereto.
- Formulating the pricing which the applicant would charge its customers for lamp room management services.

[14] Grobler resigned from the applicant on 29 October 2013 by giving notice. The applicant however informed him on 31 October 2013 that he did not need to

[1] Annexure "FA17"

tender his services after 5 November 2013, and that he would be paid for November and December 2013 *in lieu* of notice.

[15] The second respondent did not oppose the application. According to the applicant, the second respondent is its direct competitor, a fact which was confirmed by Grobler. The second respondent had commenced operations in South Africa in 2000 as a supplier of battery related products to the mining industry. It had also acted as a temporary employment service to manage its customers' lamp rooms. It conducts its business in Limpopo, North West, Mpumalanga, Gauteng and Northern Cape provinces. The second respondent also purchases health and safety equipment such as caplamps, rescue packs and gas detection units from an "OEM" in South Africa and on-sells such products to the mines. It also provides the mining industry with lamp room solutions, products and related services. Its customers are both open cast and underground mines.

[16] According to the applicant, the second respondent also provides lamp room management services by supplying employees to its customers who manage the lamp room on behalf of the customer; managing the mines' health and safety equipment such as cap lamps and rescue packs; the testing of rescue packs and gas instruments, and ensuring that all legal requirements pertaining to the management and maintenance of health and safety equipment are complied with.

[17] The second respondent also supplies lamp room equipment to its customers and together with the "OEM", repairs and refurbishes such equipment. The OEMs are First National batteries and Afrox who also develop, manufacture and supply cap lamps and rescue packs to mines. These compete directly also with the applicant in the development, manufacture and supply of such equipment. The second respondent also provides a lamp room management system to its customers. This in turn provides access control to and monitor employees in the mining area, ensuring that all employees are in possession of their safety equipment when entering the mining area.

[18] Until 1 December 2013, the applicant and the second respondent had a working relationship in terms of which the applicant supplied the second respondent with certain health and safety equipment such as caplamps, rescue packs and gas detection instruments which the second respondent would then on-sell to those of its customers who had procured the second respondent to manage its lamp rooms.

[19] In the light of the above, the applicant holds the view that the second respondent competes with it in;

19.1 The provision of competing health and safety equipment and, more particularly, caplamps, gas instrumentation and rescue packs to the same customers and potential customers of the applicant;

19.2 The provision of lamp room management services, including the provision of employees to manage the lamp room of its customers, who are mines in South Africa; and

19.3 The provision of lamp room and asset management systems to its customers.

[20] The applicant further contended that whilst the second respondent may not act as an OEM by itself manufacturing or developing health and safety equipment but securing such equipment from companies who operate as an OEM in South Africa, the second respondent still competed with the applicant by offering competing products in the same market

*The Restraint clause:*

[21] Grobler was employed in terms of a contract of employment concluded on 4 May 2010. The restraint clause provides for a period of two years throughout the whole of the Republic of South Africa. The applicant however only seeks to enforce the agreement for a period of one (1) year), on the grounds that it had identified that period as sufficient to cater for the protection of its proprietary intersts.The relevant provisions are;

<u>*Clause 7 Restraint clause (Senior Employees only):*</u>

*(a) Training and development of its employees;*
*(b) Research and development;*
*(c) Technical data;*
*(d) Commercial plans and strategies;*
*(e) Product manufacture, marketing, selling and servicing;*
*(f) The development of goodwill amongst its customers; and*
*(g) Other legitimate business interests*

*The Employee will not directly or indirectly throughout the Republic of South Africa for a period of 2 (two) years after the termination of his/her employment for any reason whatsoever;*

*7.1.1 engage in work or other activity similar in any way to, or of the kind performed by him/her for the company, involving products or processes similar to or the same as the products or processes with which she /he worked whilst employed with the Employer;*

*7.1.2 be interested in or concerned with, in any capacity whatsoever, any person, company or association, organisation or concern which competes directly or indirectly with the Employer or its associated companies;*

*7.1.3 offer employment to or employ, or cause employment to be offered to or cause to be employed or solicit any employee of the Employer or its associated companies who was employed by the Employer or its associated companies at the date of the termination of the Employee's employment or at any time during the 6 (six) months preceding such termination.*

*7.2 The Employee acknowledges that:*

*(a) s/he has carefully considered the provisions of the restraint set out above; and*
*(b) agrees that those clauses are, after taking all relevant circumstances into account, reasonable, and that s/he was in a position of bargaining equality with the Employer at the time s/he entered into this agreement and particularly when s/he agreed to the aforesaid restraint (Sic).*

*8. <u>Confidential Information</u>*

*The Employee will not either during or after his/her employment, without prior written consent of the Employer having been obtained, reveal to a third party* *any confidential information pertaining to the business of the Employer or its associated companies; financial affairs, methods of design, distribution or procurement or any trade secrets obtained by him/her whilst in the employ of the Employer or its associated companies.*

*Point in limine (Non-joinder):*

[22] Grobler for the first time in his answering affidavit, disclosed that he was employed by a company known as Customer Management Services (Pty) Ltd ("CMS") as a Compliance officer, and not by the second respondent. CMS however rendered certain services to the second respondent. According to Grobler, CMS had a real and substantial interest in any order which the court may grant in this application. Grobler further submitted that in a letter sent by his attorneys of record to the applicant on 9 December 2013, the applicant was informed that he was not in the employ of the second respondent, and yet it had proceeded with the application without having regard to any legal interests which CMS may have in the order which may be granted. To this end, Grobler's contention was that CMS should have been joined as a party in these proceedings.

[23] The applicant's response was that the joinder of the second respondent and non-joinder of CMS was the direct result of Grobler's lack of candour in responding to a letter of demand that preceded this application. On 29 November 2013, the applicant's attorneys of record addressed letters to Grobler and the second respondent wherein they were advised that it had come to the attention of the applicant that Grobler was in the employ of the second respondent in breach of the restraint undertaking. The applicant demanded written undertakings by 2 December 2013 that Grobler cease his employment with the second respondent. It has also requested the second respondent to provide written undertakings that it would desist from employing Grobler. No such undertakings were provided by 2 December 2013.

[24] Following telephonic follow-ups and agreements for extensions between the applicant's and the respondents' attorneys, the second respondent's attorneys responded on 6 December 2013. In their response, the respondents had refused to accede to the demands and denied that Grobler was employed by

the second respondent. Grobler had also denied that he was in breach of the restraint undertakings and the second respondent had denied that it was a direct competitor of the applicant.

[25] It is my view that the point *in limine* raised by or on behalf Grobler in regards to the non-joinder of CMS should be dismissed on the following grounds;

In his letter of 6 December 2013 to the applicant's attorneys of record, Grobler only denied that he was employed by the second respondent. He did not disclose that he was in fact employed by CMS, and only did so in his answering affidavit. If indeed CMS as Grobler's employer was aware, as it should have been, of this application, nothing prevented it from approaching the court to be joined if indeed it had direct or substantial interest in the proceedings and the outcome of this application.

[26] The Supreme Court of Appeal in *The Judicial Service Commission and another v The Cape Bar Council and another*[2] (per Brand JA) dealt with the question of non-joinder in the following terms;

> "It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA*) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non- joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see eg *Burger v Rand Water Board 2007 (1) SA 30 (SCA)* para 7; Andries Charl Cilliers, Cheryl Loots and *Hendrik Christoffel Nel Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited.)

[27] The same issue was also dealt with by Zondo JP (as he then was) in *PSA v The Department of Justice and other* [3] in the following terms;

[2] (Case No: 818/2011) at para 12
[3] (Case no: CA5/2002)

"With regard to the issue of non- joinder it is trite that a third party should be joined in proceedings if he is shown to have a direct and substantial interest in a matter and has not consented or undertaken to be bound by any judgement that may be given in the matter. It is not necessary to refer to many authorities in this regard. It is sufficient to refer to the case of **Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637(A).**"[4]

And,

"Where a third party who has a direct and substantial interest in a matter is not joined in proceedings, it is not a defence to a point of non-joinder to say that such party had knowledge of the proceedings but did not intervene. His mere non-intervention, despite having knowledge of the proceedings, does not make the judgement emanating from those proceedings binding on such party. (see **Amalgamated Engineering Union** at 660)"[5]

[28] The applicant in this case only seeks to enforce a contract between itself and Grobler. CMS only came to light after this application was launched, and nevertheless, the applicant does not seek relief against it. The only interest the applicant has is to ensure that Grobler complies with his restraint understanding. The fact that CMS only came into the picture belatedly cannot in my view necessitate a postponement of these proceedings in order for the applicant to launch an application to join it. It is not known what direct or substantial interest CMS has in this application or its outcome, and the mere fact that Grobler might assume that CMS has any interest in the matter cannot sustain a plea of non-joinder. Furthermore, I did not understand the applicant's case to be that it sought CMS to be bound by any judgment. As shall be illustrated further in this judgment, CMS did not only come into the picture as an employer of Grobler. There is more to the employment relationship between itself and Grobler. To this end, an application, if any, to join CMS should have been brought by either Grobler or CMS.

*The legal framework surrounding restraint of trade:*

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[4] at para 25
[5] at para 29

[29] The principles set out in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[6] have remained authoritative in regards to restraint of trade agreements. It is now accepted 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 work. The applicant's duty as concerning the enforcement of the restraint of trade is to show the existence of the contract and its breach by the employee. The onus is on a party wishing to be absolved from a restraint of trade agreement to allege and prove that the enforcement of the restraint would be contrary to public policy as it is unreasonable.

[30] The court in *Magna Alloys* accepted that a contract in restraint of trade is not necessarily wholly enforceable or wholly unenforceable, and a court may in the public interest, order that the whole, or only a part, or no part at all, of a restriction on trade be enforced[7]. The court stated that it is in the public interest that persons honour their own agreements. The fact that an agreement is unreasonable or unfair in regard to one of the parties will normally not provide any ground for challenging the validity of the agreement[8].

[31] In *Sunshine Records (Pty) Ltd v Frohling and Others*[9] Grosskopf JA summarised the approach in *Magna Alloys* as follows:

> "In determining whether a restriction on the freedom to trade and to practise a profession is enforceable, a court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons in the interests of society, be permitted as far as possible to engage in commerce or professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations, a court will obviously have regard to the circumstances of the case before it."

[6] [1984] (4) SA 874 (A) at 891 B-C)
[7] at 896 A-E
[8] at 893
[9] 1990 4 SA 782 (A) at 794C-E

[32] It follows from the above approach that the then Appellate Division was persuaded by the common law freedom to economic activity or trade. This approach was to be underpinned by section 22 of the Bill of Rights in the South African Constitution, which provides as follows:

> "**22. Freedom of trade, occupation and profession.** — Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[33] The court in *Magna Alloys* did not specify what the test for reasonableness was. In *Basson v Chilwan and others*[10] Nienaber JA, having aligned himself with the principles set out in *Magna Alloys*, had identified four questions which should be asked when considering the reasonableness of the restraint. These are:

1. Does the one party have an interest that deserves protection at the termination of the employment?
2. If so, is that interest threatened by the other party?
3. Does such interest weight qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
4. Is there an aspect of public policy having nothing to do with the relationship between the parties, which requires that the restraint be maintained or rejected? Thus, where the interest of the party sought to be restrained outweighs the interest to be protected, the restraint is unreasonable and consequently unenforceable.

[34] In *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another*[11], the Court added a further enquiry, viz, whether the restraint goes further than is necessary to protect the interest. In this regard issues such as the duration of the restraint and the geographical area covered by the restraint are accorded the same importance. In this case however, although Grobler had submitted in general that the restraint understanding was unreasonable and unenforceable, no

[10] [1993] (3) SA 742 (A) at 767 G-H
[11] 1999 (1) SA 472 (W) at 484E

specific contentions were made in regard to either the duration of the restraint or its scope.

*Evaluation:*

[35] The existence of the contract of employment, and by implication, the restraint clause was not placed in dispute. To the extent that Grobler had also abandoned his earlier contentions that he had entered into the agreement as a result of duress, the arguments pertaining to the lawfulness of the agreement fell by the wayside. Thus the issues for consideration are whether there was a breach of the agreement, and further whether the agreement is reasonable and enforceable.

[36] When Grobler handed in his resignation on 29 October 2013, Nelson had asked him where he would be taking up alternative employment. Grobler's response was that he had some options, and had in passing, mentioned that he would go and work for a certain "Marx". "Marx" is the Managing Director of the second respondent. At that stage, Nelson had informed Grobler that if he were to work for Marx, he would be acting in breach of his restraint undertaking. Grobler's response was that he had checked, and that the restraint would not apply as he had not managed the applicant's lamp room service offering for a period of two years. Nelson had left the matter at that in the light of Grobler's position that he had not as yet made a final decision in regards to his future employment.

[37] On 31 October 2013 when Grobler was informed in writing that he did not need to work out his notice period, he was also reminded of his restraint obligations and was warned that legal action may be taken against him if the applicant became aware that he was engaging in any conduct in breach of his restraint and confidentiality undertakings.

[38] On 25 November 2013, Nelson attended at Impumelelo coal mine together with the applicant's Divisional Product Manager, Marius Smith and Paulo Patao, the applicant's Technical Co-ordinator for Mpumalanga and Limpopo provinces, to inspect gas detection instruments on site. Upon their arrival on site, they noticed Grobler testing certain products in the mine's lamp room. It

was also reported to Patao that Grobler was also seen on the same site during 26 to 28 November 2013. This led the applicant to believe that Grobler must be employed or otherwise concerned with or interested in the business of the second respondent.

[39] It was only in his answering affidavit that Grobler had revealed for the first time that he was employed by CMS as a compliance officer. CMS according to Grobler, conducts its business by rendering services to the second respondent regarding the compliance with the legal requirements such as Mine and Safety Act, DRM's requirements and the Mine's Code of Practice by the lamp rooms that are managed by the second respondent exclusively. He contended that CMS does not design, manufacture, source, distribute or sell any equipment nor does it procure any clients nor does it manage any lamp rooms or equipment. In his capacity, he only consults with the second respondent's clients and lamp room managers to ensure that the lamp rooms are managed according to requirements. He denied that he used any information and/or knowledge peculiar to the applicant in the execution of his duties.

[40] Grobler further contended that in order to ensure tht there was compliance with the legal requirements, he had to inspect some of the equipment in the lamp room from time to time to see whether it was safe, duly cared for and stored, calibrated and used in the correct manner. The information and knowledge needed to execute these duties according to Grobler, appeared from the applicant's own information and training manuals furnished with the equipment, and did not prejudice the applicant nor was it in conflict with any of the applicant's alleged rights. He denied that he and CMS competed with the applicant.

[41] It is trite that in motion proceedings, the parties are confined to the Notice of Motion and their pleadings as set out in the three sets of affidavits[12]. It is equally trite that a case cannot be made out for the first time in the replying affidavit. In *Shephard v Tuckers Land and Development Corporation (Pty)*

[12] See Betlane v Shelly Court CC (2011 (1) SA 388 (CC) para 29

*Ltd*[13] the Court had however acknowledged that the rule against raising new material for the first time in the replying affidavit was not inflexible. Nestadt J illustrated the point in the following terms:

> "This is not however an absolute rule. It is not the law of the Medes and Persians. The court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits."

[42] In my view, and without the parties having necessarily raised the issue, this is one of those cases where the court should exercise its discretion and allow the new material raised in the applicant's replying affidavit to stand. This material pertains mainly to the averments made by Grobler in respect of CMS in his replying affidavit. The obvious reasoning in this regard is premised on the second respondent's and Grobler's lack of candour in the first instance. Had they disclosed prior to the launching of this application that Grobler was in fact employed by CMS, instead of leaving the applicant to second guess what the real state of affairs was, it would not have been necessary for the new material arising in the replying affidavit to have been dealt with in the manner that the applicant had. Furthermore, even though Grobler would have been entitled to file a second set of affidavits, he had not done so, and this was not raised as an issue during arguments.

[43] In his replying affidavit, Nelson had submitted that Grobler's contention that he was not employed by the second respondent was not entirely correct in that in an e-mail dated 5 December 2013 which was sent to Patao by one Kotze of the second respondent, and which was also copied to Grobler, the latter's e-mail being [……] clearly shows that he is employed by the second respondent. The applicant had also investigated CMS, and a Windeed search revealed that:

i. The sole members of the second respondent was Gert Cornelius Marx ("Marx");
ii. The only active director of CMS was the said "Marx";

[13] (1978 (1) SA 173 (W) at at 177H – 178A

iii. and Grobler was appointed as a director of CMS in september 2005, although he had since resigned.

[44] Grobler in his answering affidavit conceded that the second respondent was a competitor of the applicant in the area of management of lamp rooms. His contention however was that such competition was in the normal course of business, and there was nothing peculiar about or worthy of protection in the management of lamp rooms. The issue of any protectable interests will be dealt with at a later stage of this judgment. However, in the light of the concessions that the second respondent is a competitor, and since CMS was owned by the sole director of the second respondent, “Marx”, and further since CMS renders its services exclusively to the second respondent, it follows as correctly pointed out on behalf of the applicant that CMS is in effect, an extension of the second respondent. I fail to see how it can in these circumstances be said that the two entities are independent of each other. This being the case, it follows that Grobler’s employment with CMS constitutes a breach of his restraint undertaking with the applicant, more particularly its clause 7.1.1.

[45] It is accepted that merely working for a competitor may not necessarily be sufficient to grant an interdict. Other than the fact that Grobler currently works for a competitor, the questions asked in *Basson v Chilwan* and *Kwik Kopy* still need to be addressed. These however are to be addressed within the context of what Grobler’s defence is, and also the nature of his employment with the competitor.

[46] Although Grobler had made a general comment that the agreement was unenforceable, he did not however point out in what material respects he was of the view that the contract was unenforceable or unreasonable. The thrust of his defence was primarily that he had no access to the applicant’s lamp room and the information that one would acquire therein for over two years. Secondly, his contention was that he was never recruited to set up the applicant’s lamp room management sector. In order to put these arguments into context, it will be taken that they pertained to whether in fact there are any protectable interests that the applicant is entitled to protect.

[47] A restraint would not be regarded as reasonable and enforceable in the absence of a proprietary interest deserving protection[14]. In *Experian South Africa (Pty) Ltd v Haynes & another*[15], Mbha J identified protectable interests deserving of protection in the following terms;

> "It is well established that the proprietary interests that can be protected by a restraint agreement, are essentially of two kinds, namely:
>
> > 'The first kind consists of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "trade connection" of the business, being an important aspect of its incorporeal property known as goodwill;
> >
> > The second kind consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "trade secrets".' (references omitted)

[48] The applicant seeks relief in the form of a final interdict. It therefore has to show a clear right; the absence of an alternative remedy; and that, if the interdict should not be granted, it will suffer irreparable harm[16]. For a clear right to be established, the court has to consider whether there is an interest deserving of protection. If this question is answered in the affirmative, the next question is whether the employee is in a position to threaten those interests. If the answer is still in the affirmative, those interests must be weighed up against the interest of the employee not to be economically inactive and unproductive[17].

[49] Grobler's main contention was that he was employed by the applicant as a product manager in its SLT division and not as lamp room manager. He had contended that although the lamp room services and integration with the

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[14] See *Trevlyn Ball v Bambalela Bolts (Pty) Ltd and Another* [2013] (9) BLLR 843 (LAC) at para 16, and also *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (J 2073/11) [2011] ZALCJHB 150).
[15] ([2013] (1) SA 135 (GSJ) at paras 17, 17.1 and 17.2
[16] See *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC) at para 39.
[17] See *OH Mthombo (Pty) Ltd v Bheekie-Odhav* (LC C 177/12) (22 March 2012.)

LMS/AMS systems resorted under his responsibilities initially, he was never employed to set up the applicant's lamp room management offering. Grobler further contended that he has not had any access to any of the applicant's information and/or planning and/or clients and/or systems employed in its lamp room management business since the middle of 2011. His further contention was that the applicant provided everyone who purchased lamproom equipment from it with all the necessary information on how to use lamproom equipment in the correct manner and in a manner that is safe.

[50] Given the nature of the relief that the applicant seeks, and further in the light of the disputes of facts on the papers, it is trite that such disputes should be resolved in accordance with the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[18]. Accordingly, where disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

[51] Nelson had conceded in his replying affidavit that Grobler did not run the lamp room management division for two years prior to his resignation. He however contended that from 2011 until his resignation, Grobler was employed as the Product Manager of the applicant's Lighting Technology division. In that position, he had worked closely with the lamp room management division, and had obtained and used information which was confidential in nature as it pertained to equipment developed by the applicant to suit a client's needs.

[52] In the light of the admission by Grobler that the second respondent is a competitor of the applicant, and further in the light of the fact that CMS, which employs Grobler is intrinsicably linked to the second respondent, or that the two entities are *prima facie* the same company, the following conclusions should be drawn;

The second respondent, and by implication, CMS, is in competition with the applicant in the following respects:

[18] 1984 (3) SA 623 (A) at 634E

The provision of health and safety equipment and, more particularly, caplamps, gas instrumentation and rescue packs to the same customers and potential customers of the applicant; the provision if lamp room management services, including the provision of employees to manage the lamp room of its customers, who are mines in South Africa; and the provision of lamp room and asset management systems to its customers.

[53] On Grobler's own version, CMS is indeed in the business of inspecting a mine's lamproom to ensure compliance with the relevant legislation. It is effectively the lamp room management of the second respondent. There is therefore no reason to reach any conclusion other than that in respect of the the nature of his duties under CMS, Grobler is performing the same duties as performed by a lamp room manager, and in blatant competition with the applicant. Furthermore, the second respondent designs, manufactures, sources, distributes and sells equipment. Lamp room management service also includes sourcing equipment for client, and to that end, CMS would be required to source the second respondent's products to client mines, again, in competion with the applicant.

[54] In regards to contact with clients, it was not in dispute that during his employ with the applicant, Grobler was in contact with its client mines and engaged with the client mines in the designing, developing and manufacturing of new products to suit their individual needs. He had therefore developed close relations with the client's mines, and had thus has intimate knowledge of the client's mines specific needs.

[55] Grobler interacted with the applicant's clients, was involved on a day to day basis with the planning associated with client mines and their specific needs. He has knowledge and awareness of potential new business with the clients, and also knowledge of the production and development of equipment in accordance with clients' needs. There is no guarantee that Grobler will not use all of these client or customer connections acquired during his employ with the applicant against it, as he was not inclined to make any undertakings in this regard.

[56] With regards to confidential information or “trade secrets”, Nelson further filed a “confidential affidavit”, following from his earlier indication in his founding affidavit that he intended to get the court’s leave to file such an affidavit. In the absence of strenous objections to the “confidential affidavit”, such leave was granted.

[57] In this “confidential affidavit”, Nelson made reference to a sample of documents and copies of e-mails annexed to the affidavit, which were exchanged between potential manufacturers and the applicant, and which also indicates the engagement of Grobler with the potential manufacturers in respect of new products; e-mails involving Grobler in respect of providing feedback from one of the applicant’s manufacturer; preparation of reference letters; requests to Grobler to investigate problems with the applicant’s equipment or products; correspondence from manufacturers regarding queries; Grobler’s liaison with manufacturers; e-mail correspondence between Grobler and manufacturers regarding feedback and suggestions, and exact modifications to products as suggested by manufacturers and an e-mail containing a pricelist provided by Grobler. Nelson had submitted that this information, which Grobler was privy to was confidential and included his detailed and intimate knowledge of the applicant’s pricing, products, customer requirements, manufacturer details and problems with certain products. He further contended that this information was not in the public domain.

[58] It does not appear to be in dispute that Grobler was the applicant’s representative and had liaised with the manufacturers regarding product specifications, capability, quality, and pricing in order to facilitate the development of the products. Thus the knowledge he acquired is not limited to the one already in the public domain in regards to the training manuals that accompany products sold to customers. The knowledge and information in his possession involves the entire process of manufacture, research and mechanisms involved in the design of those products. This information is clearly of proprietary interest to the applicant. In this regard, there is no reason to believe that the applicant will rest assured that this confidential

knowledge will not be used against it to the advantage of its competitors, more specifcally the second respondent and CMS.

[59] At paragraph 20, Mbha J in *Experian South Africa* had stated the following;

> "As I have pointed out above, the *onus* is on the respondent to prove the unreasonableness of the restraint. He must establish that he had no access to confidential information and that he never acquired any significant personal knowledge of, or influence over, the applicant's customers whilst in the applicant's employ. It suffices if it is shown that trade connections through customer contact exist and that they can be exploited if the former employee were employed by a competitor. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant, if its former employee were to take up employment, becomes apparent. See *Den Braven SA (Pty) Limited v Pillay and Another* [2008] 3 All SA 518 (D) at paragraphs [17] to [18]".

[60] In this case, Grobler has not established that he had no access to confidential information. On the contrary he did not dispute the applicant's contention that during his employ with it, he was responsible for the running of the applicant's lighting products and associated products; management of the facility, personnel, logistics and product development; provision of management reports, statistics and management costs of the lamp room division; setting up of applicant's lamp room management division, negotiating and concluding contracts with customers for the lamp room management services, preparing budgets and formulating pricing in respect of the lamp room services.

[61] Crucially, and to repeat what is already stated, Grobler liaised with manufacturers of the applicant's equipment to facilitate the design and manufacture of such equipment or products, negotiated costs with manufacturers, facilitated the import and delivery of manufactured products and provided technical support to the applicant's sales representatives. He also had intimate knowledge of the research process, which in its nature is highly confidential and constituted proprietary information in the applicant's hands. That information obviously gave the applicant a competitive advantage

in the market place, and if it gets in the hands of its competitors, that advantange would be lost.

[62] In the light of Grobler's role whilst employed by the applicant, and the nature of the information he had access to, it can hardly be said that he had no access to the applicant's lamp room and information acquired in that regard as he had alleged. It is further improbable that in his new employment as Compliance officer in CMS, his role is or would be limited to merely inspecting the lamp rooms on behalf of the second respondent. It cannot be correct as contended by Mr. Pio on behalf of Grobler that the latter's position as Compliance Officer is not in conflict with his restraint.

[63] I am not pursuaded that this application is about an endeavour to prevent Grobler from exercising his rights under section 22 of the Consititution. If this was the case, the applicant would have insisted on the two year period of the restraint clause. The application is about the protection of the applicant's propritary interests, and the mere fact that Grobler is to be released earlier from the restraint clause is indicative that there is reason for the applicant to be apprehensive. Furthermore, Grobler had not raised the issue of public policy in his pleadings, and insofar as it might be argued that his interests would be prejudiced by an adverse order, it is my view that given the circumstances of this matter, his interests cannot supercede those of the applicant.

[64] On the whole, it cannot be said that Grobler had no access to confidential information and that he never acquired any significant personal knowledge of, or influence over, the applicant's customers whilst in the applicant's employ. As it was also pointed out in *Experian South Africa*, it suffices if it is shown that trade connections through customer contact exist and that the ex-employee can exploit them for the benefit of a competitor. This fact has been established by the applicant. Furthermore, the applicant does not have to show that Grobler has already utilised the information confidential to it. All that it need merely show is that the Grobler could do so. In the light of his involvement with a competitor, and his new role therein, the applicant has every reason to believe that Grober can utilise the confidential information in

his possession. In the light of these factors, the risks to the applicant are apparent, and I am satisified that the applicant has demonstrated that it is entitled to protection of its proprietary interests in respect of its confidential information and customer connections. In this regard, it has established a clear right. Given the circumstances of this case, once it is concluded that this right has been established, it would not be necessary to deal at length with the other requirements pertaining to the granting of a final order.

[65] Grobler also contended that this application was an abuse of the court process. This contention was premised on the fact that his holiday plans were disrupted by the launching of this application on 19 December 2013 and the setting down of the application by the applicant on 9 January 2014. It was common cause that a consent order was agreed to on 9 January 2014. I fail to appreciate how Grobler can hold the view that his holiday plans were more important than the fact that the applicant had justifiable cause to bring this application on an urgent basis. The fact that the application was brought at a time that coincided with Grobler's holiday plans cannot be seen as an abuse of the court process, and his contentions in that regard have no merit.

*Costs:*

[66] The costs in respect of the hearing of the application on 9 January 2014 that resulted in a consent order were reserved. Grobler sought the costs on the grounds that the application was an abuse of the court process in view of the timing of the application. Conclusions in regard to these contentions have already been made above. It was however common cause that only the applicant made an appearance on 9 January 2014, and the consent order was finalised by the parties telephonically. That consent order was in the form of interim relief, and I am of the view that considerations of law and fairness dictate that no cost order ought to be made in that regard.

[67] The only issue of costs to be determined pertains to the application itself. The application was brought about as a result of the refusal of Grobler and the second respondent to be forthright about the employment of Grobler by either CMS or the second respondent as far as 2 December 2013 when the

applicant had sought an undertaking from them. The lack of candour as contained in their response on 6 December 2013, and the mere denials that Grobler was not employed by the second respondent or that the latter was not a competitor in my view is a matter which the court must show its displeasure at, with an appropriate cost order. I have taken account of the fact that applications concerning restraints of trade ordinarily have consitutional implications and costs orders should not be made lightly[19]. However, the circumstances of this case and the manner with which the respondents have approached this matter calls for such an order. In the circumstances, the following order is made;

Order:

1. The First Respondent is interdicted and restrained from directly or indirectly and in any capacity, for a period of 12 (Twelve) months calculated from 1 January 2014, within the Republic of South Africa from;

   1.1 Engaging in any work or other activity similar in any way to, or of the kind performed by the first respondent for the applicant, involving products or processes similar to or the same as the products or process with which the first respondent worked whilst employed with the applicant, namely the management services of a lamp room, and the supply of caplamps and rescue packs;

   1.2 Being interested in or concerned with, in any capacity whatsoever, any person, company or association, organisation or concern which competes directly or indirectly with the applicant or its associated companies;

   1.3 Offering employment to, or employ, or cause employment to be offered to or cause to be employed or solicit any employee of the applicant or its associated companies who was employed by the applicant or its associated companies at the date of the termination of the first respondent's employment on 31 December 2013 or at any time during the six months preceding such termination.

[19] See *Trevlyn Ball* at para 30

1.4 Revealing to a third party any confidential information pertaining to the business of the applicant or its associated companies, without prior written consent having been obtained from the applicant, including but not limited to information about its inventions, manufacturing process, financial affairs, method of design, distribution or procurement for any trade secrets obtained by the first respondent whilst in the employ of the applicant or its associated companies.

2. The First Respondent is ordered to pay the costs of this application.

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

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| For the Applicants: | Adv Christopher Whitcutt SC with Emma Keeling |
| Instructed by: | Edward Nathan Sonnenbergs Inc |
| For the Respondent: | Adv. P. Pio |
| Instructed by: | Du Plessis & Eksteen Inc |