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IN THE HIGH COURT OF SOUTH AFRICA

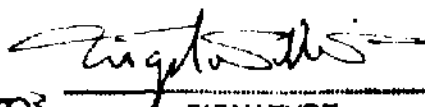
(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 14293/03

2003-06-13

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DEFENDANT'S SIGNATURE IS NOT APPLICABLE	
(1) NOT APPLICABLE ~~YES~~ /NO	
(2) INTEREST TO OTHER JUDGES	YES/NO
(3) REVISED ✓	
DATE 18/06/2003.	SIGNATURE 

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In the matter between

I I R SOUTH AFRICA BV

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t/a The Institute for International Research

Applicant

and

HALL, SHOUNEEZ AND ANOTHER

Respondent

J U D G M E N T

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WILLIS, J: The applicant has approached the court by way of urgency seeking the following relief:

- "1. Directing the first respondent immediately to terminate her employment and/or association with the second respondent.

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2. Interdicting and restraining the first respondent from being in the second respondent's employ until after 24 January 2004.
3. Interdicting and restraining the first respondent for a period of 12 months from 24 January 2003 from being involved in the restraint area with any entity that markets, produces, sells, administers and hosts events similar to and/or in direct or indirect competition with or may be in direct or indirect competition with such events as marketed, produced, sold, administered and/or hosted by the applicant as at 24 January 2003 and for a period of 12 months prior to 24 January 2003 where, for the purposes of this order -
 - 3.1 'entity' means any person, partnership, close corporation, company, association, firm, business undertaking, trust, association for gain or any other vehicle, whether a legal persona or not, whereby business is carried on and any government department or agency, municipality, public utility or statutory body;
 - 3.2 "events" means conferences, seminars, training and/or speaker events including "guru-events";
 - 3.3 "involved" means a direct or indirect interest in an entity whether as a shareholder, director, partner, owner, principal, agent, employee, representative,

financier or consultant to that entity or whether by way of part-time or fulltime employment by that entity, or whether in any other capacity whatsoever, but excluding the holding of not more than 5% of the issued share capital of any company listed on any Stock Exchange; 5

3.4 "restraint area" means the geographical area situated within an 80 kilometre radius from the Johannesburg City Hall, corner Rissik and Market Streets, Johannesburg. 10

4. Directing that the respondent immediately returns all the applicant's property that may still be in the first respondent's possession or under her control such as brochures, pamphlets, written instructions, notes, memoranda or recordings relating to the applicant's business which may have come into the first respondent's possession and/or which may have been made (presumably available should appear thereafter) by the first during her employment with the applicant including all information (schedules, precedents and the like) captured and recorded electronically on computer disc or computer hard drive as well as information in hard copy, i.e. document form. 15 20
5. Interdicting and restraining the first respondent with immediate effect, and henceforth to desist from using confidential information (as defined and set out in the 25

restraint agreement dated 13 September 2002 or any portion thereof) for her own and/or the second respondent's purposes or benefits or for any other purpose whatsoever.

6. Directing the second respondent to immediately terminate the employment of the first respondent. 5
7. Interdicting and restraining the second respondent from employing the first respondent until after 24 January 2004.
8. Interdicting and restraining the first and the second respondent from holding conferences as described and set out in X hereto ("the offending conferences") on the - planned dates or any other dates. 10
9. Ordering the first respondent and the second respondent to pay the costs of this application jointly and severally, the one paying the other to be absolved." 15

There are some 14 conferences that are affected in the schedule, Annexure X, referred to above.

The facts in this case are common cause although the inference to be drawn from certain of the facts is not. The first respondent had been employed by the applicant as a "conference producer". In terms of the contract of employment dated 23 June 2000 she was employed at a gross monthly salary of R6 500,00 which included a car allowance of R1 000,00 per month. She signed a confidentiality and restraint of trade agreement which was included as a clause of the contract of employment. 20 25

The first respondent resigned from her employment with the applicant and worked for the second respondent in breach of the restraint of trade agreement. She has not opposed this application. The applicant and the second respondent are competitors in the business of organising conferences. This is a very competitive industry. 5

The second respondent does, however, oppose this application and the issue which has generated much heat in the application is the relief sought in paragraph 8, namely an interdict restraining the second respondent from holding the conferences as described in Annexure X hereto. 10

The second respondent, when its attention was drawn to the fact that the first respondent was working for the second respondent in breach of her restraint of trade agreement, convened a disciplinary enquiry against the first respondent and ultimately dismissed her. Therefore much of the relief sought by the applicant is irrelevant. 15

Technically there may be some merit in interdicting the first respondent from, for example, using confidential information but as she has been dismissed, I see no necessity for making an interdict along these lines. 20

Furthermore, the relief sought against the first respondent relating to the return of such documents as she may have in her possession, also seems to me to be irrelevant as there is nothing before me to indicate that she is indeed in possession of any such documents in breach of her agreement although of course I accept that she may be. These issues were faintly pursued by Mr Weiner, 25

who appears for the applicant.

As I have already indicated, the keenly contested issue, the gravamen of this entire case and the issue which is of critical importance to both the applicant and the second respondent is whether or not I should interdict the second respondent from holding these conferences. It goes without saying that if the court were to interdict the second respondent accordingly, there would be a considerable economic penalty entailed for the second respondent, and much inconvenience, not only to the second respondent but also to people who have either registered for these conferences or were planning to attend them. 5 10

It is common cause that the first respondent assisted in "putting the conferences together". She was not, however, the sole or exclusive cause of these conferences being set up.

The second respondent has explained how it came about that it employed the first respondent. It says as follows in its answering affidavit:- 15

"29. The second respondent advertised the position of conference producers towards the end of 2002 in "The Star Workplace". The first respondent applied and the first interview was held with Mr Devin McDuling. Because the second respondent requires its employees to sign restraint of trade and confidentiality agreement, the first respondent was specifically asked by Mr McDuling whether she was subject to a restraint of trade 20 25

agreement. She said "No". She was asked whether she had a letter of appointment, to which she replied that she had misplaced it.

30. I held a second interview with the first respondent and again she was asked whether she was subject to a restraint of trade agreement. She replied "No" and added that even if she had, she believed that the applicant would not enforce such an agreement. 5

31. I had no reason to doubt the first respondent and made no further enquiries. I too had worked for Marcus Evans without a restraint of trade as I refused to sign one. I therefore did not find it strange when the first respondent said that she was not subject to a restraint." 10

It is, however, common cause, that in this particular industry restraint of trades are the norm. 15

It is clear from the second respondent's version of events that it did not intentionally assist the first respondent to breach the restraint of trade agreement and if I understood Ms Weiner correctly, she did not argue that there had been an intentional act on the part of the second respondent. She submitted that the second respondent had been negligent in the light of these explanations by the first respondent in not making further enquiries. Ms Weiner colourfully submitted that the second respondent had "sedulously applied Nelson's telescope". 20

I shall assume, without deciding the issue, that negligent conduct on the part of a person in the position of the second 25

respondent can indeed give rise to a claim based on unlawful competition. In my view, the second respondent was not negligent. In my view people conducting their everyday lives are entitled to assume that others with whom they are dealing are honest. There is nothing particularly unusual in the version of the first respondent which in my view would have alerted the second respondent to the possibility that the first respondent was being dishonest. After all, it must be borne in mind that the first respondent was employed as a conference producer earning some R6 500,00 per month which included a car allowance. She was therefore not obviously some "high-flying" executive in respect of whom a restraint of trade agreement might have been expected.

There is a further issue that arises even if I am wrong in finding that the second respondent was not indeed negligent. It is this: whether the second respondent's conduct in "sedulously" applying "Nelson's telescope", justifies the relief that has been so keenly contested in this particularly application namely the restraint on the second respondent from holding the conferences as set out in Annexure X.

Ms Weiner relied very heavily on two unreported judgments in submitting that indeed it would be correct for the court and indeed required by law to grant this relief. These two judgments are *Marcus Evans (South Africa) (Pty) Ltd v Mpungose, Zinhle and Others*, Case No. 2002/2780 which is a judgment of my brother Malan J and *IR Netherlands BV (Incorporated in the Netherlands) T/A Institute for International Research v Tarita, Imagen*, Case No. 02/19675, which

is a judgment of my brother Marais J. Marais J in his judgment referred to the reported judgment of *Genwest Batteries (Pty) Ltd v Van der Heyden and Others* 1991 (1) SA 727 (W). This is the judgment of my brother Goldstone J. In that judgment Goldstone J held that unlawfully assisting a person to breach a restraint of trade agreement was wrongful and could be interdicted. I do not consider this judgment to be of particular assistance in dealing with the particular issue with which I am confronted, namely whether I should go so far as to restrain the second respondent from holding the conferences in question.

In both the *Marcus Evans* case and the "*Tarita*" case (in which the present applicant was also a party), the learned judges did indeed interdict against the holding of conferences by persons who had employed others in breach of their restraint of trade agreements. In my view it is important to consider these issues in perspective. Until the famous case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) the courts had generally been content to apply the English principle that restraint of trade agreements were *prima facie* contrary to public policy and unenforceable. Since *Magna Alloys* the law has been corrected on the basis that Roman Dutch Law did not apply the same principle that restraint of trade agreements were *prima facie* unenforceable as they were contrary to public policy. As is well known, the *Magna Alloys* case decided that restraint of trade agreements were enforceable unless they were unreasonable. Nevertheless, it is clear from the *Magna Alloys* case and the numerous

cases that have been decided in restraint of trade matters thereafter, that it is ultimately public policy which draws the line between what is permissible and what is not.

Interestingly, in this particular case I have not been called upon to find whether or not the restraint in this particular matter was reasonable. The second respondent, by taking the steps which it did to dismiss the first respondent, obviously accepted that the restraint was reasonable. I am not convinced as to the wisdom of its decision but that is a matter that is irrelevant for the purposes of deciding this particular application. 5 10

I cannot believe that public policy would accept such draconian and far reaching consequences as interdicting the second respondent in circumstances such as this from holding the conferences in question. Ms Weiner employed an interesting and useful analogy. She posed the situation of a scientist who had been working for company A in endeavouring to find a cure for AIDS. The scientist was subject to a restraint of trade agreement. The scientist in breach of his agreement went to work for company B which was negligent in not ascertaining that the scientist was subject to a restraint of trade agreement and refusing to employ that scientist. Over the course of a few months during which the scientist was subject to the restraint of trade, he, together with others discovered the cure for AIDS. What would the consequence be for company A by reason of its negligent employment of the scientist? Could company A obtain an interdict against company B, restraining it from selling or in any way benefitting 15 20 25

from the discovery of the cure for AIDS because company B had been negligent in employing the scientist. Ms Weiner, if I understood her correctly, was, by force of logic, constrained to agree that if I accepted the principles for which she was contending, that indeed would be the relief that company A would be entitled to obtain against company B. 5

Indeed, if I understood Ms Weiner correctly, she was neither embarrassed nor inhibited in making this assertion. On the contrary, she made it with considerable enthusiasm. In my view, if a court were to make such an order there would be a public outcry and rightly so. Not only would the order be draconian and hugely burdensome upon company B but it would also deprive the ordinary citizenry of access to the cure for AIDS. 10

In this particular case an interdict stopping the conferences in question would not only profoundly inconvenience the second respondent and cost it a considerable amount of money but it would inconvenience those persons who had registered for or were planning to attend the conferences. If my brothers Malan J and Marais J intended to develop principles of law which had such far reaching and draconian consequences, I am constrained to conclude that they were indeed wrong. The pendulum cannot swing so far from holding that restraint agreements were *prima facie* contrary to public policy to, so allowing the kind of draconian consequences which the applicant submits would arise in situations such as that with which I am confronted in the present case. 20 25

I do not think it appropriate to nit-pick in this particular case about costs. As I have already indicated, the residual relief sought against the first respondent was faintly pressed and I do not think that it is appropriate to penalise her with a costs order, especially as she had not opposed the application. Furthermore, it is clear that this was not the real issue in contention.

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It is true that certain costs were incurred by the applicant prior to the second respondent's dismissal of the first respondent. The fact is, however, that the second respondent acted promptly in remedying what it believed to have been a wrong and I do not see why it should be penalised in the circumstances of this particular case by a costs order.

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The application is dismissed with costs.