

SOUTH AFRICA / JUDGMENT

Hudaco Trading (Pty) Ltd v Green and Another (08/20735) [2008]

ZAGPHC 487 (22 October 2008)

[2008] ZAGPHC 487**COURT**

High Courts - Gauteng

BEFORE

Jajbhay

CASE / FILE NUMBER

08/20735

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Source record**NOT****REPORTABLE****IN****THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)****CASE****NO: 08/20735****DATE:22/10/2008****In**

the matter between:

HUDACO
TRADING (PTY)
LIMITED.....
Applicant
and
GREEN,
ANDREW MICHAEL
LOUIS.....
First Respondent
GASKET
MANUFACTURING CORPORATION
(PTY)
LIMITED.....
Second Respondent

JUDGMENT

JAJBHAY. J:

[1] The applicant seeks an interdict against the first respondent an erstwhile divisional manager, from breaching an agreement of

restraint of trade in favour of the applicant, for a period of one year, commencing 19 June 2008. Interim relief was granted to the applicant by Horn J on 9 July 2008.

[2] The first respondent acknowledges that he signed the restraint, and admits that he was at the time of the launching of the application

working for a competitor of the applicant. The principal defences raised by the first respondent are that the restraint is not

reasonable, as it is too broad, and further that there is no protectable interest warranting this Court interdicting him from being employed. It was further contended that in the event that this Court finds that the restraint is reasonable, this Court should

exercise its discretion, owing inter alia to the fact that the applicant constructively dismissed him, and read the contract down so as to limit the duration for which the restraint should be operative to three months.

[3] It is common cause that the applicant and the first respondent concluded a written agreement on 8 March 2006 which included a restraint of trade. The first respondent was formally employed as a divisional manager of the applicant's Sealing Division. The first respondent resigned on 4 June 2008. The first respondent left the applicant's employ on 20 June 2008. The first respondent took up employment with the second respondent a direct competitor, on 23 June

2008. The first respondent, on behalf of the second respondent, commenced soliciting business on behalf and for the benefit of the second respondent, which included some of the applicant's customers.

[4] The applicant is a large multinational company, which employed the first respondent in one of its divisions. At the time of his resignation the first respondent was employed in the Sealing Division of the BEP Bestobell

Division of the applicant. The first respondent is a specialist gasket salesman nearing the end of his career.

[5] The first respondent worked in the same sealing business for many years. He started feeling marginalised and belittled in his work environment since the first respondent's line superior, Vermaak senior, employed his son Vermaak junior in the division. He further felt improperly treated in other respects such as the manner in which the company treated him in respect of a telephone account and a business expense. He believed that his work

environment had become intolerable, and he consequently resigned. He immediately commenced employment with the second respondent in the gasket business.

[6] it is not in dispute 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 employees' freedom to trade or to work. It was further

accepted that the onus of proving that the restraint is unreasonable and unenforceable rests upon the former employee: *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A). Furthermore, a court is entitled to partially enforce a restraint: *Magna Alloys and Research* at 897F-898E. The first respondent accordingly bears the onus of establishing that the restraint of trade is unreasonable and accordingly unenforceable because: the application has no legitimate protectable interest justifying protection through the restraint; and on the first respondent's version his employment with the applicant had been made intolerable and that on account thereof the enforcement of the restraint would be unreasonable.

[7] Insofar as the restraint of trade agreement is concerned, the following facts are important. The first respondent was initially

employed as a salesman from 14 April 1993 by BEP Bestobell (Pty) Ltd. The business of BEP Bestobell (Pty) Ltd thereafter became an operating division of Hudaco Transmission (Pty) Ltd. On 8 March 2006, BEP Bestobell, a division of Hudaco Transmission, and the first respondent concluded an employment agreement in writing pursuant to which Hudaco Transmission employed the first respondent. The employment agreement described the agreement concluded between Hudaco Transmission and the first respondent as: "An agreement made this 8th day of March in the year 2006 between BEP Bestobell a division of Hudaco Transmission (Pty) Ltd whose registered office is situated at 9 Covora Street, Jet Park, Boksburg, South Africa (hereinafter referred to as the company) and AML Green (hereinafter referred to as the employee)." The employment agreement further provided that:

111. The company shall employ the employee and the employee shall act as sealing divisional manager (or in such other office, or offices of comparable status, or as may from time to time be agreed upon). This agreement shall be deemed to have started on 1 February 2006.

This agreement replaces all previous agreements and arose as a result of amendment to salary and car scheme and as a result of negotiation of inclusion of restraint of trade clauses.

Reporting will be to the managing director.

2. Your basic salary will be R255 132,00 (Two Hundred and Fifty-Five Thousand One Hundred and Thirty-Two Rand) per annum, payable monthly in arrears and subject to PAVE tax, pension fund and medical aid deductions.

3. Should you leave the employ of the company for any reason whatsoever, you are to advise the company whether you will be joining an opposition company on your resignation. During your employment with the company, you undertake not to enter into negotiations with any of our suppliers, with the object of taking the distributorship away from the company. You also undertake not to negotiate in any way with our suppliers thereafter for a period of twelve (12) months, which could result in our losing their distributorship arrangement in whole or in part.

4. RESTRAINT OF TRADE

4.1 Non-competition after termination

You may not, for a period of one year after the termination of this agreement for any cause whatsoever, represent or canvass or accept orders for or on behalf of any person, firm or company for products (or goods) of a like or similar kind to or designed to perform functions like or similar to those of the products of (or goods sold by) the company or engaged or be interested, either directly or indirectly whether as principal, owner, agent or employee, in any business competing with that of the company within the territory of South Africa.

4.2 You are further required to undertake that for a period of one year after the termination of this agreement for any cause whatsoever you will not call upon or visit any of the customers of the company for the purpose of canvassing or obtaining orders for products (or goods) similar to, or competing with those manufactured (or sold) by the company.

4.3 The employee shall not divulge or communicate to any person (other than those whose province it is to know the same or with proper authority) any of the trade secrets or other confidential information of the company or of its holding company or any of its subsidiary or associated companies and the employee shall use his best efforts to prevent the disclosure of any such trade secrets or confidential information by any other employee of the company or any of its subsidiary or associated companies whose employment is under the direction of the employee.

The aforesaid restriction shall continue to apply after the termination of the employee's, appointment hereunder without limit in point of time but shall cease to apply to information or knowledge which may come into the public domain."

[8] The applicant seeks merely partial enforcement of the restraint, restricting the operation of the restraint to business that competes with the applicant's Sealing Division and to trade connections and trade secrets of the applicant's Sealing Division. The applicant's BEP Bestobell Division consists of four trading divisions. The restraint sought is limited to the sealing trading division only.

[9] In the light of *Magna Alloys and Research as well as Den Braven SA (Pty) Ltd v Pliiay* [2008] JOL 21648 (D), a restraint can be partially enforced so as to enforce the restraint in a reasonable manner.

[10] The determination of reasonableness is in effect a consideration of public policy, with every case being judged with particular regard to its own circumstances. A court will have regard to the public policy imperatives that every person has a right to trade freely and that people should be held to their contractual undertakings: *Magna Alloys and Research] SA Sentrale Ko~op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 767 (A). Grosskopf JA stated the position in *Sunshine Records (Pty) Ltd v Frohting and Others* 1990 (4) SA 782 (A) at 794B-E:

"In determining whether a restriction on the freedom to trade or 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 should, in the interests of society, be permitted as far as possible to engage in commerce or the 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. In general, however, it will be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade."

AH persons should in the interests of society be productive and be permitted to engage in trade and commerce or their respective

professions: *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para [15], It is also trite that a restraint which contains an unreasonable restriction on a party's right to freedom of

trade is contrary to public policy: *Rawlins and Another v Caravantruck (Pty) Ltd* [1992] ZASCA 204; 1993 (1) SA 537 (A). A restraint would be unenforceable if it prevents a party after termination of his employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is clearly not in the public interest: *Reddy v Siemens Telecommunications* above; *Townsend Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33 (C); *OTP Limited and Others v Argus Holding Limited and Another* [1995] ZASCA 32; 1995 (4) SA 774 (A).

[11] 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, has been authoritatively set out in the following terms:

"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 ... *Heydon The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that the customer contact doctrine depends on the notion that:

"The employee, by contact 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 employer ... as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection

This statement has been applied in our courts ... 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."

[12] When considering the facts of a particular case it must always be borne in mind that a protectable interest in the form of customer connections does not come into being simply because the former employee had contact with the employer's customers in the course of their work. 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 business.

[13] In the present matter the first respondent contended that the applicant did not make out a case for partial enforcement, in my view this is not correct. Here, a proper basis has been set out for the partial enforcement of the restraint and in particular in limiting the same to the applicant's Sealing Division. The agreement relied upon specifically refers to the first respondent's employment as a "sealing divisional manager, where he had been employed for some 15 years and in which capacity he had access to the applicant's confidential information and contributed to establishing the applicant's trade connections within that Sealing Division. Here, the first respondent has admitted a commonality in customers as well as products. The first respondent specifically concedes that "there are a finite number of customers, and a finite number of suppliers, and most customers are fairly well known to most suppliers". More importantly, the first respondent admits that the applicant has a nationwide presence. Here, I am satisfied that the protectable interests remain of application for the duration of the restraint, namely to June 2009. The information relating to pricing on asbestos and non-asbestos products remains relevant given the exemptions on the national asbestos ban. This clearly creates a window of opportunity to aggressively sell both asbestos products before they can no longer be sold and non-asbestos substitutes in

anticipation of the lapsing of the exemptions on the asbestos ban. In these circumstances, the first respondent's contention in this particular respect cannot be upheld. The partial enforcement of the restraint as sought by the applicant is not unreasonably wide.

[14] It was further contended that the applicant had rendered the employment intolerable. A proper reading of the papers, indicates

that the first respondent has not demonstrated that his employment, particularly after having been employed by the applicant for some 15 years, was rendered intolerable or that he had been constructively dismissed. It can be safely concluded that the first respondent's motives for his voluntary termination of his employment with the applicant must not be permitted to mutate into a case of constructive dismissal. In any event, the restraint clauses in the written agreement specifically provide that the restraint will be effective upon the termination of the employment (for any cause whatsoever). Therefore, it follows that even if the applicant terminated the first respondent's employment unlawfully via constructive dismissal, the restraint will nonetheless be enforceable: *Reeves v Marfield Insurance Brokers CC* [1996] ZASCA 39; 1996 (3) SA 766 (A) especially at 771I-772A.

[15] Here, the applicant relies on at least two protectable interests that are threatened by the first respondent having joined the second respondent:

15.1 Its trade secrets or confidential information to which the first respondent was privy and which would be useful to the second

respondent as a competitor;

15.2 Its trade connections.

[16] The first respondent as part of the onus on him to demonstrate that the enforcement of the restraint is not reasonable, bears the onus of demonstrating that there is no protectable interest. Once the applicant has demonstrated the existence of the restraint and its breach in the first respondent taking up employment with a competitor (which is common cause on the papers), it is then for the first respondent to raise why there is no protectable interest. Once the first respondent challenges that protectable interest it is then for the applicant to adduce evidence in support thereof in reply: *Hirt and Carter (Pty) Ltd v Mansfield and Another* 2008 (3) SA 512 () at 525I-J.

[17] To the extent that the applicant raises new facts in its replying affidavit in support of its protectable interest, this to my view and in light of the authority set out below, is permissible. The position has been captured by Saner: *Agreements in Restraint of Trade in South African Law Lexis Nexis* [issue 10] at 15-22(1):

"The fact that the onus is on the respondent in restraint applications to establish their defence (for example that the applicant has no proprietary interest worthy of protection) means that facts germane to their contentions will, of necessity, be set out in the answering affidavit. The issues need not be (and in reality are not) dealt with in the founding papers. The applicant must,

perform, deal with them for the first time in reply. In such circumstances the respondents should apply for leave to file further affidavits to deal with any new matter raised in reply by the applicant. Failure to do so will in all probability lead to the matters being decided on three sets of affidavits, possibly to the detriment of the respondent. By virtue of the incidence of the onus in restraint applications (and actions) an application to strike out 'new' matter in an applicant's replying affidavit might very well not succeed." Basson v Chilwan [1993] ZASCA 61; 1993 (3) SA 742 (AD).

[18] To the extent that the first respondent sought an opportunity to deal with any new allegations, he should have sought leave to file a further set of affidavits.

[19] It is the first respondent who bears the onus of proving that no protectable customer connection exists. The Appellate Division in Rawlins and Another above held in regard to the protection of trade connections:

"The need of an employer to protect his trade connections arises where the employee has access to customers and 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 ..."

Heydon The Restraint of Trade Doctrine (1971) at 108, quoting an American case says that the "customer contact doctrine depends on the notion that 'the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins as a rival he automatically carries the customer with him in his pocket'. I have earlier in this judgment set out the criteria that were spelled out in that case.

[20] Applying these factors enumerated in Rawlins and Another above to the common cause or largely undisputed facts the following emerges:

20.1 The duties of the employee. These duties are comprehensively set out in the founding affidavit many of which demonstrate the intimate contact with the customers. These duties are admitted or not seriously disputed.

20.2 His personality. It is common cause that the first respondent is a good salesperson. The first respondent boasts that within hours of being employed he secured a significant order of gaskets, exceeding greatly what was the total monthly turnover for the division. The fact that the first respondent is a good salesman rather than a mediocre salesman increases the likelihood that the first respondent has significant influence over the applicant's customers and can induce them to move to the second respondent.

20.3 The frequency and duration of contact between him and the customers. The first respondent admits that he had regular, if not daily, contact, with the applicant's customers. The first respondent admits that many of the customers, especially the larger ones, would usually deal directly with the first respondent rather than the sales representatives. The first respondent admits that he stored business contacts on his cellphone.

20.4 Where such contact takes place. The contact was both by personal visits at the customer's place of business and over the telephone.

The first respondent regularly entertained customers, extending the nature of the contact between them.

20.5 What knowledge he gains of their requirements and business and 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). The first respondent over time and at the applicant's expense built up a specific knowledge of a customer's individual's needs. The first respondent admits that "the customers will likely buy from the supplier that best meets their needs" and that what was discussed at manager's meetings included the customer's needs. This is a key feature leading to the establishment of trade connections with the customers and the ability of the first respondent to persuade the customers to migrate their business to the second respondent.

20.6 How competitive the rival businesses are. The first respondent admits that the applicant and second respondent's businesses constitute two of four main players within the gasket industry; these four companies would typically always be invited to quote on contracts and account for the bulk of the sales in the market. The first respondent admits that the applicant and the first respondent sell the same or similar products and service the same market and on occasion the same customers. There is a significant commonality of customers and product.

20.7 The type of product being sold. The product is largely is generic product and the knowledge of the customers' needs can easily be transposed from the applicant to the second respondent's business.

20.8 Whether there is evidence that customers were lost after the employee left. The applicant alleges that it has lost the business of Ross Controls CC. The first respondent does not deny this. Similarly, in relation to mining pressure systems and Abeyla Trading, there has been a marked decline in business since the first respondent took up employment with the second respondent.

[21] The first respondent admitted that upon taking up employment he commenced calling on potential customers, which included the

potential customers of the applicant. The main attempt by the first respondent to demonstrate that there are no trade connections is that there is no particular relationship established through a personal relationship but rather it is dominated by price. This in my view is misplaced. This contention did not find favour in Den Braven above as it did not take account of "such factors as customer loyalty to a particular supplier; customer inertia in continuing to purchase from an established supplier rather than going to the effort of always checking the market for the best possible price and the fact that where two different suppliers quote very similar prices for comparable products, the trade connection established through the salesperson may well be the decisive factor. It is not, in my view, necessary for an applicant in this situation to winnow the wheat of trade connections and customer contact from the chaff of other factors that may

influence purchasing decisions". With respect., i agree.

[22] Therefore, it follows that the probabilities are that the first respondent, armed with knowledge of the applicant's customers' needs which he learnt whilst employed by the applicant for some 15 years and at the applicant's expense, can persuade those customers to move their respective business from the applicant to the second respondent. The remarks by Wallis AJ in *Den Braven* above are

apposite:

"The court must avoid the subconscious temptation in cases such as these to think that the former employee is 'just a salesman' and to treat the attempt to enforce the restraint as a case of the employer taking a sledgehammer to crack a nut"

in the present matter the first respondent is so much more than just a salesman: it is common cause that he has been the divisional manager of the applicant's Sealing Division for at least 15 years. In the circumstances the first respondent's attempts to downplay the role played by a salesman in establishing trade connections and accordingly the goodwill of a company must be rejected.

[23] These trade connections form part of the applicant's goodwill and is an asset, and so is capable of protection by means of the restraint sought.

[24] The respondent must also discharge the onus of showing that there are no trade secrets: *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991

(2) SA 482 (T) at 503A; *Bridgestone Firestone Maxiprest Ltd v Taylor*

[2003] 1 All SA 299 (N) at 303; and *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W) at 57J-58D. The applicant has only to show that there is secret information to which the first respondent had access whilst employed by the applicant and which the first respondent could, if he so desires, impart to the second respondent. The fact that the first respondent may not recollect the confidential information, as the first respondent contends, or may not have retained any confidential information, as the first respondent contends, is irrelevant and is not a bar to the enforcement of the restraint as the applicant cannot be expected to rely on the first respondent's bona fides or lack of retained knowledge. The first respondent had access to confidential information proprietary to the applicant during his 15 years tenure as a divisional manager which he, at the very least could impart to the second respondent. This information includes: pricing of asbestos and non-asbestos products; knowledge of the variables utilised to calculate the pricing of the applicant's products, including raw material costs, holding costs and agents-distributor's costs; corporate opportunities, both in the asbestos and non-asbestos market give the national ban on the use of asbestos products and the one year moratorium on that ban; an intimate knowledge of the applicant's customer's specific requirements and needs; and the information necessary to effectively tender for larger contracts.

- [25] Here, I can safely reach a conclusion that it has been demonstrated that the second respondent as the new employer is a competitor of the applicant, trading in a range of similar products. Accordingly, the risk of harm to the applicant if the first respondent is able to take up employment with that competitor is clear. The risk is increased whereas in the present matter, the first respondent has a lengthy track record working in the particular market. The products that he will be dealing in will be exactly the same as he had dealt with previously on behalf of the applicant.
- [26] 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 interests will be prejudiced by the first respondent taking up employment with its competitive rival, the second respondent.
- [27] The covenant expressed in the restraint of trade in the present matter is valid. It is enforceable to the extent that in my view, such enforceability would not be contrary to public policy. The circumstances of the present matter set out herein before indicates that the covenant is in fact reasonable. In arriving at this conclusion, I have taken into account the factors since the resignation of the first respondent as well as the situation prevailing at the time that the enforcement was sought. Here, public interest requires that the parties to the present dispute should comply with their contractual obligations. The contractual obligations which were entered into between the parties are neither unreasonable nor unfair.
- [28] It was contended on behalf of the first respondent that any decision, and in particular the decision of this Court on the public policy considerations inherent in this application should be made having regard to the matter through the prism of the Bill of Rights. In other words, one must have regard to the norms, values and principles contained in the Constitution of the Republic of South Africa (1996). In this particular regard, it was contended that section 22 of the Constitution guarantees every citizen the right to choose his or her trade, occupation or profession freely. Wallis AJ deals with this specific aspect in the matter of *Den Braven* above. The learned Judge states that:

"Direct application of the right of every citizen to choose their trade, occupation or profession freely to natural or juristic persons who are party to restraint of trade agreements would have the inevitable effect of nullifying all such agreements, however appropriate and desirable, in South African law. Such a result seems to be an unlikely construction of the Bill of Rights. The flaw lies, in my respectful opinion, in overlooking the words in section 8(2) of the Constitution that provide that a provision of the Bill of Rights binds a natural or juristic person: if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Once it is recognised that the right embodied in the first sentence of section 22(1) cannot be separated from the entitlement to regulate by law the practice of a trade, occupation or profession, in terms of the second sentence it is I think apparent that the nature of the right embodied in section 22 and the nature of the duties imposed by the right are not appropriate to be rendered applicable to natural or juristic persons in the context of contractual relationships. To the extent that it was argued or held in the cases to which I have referred that section 22 had direct application to restraint of trade agreements I must respectfully disagree."

[29] Of course, the above does not mean that section 22 has no bearing upon the enforceability of restraint of trade agreements. It is apparent from the passage in the judgment of Ngcobo J in the matter of *Barkhuizen v Napier* 2007(5)SA 323 CC where the learned Justice deals with public policy under our Constitution. He sets out the following:

"What then is the proper approach of constitutional challenges to contractual terms where both parties are private parties? Different considerations may apply to certain contracts where the State is a party. This does not arise in this case.

Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most ideal by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values underlie it.

What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is therefore unenforceable.

In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenge is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."

[30] The Constitutional Court approached the above matter in a manner that enforces that contractual obligations are enforceable unless they are contrary to public policy, which is to be discerned from the values embodied in the Constitution and in particular in the Bill of Rights. In the present matter, the first respondent has not in any way indicated that the agreement that he relies upon is contrary to public policy. Nor has he indicated that how the clause may be inimical to the values enshrined in our Constitution. Therefore the relevance of this particular right enshrined in the Constitution is misplaced.

[31] The first respondent relied on the unreported case of *Hudaco Transmission (Pty) Ltd v Johnson, William David and Another* Case No. 06/22924 delivered on 13 November 2006. In that matter, Gildenhuys J set out:

"It is within the court's power to depart from the express limits of a restraint, but this power is not unrestricted. Partial enforcement will only be ordered if the public interest requires it, and if it can be done without drastically amending the contract, thereby creating a new contract which the parties did not have in mind."

The learned Judge further stated that:

"A party seeking to enforce something less than the full restraint of trade is obliged to raise the issue pertinently, so that it can be dealt with properly both in evidence and in argument: *Lifeguards Africa (Pty) Ltd v Raubenheimer* 2006 (5) SA 364 (D&CLD) at 380A-B."

That matter, as correctly submitted on behalf of the applicant had substantially different facts from the present matter. There, the learned Judge stated that:

"The effect on the first respondent of a restraint provision limited only to business operations similar to those of the applicant's mather and platt division was not canvassed in the affidavits before the court. The applicant should have made it clear, from the outset, that it would be seeking only partial enforcement of the restraint clause."

It will be recalled that in the present matter, the applicant did at all times make it clear, that it will be seeking only partial enforcement of the restraint clause. In those circumstances, the principles set out by the learned Judge are not applicable to the present matter. The facts are quite different.

[32] in the result, the applicant is entitled to confirmation of the rule as requested in Part B of the Notice of Motion. In all of the circumstances, I make the following determination:

32.1 The first respondent is interdicted and restrained for a period of one year commencing 19 June 2008 from being employed by the second respondent or from engaging in or becoming interested in, or remaining engaged in or being interested in, either directly or indirectly, whether as principal, owner, agent or employee, in any business competing with that of the applicant's BEP Bestobell Sealing Division within the territory of South Africa.

32.2 The first respondent is interdicted and restrained for a period of one year commencing 19 June 2008 from calling upon or visiting any of the customers of the applicant's BEP Bestobell Sealing Division for the purposes of canvassing or obtaining orders for

products or similar products imported, distributed, manufactured, sold or otherwise traded by the applicant's BEP Bestobell Sealing Division,

32.3 The first respondent is interdicted and restrained from divulging or communicating to any person, including the second respondent, any of the trade secrets or other confidential information of the applicant's BEP Bestobell Ceiling Division.

[33] The first respondent is ordered to pay the costs including the costs occasioned before Horn J. The costs shall include the costs of employing one senior counsel.

M JAJBHAY JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT:ADV A SUBEL SC

ADVB GILBERT

ON BEHALF OF THE FIRST

RESPONDENT: ADV W WELZ

DATE OF HEARING:17 OCTOBER 2008

DATE OF JUDGMENT:22 October 2008.

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