
SOUTH AFRICA / JUDGMENT

Scibit Scientific Bitware (Pty) Ltd v Potgieter (1784/2021) [2021] ZAFSHC 268 (2 November 2021) [2021] ZAFSHC 268

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

1784/2021

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

CASE NO. 1784/2021

In the matter between

SCIBIT SCIENTIFIC BITWARE (PTY) LTD

APPLICANT

and

CHRISTIAAN JOHANNES RUDOLPH POTGIETER

RESPONDENT

JUDGMENT

CORAM:

NAIDOO J

HEARD ON:

29 JULY 2021

DELIVERED ON: 2 NOVEMBER 2021

[1] This is an application essentially for an order restraining the respondent from conducting business in violation of a restraint of trade agreement, flowing from a contract of employment entered into between the applicant and respondent. Adv J Els represented the applicant and Adv WA Van Aswegen represented the respondent.

[2] the applicant sought an order, inter alia, in the following terms:

“1. That the Respondent be interdicted and restrained from directly or indirectly utilizing, disclosing, allowing access or to making public to any unauthorized person or third party for any reason whatsoever, the Confidential Information of the Applicant or to derive any economic value, benefit or profit from the use of such Confidential Information, save as expressly authorized by the Applicant, or required by any applicable law or court to be disclosed, and then only to be disclosed to the extent required by such law.

2. That the respondent be directed to return all intellectual property to the Applicant and to terminate all use of and access to the intellectual property, and where necessary, to take all necessary steps to transfer the intellectual property into the name of the Applicant.

3. That the Respondent be interdicted and restrained from, for a period of 24 months following the date of termination of the employment agreement, directly or indirectly:

3.1 within the Magisterial district of Bloemfontein carrying on or be involved in, having an interest in (whether as principal, shareholder, partner, director, contractor, agent or otherwise), being employed or contracted by, or rendering assistance to or providing advice, or being in any way associated with or engaged in or interested in, or in any way financing, guaranteeing or underwriting the obligations or work product of another business, entity or practice which conducts business similar or competing directly or indirectly with that of the applicant; and

3.2 without limitation of district, on behalf of himself or any other person or persons or company, to canvas, entice or solicit instructions, work or referrals from any person or persons or entities who shall at any time during his/her employment with the Applicant have been a customer, client or business associate of the Applicant or any of its associated entities.

4. That the Respondent be interdicted and restrained from canvassing, enticing or soliciting any employee of the Applicant to leave the employment of the Applicant.

5. That the Respondent be ordered to pay the cost of this application on an attorney and client scale.”

[3] The applicant, which was registered in 1998, provided services to its clients in the form of access control and software development. Its main client at the time was Anglo Platinum. In approximately 2014, the applicant expanded its offerings, concentrating on clients in Bloemfontein. It then offered services in three fields, namely:

3.1 Information Technology;

3.2 Security, including access control, time and attendance, and Closed Circuit Television (CCTV) cameras; and

3.2 Research and Development.

[4] The applicant avers that in addition, it provides a combination of services to its clients, which are unique to the Applicant. It has built up a reputation for the provision of these services, which few other companies offer in Bloemfontein. Such services are:

4.1 Onsite IT Support Contractor, which entailed an employee visiting the customer's office periodically

- on a pre-determined schedule, at a certain rate;

4.2 File servers/ Disaster Recovery/Offsite Backups, where the applicant provided all three services in a single on-customer-site device;

4.3 Remote Desktop Servers, allowing the customer to have all its employees' login details on a single or multiple cloud-based server and be able to use that on their desktop as opposed to using their laptops to perform their primary work; and

4.4 Mikrotik Networking, being the use of devices to develop and provide "the best possible" firewalling and networking to its customers.

[5] I turn now to the applicant's version in support of the relief it seeks. On 1 February 2012, the applicant and respondent entered into a written Employment Agreement, in terms of which the respondent was employed, with effect from the said date, as an IT Specialist on the terms and conditions as set out in the contract. Annexure "A" to the employment contract, which reflects the job description as "Developer", sets out the tasks and duties which the respondent was expected to comply with. Annexure B sets out his remuneration. Clause 17 deals with "Confidentiality and Intellectual Property" and Clause 18 contains the Restraint of Trade provisions. The order sought embodies the provisions of these two clauses.

[6] The applicant further alleges that when it employed the respondent, he had no knowledge whatsoever of the IT industry and that all the knowledge, experience and skills which he currently possesses, he gained through his employment with the applicant. The respondent was also trained and gained experience in the unique services I have set out in paragraph 4 above.

[7] During or about April 2014, the respondent approached the director of the applicant, Jacques Venter (Venter), and informed him that he wished to relocate to and work in the Western Cape. As the respondent had not yet secured employment, he requested to work remotely from the Western Cape until such time as he found suitable employment. The applicant acceded to this request. The respondent informed Venter in May 2014 that he would possibly commence employment in the Western Cape, but requested to remain in the applicant's employ, working reduced hours, until such time he was satisfied that the employment he was taking up, was suitable. The applicant also acceded to this request. The

applicant argues that the respondent therefore, did not resign from his employment with the applicant and continued to work in terms of the employment contract signed in 2012. He worked reduced hours and was accordingly paid less than he previously was. The respondent left for the Western Cape around the beginning of May

2014.

- [8] The respondent remained in the Western Cape until the beginning of August 2014. He thereafter returned to Bloemfontein and resumed his employment with the applicant, after informing Venter that he was not able to secure suitable alternative employment. He continued his employment with the applicant until he resigned at the end of September 2020 and left at the end of October 2020. Prior to the respondent resigning, he informed Venter that due to his relationship with his mother being strained, he intended to relocate permanently to the Western Cape, where his father, grandfather and brother resided, and intended to open his own business there. Venter advised him that he had no problem with that as the applicant had no clients in the Western Cape.
- [9] An entity known as Opulentia was a long-standing client of the applicant, to whom the latter provided a wide range of IT services, including the on-site contracting service which was handled by the respondent. At the end of October 2020, Opulentia cancelled all on-site contracting, and the applicant then discovered that the respondent would be providing that service to Opulentia. He sent a letter to Opulentia, pointing out that it was inadvisable to stop the service completely and suggesting an alternative. In response, he received a letter from a director of Opulentia, Ignatius Van Niekerk (Van Niekerk) informing him that over the previous few years they had built up a very good relationship with the respondent due to his good work and people skills. The respondent had also, over the years, shared with them his dream of relocating to the Cape and opening his own business. When the respondent indicated that he was ready to do so, they decided to invest in his business, given their good relationship with him. They had also provided him with a workspace, until he relocated to the Cape in January 2021.
- [10] Thereafter it seems the situation escalated, and the applicant received a letter from the respondent's attorneys alleging that the applicant cannot rely on the restraint of trade clause, as the respondent resigned from the applicant's employ when he went to the Western Cape in May 2014 and when he returned to Bloemfontein, a new employment contract was not signed. Opulentia also requested the applicant to transfer all its data (to it) as the respondent would henceforth be providing information technology services to Opulentia.
- [11] A slew of correspondence passed between the applicant and the respondent's attorneys, where the applicant repeatedly denied that the respondent had resigned in May 2014 or that he worked without an employment contract since his return to Bloemfontein in August 2014. The applicant pointed out that there is no documentation whatsoever evidencing these allegations by the respondent, concluding that the respondent was either mistaken or misrepresenting facts to his attorneys. Furthermore, when the previous letter from Van

Niekerk was received, the applicant was willing to sign an addendum to the respondent's 2012 employment contract permitting him to perform the on-site services until his departure to the Western Cape. This, was an attempt to prevent any further harm to the applicant and (to borrow Venter's words) to co-exist peacefully. No response was received to this offer or the last letter sent to the respondent's attorneys in November 2020.

- [12] After Opulentia requested a transfer of its data and effectively terminated the applicant's mandate to provide IT services to it, the respondent's attorneys addressed a letter to the applicant requesting the addendum I referred to above.

The applicant addressed a letter to the respondent's attorney on 26 December 2020 attaching the respondent's twelve payslips for 2014 in order to demonstrate that his service was unbroken, and also indicated to the attorneys that there was written communication between the applicant and respondent confirming that he would be paid on a pro rata basis as he worked remotely (for the applicant) from the Western Cape while he sought employment there. It appears that there were attempts to settle the matter but as no settlement could be reached the applicant launched this application.

- [13] With regard to the respondent's breach of the restraint of trade agreement, the applicant alleges that the respondent is a director of a company called Africa Advance Technology (AAT) and that Opulentia's co-director, Van Niekerk, is respondent's co-director in AAT. The applicant also alleges that the respondent is employed by AAT as Information Technology and Operation Manager and his duties include information technology and operation management, hardware technician, software development and network administration. AAT competes directly or indirectly with the applicant, and the respondent as a director and employee of AAT has breached clause 18 of his employment contract with the applicant.
- [14] With regard to having a protectable interest, the applicant avers that while in its employ, the respondent had access to confidential information and intellectual property, including trade secrets, financial methods, know-how, strategies, financial position, corporate information, transactions, software, policies and procedures, marketing methods, client lists, client details, client matter information, incentive and reward schemes, remuneration structures and suppliers and service providers. As a result, the respondent gained intimate knowledge of various aspects of the applicant's business, such as the list of clients and the specific services rendered to each client, the rate at which the services are rendered to the clients and the profit margin of the applicant.
- [15] The applicant records that some years ago Venter drafted a general business presentation to generate business for the applicant. The presentation was not circulated to its competitors, nor was it available in the public domain. After the respondent's

departure from the applicant's employ Venter discovered a presentation which the respondent intended to use for his new business. It was very similar to the one prepared by Venter and purported to offer the same unique combination of services that the applicant offers its clients. The applicant argues that the respondent used its confidential information to generate business for himself.

- [16] The applicant also discovered a budget or cash flow projection which was drafted by the respondent as well as a list of some of the applicant's customers. In the cash flow projection clients are listed as "Client A" to "Client T". Venter undertook a comparison of the clients listed in the cash flow projection with the list of the applicant's customers found with the cash flow projection, and discovered that the services and corresponding amounts appearing in the cash flow projection were the same as the actual services that the applicant provides to its customers mentioned on the customer list that was found. He ascertained that nine (including Opuientia) out of the fifteen customers on the customer list were targeted in the cash flow projection. The applicant concluded that the respondent planned his cash flow on amounts he would derive from the applicant's customers should he succeed in luring them away from the applicant.
- [17] The applicant then proceeded to record details of the customers who the respondent had lured away or attempted to lure away from the applicant. It argues that Opuientia was successfully solicited. A long- standing client of the applicant, EMS, is a group of companies doing business in various commercial sectors. The Chief Executive Officer of the group contacted Venter, querying why a request for data transfer in respect of two of the companies in the group could not go through and when asked the name of the service provider, he sent the e-mail domain that was blocked. The applicant was able to see that it was a domain that belonged to "rudolph@aatechnology.co.za"
- [18] The applicant also alleges that the respondent is attempting to use a circuitous route to evade the restraint clause. A company called Gavin's IT has entered the picture. Opuientia makes use of the services of Gavin's IT and the applicant surmises the respondent is making use of Gavin's IT through his co-director AAT, Van Niekerk, who is also a co-director in Opuientia. The applicant argues that this view is strengthened by events concerning the law firm De Villiers Attorneys who had been a customer of the applicant for many years and was specifically serviced by the respondent while he was in the applicant's employ. De Villiers attorneys, who is on the respondent's list, had suddenly requested a transfer to Gavin's IT. The applicant, on the basis of the scenario set out above seeks the order I mentioned earlier.
- [19] The respondent commences his Answering Affidavit by claiming that, by virtue of his qualifications and experience, he is qualified to give an expert opinion on the technical matters he deals with in the affidavit. The respondent's opposition to this application is predicated on the version that his resignation from his employment with the applicant in May 2014 terminated the employment contract that he entered into with the applicant in February 2012. When the applicant re-employed him in August 2014, he did not conclude a restraint of trade agreement with the applicant. That therefore, disposes of the application

as there is no restraint agreement that binds him.

- [20] The respondent matriculated in 2008 and obtained a qualification from CTI Education Group in software development in 2011 and was offered a job by the applicant shortly after he completed his college education. A friend allegedly convinced him to apply for a job in Cape Town, which he did and secured a job with Ocellics Software Solutions (Ocellics) in Cape Town. He gave the applicant notice of his resignation, alleging that it must have been in writing but was not able to produce a copy of such resignation. The respondent alleges that about the time he resigned, the applicant lost Anglo Platinum as a client and Venter asked him to assist with the transfer of Anglo Platinum's data to a new server.
- [21] The respondent alleges that he completed the task of the data transfer within two weeks. He had in the second week already commenced his employment with Ocellics. The job at Ocellics did not work out, and the respondent resigned after three months and returned to Bloemfontein. He was offered a job by the applicant and accepted the offer, as the remuneration structure was much improved, he was also offered a commission on services and sales, as well as a callout fee for every callout. He continued in the employ of the applicant until September 2020 when he was approached by Van Niekerk of Opulentia with a business proposal to start an IT company. This is how AAT was established. He then resigned from his employ with the applicant, with the intention to "get things going in Bloemfontein" and then establishing the company in Cape Town. This did not materialise because of the Covid 19 pandemic, which has left businesses in the IT sector in Cape Town struggling for survival.
- [22] The respondent admits receiving payments from the applicant during the months of May, June & July 2014. He surmises that the payment for May was for the data transfer work that he undertook for the applicant, but cannot remember what the payments for June and July were for. Again, he surmises that it may have been a pro-rata payment in respect of his 13th cheque. He is however, sure that it is not for hours worked as an employee of the applicant. He then criticises the applicant for not providing details of what work he did or how many hours he worked. The respondent also asserts that the payslips which were attached to the Founding Affidavit did not come to his attention, nor did the applicant prove that it did. I will deal further with this aspect later.
- [23] The respondent further asserts that it would be unreasonable and against public policy to enforce the restraint of trade agreement. In substantiation, he proffered a lengthy explanation of the work done by AAT and that done by the applicant. In essence, he asserts that AAT is an Information Technology (IT) company that is in the business of Networking, Voice over IP and servers, whereas the applicant is a software development company. He was employed by the applicant as a software developer and not as an IT specialist. Much of the IT knowledge which he uses at AAT was self-taught or gained through his interactions with people in the IT sector. Such skills are carried in his head and he cannot be prevented from using his general knowledge, skills and experience.

- [24] The respondent denied having gained intimate knowledge of the applicant's business models or markups in his capacity as software developer, claiming that he was too junior an employee to have gained that kind of knowledge. The market-related prices for IT services is fairly standardized and freely available in the public domain, and the same applies to the applicant. In addition, the advancement of technology and fluctuations in the exchange rate result in the IT sector being fluid and subject to change. So even if he had intimate knowledge of the applicant's pricing structures, mark-ups, discounts, etc, it would by now be obsolete. The period of the restraint is unreasonable, taking into account the ever-evolving nature of the IT industry, that information is readily accessible in the open market, the state of the country's economy and the unequal bargaining power the respondent had when he signed the restraint of trade agreement.
- [25] The applicant filed a Replying Affidavit dealing with various aspects raised by the respondent in Answer, including the presentation of work logs and time sheets for the period that the respondent was in the Western Cape and worked remotely for the applicant. In oral argument before me, Mr Van Aswegen asserted that the applicant introduced new facts in its Replying Affidavit and is not permitted to make out a case in Reply. Its case should have been made out in its Founding papers. He was referring specifically to the work logs and time sheets as well as copies of the email correspondence that passed between the applicant and respondent during the time that the respondent was in the Western Cape. For this reason, I deem it prudent to deal with this issue before considering or referring to the Replying Affidavit.
- [26] As I indicated earlier, the arrangement between the applicant and respondent was that when the latter moved to the Western Cape, he would continue in his employment with the applicant until he found suitable alternative employment. The applicant became aware via the respondent's attorneys that the latter is claiming that he resigned from the employ of the applicant when he moved to the Western Cape. The allegation in the Answering Affidavit was that the respondent was enlisted to assist with one task, which he did. He further said in Answer that he did no further work for the applicant after he completed that task, creating the impression that he only worked for Ocellics during that period. He also alleged that when returned to Bloemfontein, he was re-employed by the applicant. It was in reply to these allegations that the applicant attached the work logs and email correspondence to illustrate that the respondent not only remained in the applicant's employ, while working for Ocellics, but even negotiated the arrangements regarding payment of his salary.
- [27] The applicant was entitled to respond to these allegations. It must be borne in mind that the applicant attached to its Founding Affidavit the pay slips of the respondent for the relevant period to show that the respondent remained in its employ throughout the time he was in the Western Cape. In addition, the applicant furnished to the respondent's attorneys the pay slips of the respondent for the whole of the 2014 year (see Annexure FA13), evidencing not only that the respondent continued in his employment with the applicant but that he earned a lesser amount in May, June and July of that year because he worked reduced hours and

that when he returned to Bloemfontein, his salary reverted to the amount he earned prior to his departure to the Western Cape.

[28] The respondent's allegation that he could not remember what the payments in June and July 2014 were for, was a further reason for the applicant to reply (as it was entitled to), and attach the evidence that the respondent knew, accepted and acted in accordance with the knowledge that he was still employed by the applicant. In my view, therefore, the argument that the applicant introduced new facts or was supplementing its case in Reply is misplaced and cannot be sustained. If the respondent was of the view that there were matters raised in Reply, which required his response in order to prevent prejudice to himself, it was open to him to seek the court's leave to file a further affidavit, which he did not do. It does not avail him to complain now that he has not had an opportunity to respond to the Replying Affidavit.

[29] The issues for the court to decide in this matter are whether:

29.1 there is a valid restraint of trade agreement by which the Respondent is bound;

29.2 the applicant has a protectable interest: and

29.3 the enforcement and /or period of the restraint is unreasonable.

[30] Clause 18 of the employment agreement between the applicant and the respondent contains the restraint of trade agreement and reads as follows:

"18.1 The Employee acknowledges that in the course of his/her with employment the Employer, he/she will gain considerable knowledge of the Employer's business, gain access to client lists, business associates, partners and service providers of the Employer and in general have the opportunity to gain access to and understand the trade secrets, 'know how' and Confidential Information of the Employer, and the Employee further acknowledges that the only effective and reasonable manner in which the Employer can protect its rights and interest in respect of such information is by way of a restraint of trade placed on the Employee in terms of this clause 18 (Restraint of Trade).

18.2 The Employee accordingly agrees and accepts as a reasonable condition of his/her employment, that he/she shall not be entitled for the duration of this agreement and for a period of 24 (TWENTY-FOUR) months following the date of termination of this Agreement for whatever reason, directly or indirectly –

18.2.1 within the Magisterial District of Bloemfontein carry on or be involved in, have an interest in (whether as principal, shareholder, partner, director contractor, agent or otherwise), be employed or contracted by, or render assistance to or provide advice, or be in any way associated with or engaged in or interested in, or in any way finance, guarantee or underwrite the obligations or work product of another business, entity or practice which conducts business similar to or competing directly or indirectly with that of the Employer; and

18.2.2 without limitation of district, on behalf of him/herself or any other person or persons or company, to canvas, entice or solicit instructions, work or referrals from any person or persons or entities who shall at any time during his/her employment with the Applicant have been a customer, client or business associate of the Applicant or any of its associated entities; and

18.3 The Employer (sic) also undertakes to not for the duration of this Agreement or thereafter canvas, entice or solicit any employee of the Employer to leave the employment of the Employer.

18.4 The restraints imposed upon the Employee in terms of this clause 18 (Restraint of Trade) shall be deemed to be divisible and Separately enforceable in the widest sense from the other parts thereof and the invalidity or unenforceability of any clause or part thereof shall not in anyway affect the validity or enforceability of any other part of the clause.

18.5 The Employee acknowledges that he/she has carefully considered the provisions of this clause 18 (Restraint of Trade) , and agrees that the clause, after taking all relevant circumstances into account, is reasonable and necessary to protect the interests of the Employer, is entered into by the Employee in consequence of the opportunity of employment provided by the Employer, that the remuneration and benefit of employment received by him/her is sufficient compensation to justify the restraints, and that if he/she should at any time dispute the reasonableness of this clause, then the onus of proving such unreasonableness shall be upon him/her.”

[31] In this matter, the contract giving rise to the restraint of trade is in dispute, as the respondent’s version is that he resigned in 2014, effectively terminating the employment agreement, so that the restraint of trade agreement is no longer binding on him. He was -re-employed by the applicant three months later but no employment agreement was entered into between them, hence he is not contractually bound by a restraint of trade agreement. The applicant’s argument is that the respondent’s employment with it was never terminated, for the reasons I have set out above. Therefore, the employment agreement, embodying the restraint of trade clause and signed in 2012, was valid and enforceable against the respondent.

[32] The manner in which factual disputes in opposed applications should be approached and dealt with was enunciated in *Plascon Evans Paints v Van Riebeeck Paints* 1984(3) SA 623 (A), and came to be known as the “Plascon Evans Rule”. The rule entails that the matter be decided on the facts as stated by the respondent, together with the facts admitted or not disputed by the applicant, unless the dispute of fact is not genuine or not bona fides, or the version of the respondent is so far-fetched, implausible or palpably untrue that the court would be justified in rejecting that version on the papers. In the present matter, it is common cause that:

- the parties entered into a contract of employment in February 2012;
- the respondent rendered IT services to the applicant’s clients;

- the respondent intended to relocate to the Western Cape to seek better employment prospects and went to the Western Cape in May 2014;
- the respondent remained in the Western Cape for three months and was paid by the applicant for all three months
- the respondent returned to Bloemfontein in August 2014 and took up employment with the applicant again.

- [33] The point of departure is whether the respondent resigned in 2014 when he moved to the Western Cape, as he alleges, or continued in the employ of the applicant and resumed his job on a full-time basis upon his return to Bloemfontein, as alleged by the applicant. The respondent was not unable to produce a letter of resignation for 2014, and alleged that he assisted the applicant with a data transfer for only two weeks in May while he was in the Western Cape. He does not deny that he received payments from the applicant for the three months that he was in the Western Cape. He asserted that the payment for May must have been for the work he did for the applicant. He was unable to remember what the payments in June and July were for.
- [34] The applicant was steadfast in its version that the respondent did not resign but remained in its employ for the entire period that he was in the Western Cape, and continued to work for the applicant, for which he was paid. The applicant produced work logs and time sheets, as well as email correspondence between it and the respondent, from which it is very evident that the respondent continued to work for the applicant, in the full knowledge that he was doing so as a paid employee. An example of this is email correspondence, titled “Payslip” from Venter to the respondent on 27 June 2014 where the hours worked by the respondent and the corresponding remuneration were discussed. It was pointed out to him that he worked fewer hours than he ought to have, and that his salary was adjusted accordingly. The respondent replied on 29 June 2014, indicating that it sounded right to him, and then requested that the applicant pay him on the first day of each following month.
- [35] The respondent’s pay slips for the year 2014, which were attached to the Founding Affidavit bear out the version of the applicant that, after his return to Bloemfontein in August 2014, he once again worked full time for the applicant, and was paid the same salary as he earned prior to his departure to the Western Cape. The applicant denied that any new remuneration structure for the respondent was negotiated or paid. On the objective evidence presented, it is my view that the disputes raised by the respondent can be decided on the papers. It is also my view that the respondent’s version lacks any candour and cannot be relied upon. I am, therefore, satisfied that the employment contract signed by the parties in February 2012 remained in force until the respondent resigned in September 2020. The restraint of trade agreement, in terms of clause 18 of the employment agreement was accordingly valid and the respondent remained bound by its terms.

[36] The dicta of the court in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984(4) SA 874 (A) stated the position in our law with regard to agreements in restraint of trade. The principles enunciated in *Magna*

Alloys have been applied in a long line of cases in the thirty seven years since that matter was decided. The approach laid down by the court was succinctly captured in the Headnote as follows:

“The approach, followed in many South African judgments, that a covenant in restraint of trade is prima facie invalid or unenforceable stems from English law and not our common law, which contains no rule to that effect. The position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be unenforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it be enforced.”

Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the onus of proving that the enforcement of the condition would be contrary to public policy. The Court would have to have regard to the circumstances obtaining at the time when it is asked to enforce the restriction. In addition, the Court would not be limited to a finding in regard to the agreement as a whole, but would be entitled to declare the agreement partially enforceable or unenforceable.”

[37] The principles set out in *Magna Alloys* were comprehensively re-stated by Stegman J in *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502 J -503 B as follows:

“A contractual restraint curtailing the freedom of a former employee to do the work for which he is qualified will be held to be unreasonable, contrary to the public interest and therefore unenforceable on grounds of public policy if the ex-employee (the

covenantor) proves that at the time enforcement is sought, the restraint is directed solely to the restriction of fair competition

with the ex-employer (the covenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee's protectable proprietary interests, being his goodwill in the form of trade connection, and his trade secrets. If it appears that such a protectable interest then exists and that the restraint is in terms wider than is then reasonably necessary for the protection thereof, the Court may enforce any part of the restraint that nevertheless appears to remain reasonably necessary for that purpose.”

In principle, therefore, agreements which are contrary to the public interest are unenforceable. It must also be borne in mind that courts should always give effect to contracts entered into freely. That is an established principle of our law of contract. It creates certainty in the commercial world. However, every person should, as far as possible, be able to operate freely in the commercial and professional world.

- [38] Although the respondent admits entering into the agreement, he alleges that there was an unequal bargaining power between him and the applicant, requesting that the court take this into account as one of the factors in ordering that the restraint of trade clause and the period of the restraint of trade are unreasonable. He gives no indication of the basis for this allegation, or details of why there was an unequal bargaining power. In my view, the very nature of the IT industry requires an employer to protect its business interests, and it is for this reason, as the applicant has argued, that restraint of trade agreements are entered into. The respondent has alleged that it will be against the public interest to enforce the restraint agreement or the period of the restraint prayed for, as the latter is unreasonable. He is entitled to trade and conduct business, using the skills he has. This is indeed so, but the court needs to consider the circumstances germane to this matter in deciding if the public interest will be adversely affected if the restraint agreement and the period of restraint (24 months) were to be enforced.
- [39] As enunciated in the *Magna Alloys* case, a person who alleges that he is not bound by a restrictive term in a contract, which he agreed to, bears the onus to prove that it is unreasonable or against public policy. In support of his claim of unreasonableness, the respondent undertook, as I earlier indicated, a lengthy explanation of what the work of AAT, which is in the business of Networking, Voice over IP and Servers, entailed and how each of these services work. This was in support of his claim that the applicant is a software developer, while AAT is an IT company. Their spheres of business are different, he argues, and AAT, therefore, does not compete with the applicant.
- [40] Additionally, the respondent argues that he was employed by the applicant as a software developer and not an IT specialist, so that there is no legitimate basis to prevent him from competing with the applicant in a field of expertise that is distinctly different from the one in which he was employed. Much of the IT knowledge and skills he now employs in the business of AAT is self-taught and gained through his own efforts. I note in this regard that clause 6.1 of the employment contract which the respondent signed in 2012 indicates that “The Employee is appointed as an IT specialist with the Employer”, and that position required compliance with the tasks and duties detailed in Annexure A attached to the agreement. Under the heading
- of “Job Title” in Annexure A is reflected the position “Developer”.
- [41] In response to the respondent’s argument, the applicant, in Reply, contends that the respondent is over-emphasising the difference between a software developer and an IT specialist, as technical support flows naturally from software development. The respondent

would then have naturally supported the work stations, operating systems and servers on which the software is deployed. Based on good work, the company may gain customers who require only general support for their workstations, servers and systems. That is how an IT department was born and nurtured in the applicant's business and has existed as such since 1994. In a small company like the applicant, duties are not compartmentalised. Everyone has to be a "jack-of-all-trades" and do a little of all the various functions such as development, support and installations.

[42] With regard to the respondent, in spite of his claims of having qualified as a software developer, it was found (after he had failed a basic Programmer Assessment test) that he knew very little about software development, so he was re-deployed to perform tasks in data capturing, checking and verifying the quality of data and supporting administering systems and workstations for one of its large clients. Over time, he began supporting more diverse customers of the applicant, and was engaged in assembling workstations, installations and sales, thus gaining experience, skills and knowledge in the various aspects of the applicant's business. The applicant alleges that the respondent was a very prolific salesman and requested the applicant to pay for various sales courses over the years that he wished to attend. The applicant asserts that all the respondent's skills, knowledge and expertise were obtained solely from his employment with the applicant.

[43] It is perhaps convenient, at this stage, to deal with the issue of a protectable interest and the whether the respondent has jeopardized the applicant's protectable interest. The court in Sibex Engineering at 502 D-E defined proprietary interests, in the context of a protectable interest, thus:

"The proprietary interests that could be protected by such a restraint were essentially of two kinds. The first kind consisted 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 consisted 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"." [See also *Experian v Haynes and Another* 2013(1) SA 135 (GSJ) at para 17].

[44] With regard to goodwill and protectable interests, Nestadt JA in *Rawlins and Another v Caravantruck (Pty) Ltd* [1992] ZASCA 204; 1993 (1) SA 537 (A), at 541 C-H remarked that:

"The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business (Joubert General Principles of the Law of Contract at 149). 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 . . .'. 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..." [see also *Walter McNaughtan (Pty) Ltd v Schwartz and Others* 2004(3) SA 381 (C)]

- [45] With regard to its trade connections, the applicant alleges that the respondent sold the applicant's products to most of its customers and undertook on-site support and services in respect of a number of customers and dealt with them on a daily basis, most notably Opulentia and EMS. The applicant alleges that the respondent was the only face of the applicant that the customers saw for months, if not years. He had intimate knowledge of the customers' technology, which included all user names, passwords, the techniques they utilized and their internet address. All of this allowed the respondent to build special relationships with the applicant's customers, and ultimately enabled him to lure these customers away from the applicant. As I indicated earlier, the applicant alleges that Opulentia, EMS and the law firm of De Villiers Attorneys all terminated the applicant's services and requested transfer of their data to other IT firms. In the case of Opulentia, this happened two days after the respondent left the employ of the applicant.
- [46] The respondent simply does not answer these allegations made by the applicant in his Founding Affidavit. In fact, on the respondent's own version, it is evident that he enjoyed a very close relationship with Van Niekerk of Opulentia. According to him, Van Niekerk approached him with a business proposition to start a new company, namely AAT. If one then examines the email communication between Van Niekerk and the applicant's director, Venter, this close relationship between Van Niekerk and the respondent is again very evident. Van Niekerk speaks in glowing terms of the respondent's good work, his relationship with people, and importantly that he had over the years shared with Van Niekerk his dream of opening his own business. Van Niekerk indicated that it was the respondent who approached him to say he was ready to start his own business. His relationship with the respondent was clearly close and strong enough for Opulentia to invest in the respondent's new business.
- [47] Similarly EMS and De Villiers Attorneys, were long standing customers of the applicant. The respondent personally serviced De Villiers Attorneys, and both suddenly terminated the services of the applicant shortly after the respondent left its employ. In respect of EMS, I

have already set out how the applicant discovered the respondent's involvement in attempting to transfer the data of two of the companies in the EMS group to AAT. When Grobler forwarded to him an email with the details requested by the applicant, the latter noticed that the blocked domain bore the address rudolph@aatechnology.co.za. It was not difficult to establish that it was in fact the respondent who requested the transfer of data.

- [48] I have already set out in detail the applicant's evidence regarding the discovery of a business presentation that Venter had prepared some years ago (FA14), which had been copied by the respondent ostensibly to be used for AAT (FA15). In the respondent's answer to these allegations, he starts by attacking the applicant for not providing details of how he came across the copied presentation. The applicant answers this in Reply by indicating that the respondent would back up his work and, in one instance, his laptop on the applicant's system. This information was still on the applicant's system after the respondent's departure, and this is how it was discovered by the applicant. The respondent alleges in his Answering Affidavit that FA14 is available in the public domain and is used as a marketing tool. He further alleges that FA15 is not AAT's business proposal and was not intended to be. Tellingly, he does not deny that he created FA15 nor does he say why it was created and for what it was intended to be used.
- [49] In replying to this allegation, the applicant again asserted that even though FA14 was used in presentations to customers it was not publicly available, for example on the internet (as alleged by the respondent). It also states that the respondent was one of the longer serving employees and was personally involved in and responsible for selling the applicant's services to new customers. He therefore, had extensive and intimate knowledge of the applicant's customers, as well as its products and services. The respondent, in denying that FA15 was the business proposal for AAT, asserted that AAT has a company overview, which he attached to his Answering Affidavit as CP11, and asserted that CP11 is substantially different to FA14. I undertook a comparison of the three documents, based on the arguments in court and Mr Els' reference to similarities.
- [50] The applicant's presentation (FA14) consists of 38 slides, excluding the cover page. FA15 consists of 19 pages, excluding the cover page, which reads "Name?". With the exception of one page, FA15 is in essence the same as FA14. In many instances the services offered are couched in identical terms to FA14 and even the same graphics are used in some of the slides. While some slides in FA15 are identical to the corresponding slide in FA14, many of the slides reflect only a part of the corresponding slide in FA14. Some examples are:

FA 14 FA15 CP11 Page in Papers Principles: · The Truth – even when it hurts; · No long term contracts; 30 day notice; No lock in · Flexible options suitable for every budget · Quality over Quantity · Function over Form · KISS – Keep It Super Simple Principles: · Always talk the truth to a client · No long term contractor's · Option for every budget · Quality over Quantity Principles: · Always talk the truth to a client · No long term contractor's · Option for every budget · Quality over Quantity 90; 130; 228 Cabling: · New or reinstalling of network points · CAT or Fibre · Server Cabinet installations Cabling: · New or reinstalling of network points · CAT · Server Cabinet

Installations Cabling: · New or reinstalling of network points · CAT · Server Cabinet Installations 101; 135; 233 Note: The same graphic as in FA14 used in FA15 and CP11

- [51] This is a pattern that is evident throughout FA15 and CP11, with minimal changes and some additions in a few places; in addition, CP11 is in colour and has different graphics in the slides. It is evident that CP11 is based on FA15. In my view, the similarities are striking and I agree with the applicant's assertions that AAT appears to be providing the same or very similar services to that which the applicant is providing to its customers. It can be inferred that AAT is in direct or indirect competition with the applicant. The respondent admits that he is employed by AAT. From the facts I have set out regarding the long-standing customers of the applicant terminating the applicant's services shortly after the respondent left the employ of the applicant, it can equally be inferred that the respondent has used his special relationship with these customers to lure them away from the applicant, thus prejudicing and harming the goodwill and business of the applicant.
- [52] It is an established principle of our law that in order for an applicant to enforce a restraint of trade agreement, he must prove the agreement and that the respondent has breached same. There is no dispute that the employment agreement was entered into in 2012. In view of the evidence to the contrary, the respondent's defence that the agreement lapsed when he resigned in 2014, has been rejected as false. A finding has, therefore, been made that the employment agreement was valid and remained binding on the respondent for an unbroken period from February 2012 until he resigned and left the applicant's employ at the end of October 2020. It follows that the applicant has discharged the onus on it to prove the agreement and its terms.
- [53] The respondent was employed by the applicant when he was fresh out of college and still very much a rookie, with no experience and no skills. Such of the experience, skills and knowledge he gained in the subsequent eight years was as a direct result of his employment with the applicant. It is the use of this knowledge, experience and skills in a way harmful to the applicant that the latter sought to prevent in terms of the restraint of trade clause in the agreement. In view of the evidence presented it is clear that the respondent breached the restraint of trade clause and that the applicant is entitled to an order restraining the respondent, although my view is that the order prayed for is unduly wide. I deal with this aspect below.
- [54] For his part, the respondent has not discharged the onus on him to prove that the enforcement of the restraint of trade clause would be against the public interest. Upon rejection of his bogus defence, there is clearly no reason why he did not comply with the restraint agreement, which he entered into freely and voluntarily. The applicant has established that its trade connections and its trade secrets were used by the respondent to establish and advance the business of AAT, in which he was a co-director and an employee, in direct contravention of the restraint of trade clause.

- [55] Having said that the court recognizes the respondent's right to freedom of trade and to pursue the profession in which he has the qualified, and possesses the necessary experience training and skill. The court should attempt to achieve a fair balance between the interests of both parties. As I indicated earlier, I consider some of the relief claimed by the applicant to be unnecessarily broad, namely the period of the restraint in clause 3.1 and the unlimited area in clause 3.2 of the Notice of Motion. Mr Els conceded this in the course of his argument in court and submitted that, even though he did not consider the 24-month period to be too long, the court has the discretion to shorten the period.
- [56] In the context of the IT industry, it is so that information is widely available to all who seek it, especially on electronic platforms. Advances in technology have had the result that digital and electronic platforms dictate the course of commerce and the manner in which business is conducted. A year has passed since the respondent left the employ of the applicant, and there is nothing to indicate that the applicant's business is not operational. It would have had the inconvenience of replacing the respondent, and possibly adjusting its business models and the like. The applicant has also not alleged or put forward any evidence that the respondent has directly or indirectly canvassed, solicited or enticed any of its employees to leave the employ of the applicant, and I see no reason to make an order in those terms.
- [57] On the other hand it appears that the respondent has continued to work for and advance the business of AAT, in violation of the restraint clause, and has not relocated to the Western Cape, as he advised the applicant he would do. The applicant had no qualms about the respondent operating, in the Western Cape, the same business as it did, because the applicant has no clients in that region. The respondent, however, has remained in the Bloemfontein area and knowingly continued to operate a business in direct competition with the applicant. The applicant has commendably indicated that it does not wish to stamp out competition, but merely to be protected against unlawful competition. In my view both parties should be enabled to conduct their respective businesses in the IT sector and compete fairly. The manner in which the respondent has in the past and presently conducts himself places the applicant at a distinct disadvantage. I am in agreement that the protection prayed for should be afforded to the applicant, albeit for a shorter period, in order to achieve that balance of fairness that I refer to.
- [58] In the circumstances the following order is made:
- 58.1 That the respondent be interdicted and restrained from directly or indirectly utilizing, disclosing, allowing access or to making public to any unauthorized person or third party for any reason whatsoever, the confidential information of the applicant or to derive any economic value, benefit or profit from the use of such confidential information, save as expressly authorized by the applicant, or required by any applicable law or court to be disclosed, and then only to be disclosed to the extent required by such law.

58.2 That the respondent be directed to return all intellectual property belonging to the applicant, if any, to the applicant and to terminate all use of and access to the intellectual property, and where necessary, to take all necessary steps to transfer the intellectual property into the name of the applicant.

58.3 That the Respondent be interdicted and restrained from, for a period of 18 months following the date of termination of the employment agreement, directly or indirectly:

58.3.1 within the magisterial district of Bloemfontein carrying on or being involved in, having an interest in (whether as principal, shareholder, partner, director, contractor, agent or otherwise), being employed or contracted by, or rendering assistance to or providing advice, or being in any way associated with or engaged in or interested in, or in any way financing, guaranteeing or underwriting the obligations or work product of another business, entity or practice which conducts business similar or competing directly or indirectly with that of the applicant; and

58.3.2 within the magisterial district of Bloemfontein, on behalf of himself or any other person or persons or company, to canvas, entice or solicit instructions, work or referrals from any person or persons or entities who shall at any time during his/her employment with the applicant have been a customer, client or business associate of the applicant or any of its associated entities.

58.4. That the Respondent is ordered to pay the costs of this application

S NAIDOO J

On behalf of the Applicant:

Adv J Els

Instructed by:

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Cor Markgraaff & Kellner Streets

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(Ref: JVDB/SJ/SCI2/0004)

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