IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 675/2019
Date Heard: 27 June 2019
Date Delivered: 16 July 2019

In the matter between:

SIZONKE TRADING NELSPRUIT (PTY) LIMITED	First Applicant
SIZONKE TRADING PORT ELIZABETH (PTY) LIMITED	Second Applicant
and	
JOHAN ANDRé STANDER	First Respondent
ANDRé STANDER	Second Respondent
SURFACE PREPARATIONS EQUIPMENT AND COATINGS (PTY) LIMITED	Third Respondent
SPEC HARDWARE (PTY) LIMITED	Fourth Respondent
SPEC CORROSION PROTECTION (PTY) LIMITED	Fifth Respondent

JUDGMENT

EKSTEEN J:

[1] The applicants seek to enforce a covenant in restraint of trade entered into with the first and second respondents respectively. In the founding papers it is alleged that the first and second respondents have, in breach of the covenant, taken up employment with the third respondent. It accordingly sought an interdict against the third respondent alleging that it competed unlawfully with the second respondent. In the answering papers, however, the third respondent alleged that the first respondent was in fact employed by the fourth respondent and the second respondent by the fifth respondent. An application was accordingly brought to join the fourth and fifth respondent in these proceedings and to seek an interdict against the fourth and fifth respondents based upon their alleged unlawful competition. The joinder was not opposed. I can conceive of no reason not to grant same.

[2] The background leading to the conclusion of the contracts of employment and the covenants in restraint of trade are prolix and complicated. It is, however, necessary for purposes of the adjudication of the disputes between the parties to set out the circumstances in greater detail than I would have liked to do. The history, as set out below, dates back some considerable time prior to the conclusion of the contracts of employment in issue.

[3] Chesterton International Inc. (Chesterton) is a foreign company situation in the United States of America, which manufactures lubricants and sealing products utilised by large industrial clients and marketed across the world. Chesterton established and registered a subsidiary company, Chesterton Industries (Pty) Ltd (Industries) in South Africa in order to distribute its products. Industries established branches in Richards Bay, Durban, Port Elizabeth and Cape Town from which their products were distributed to end-users. In other areas, in the interior of South Africa, Chesterton entered into distribution agreements with independent companies which entitled them to distribute specified categories of Chesterton products. During 2002 Chesterton entered into such a distribution agreement with Unitrading (Pty) Ltd (Unitrading) conferring on it the exclusive rights to distribute certain specified Chesterton products within a circumscribed part of Mpumalanga.

[4] During 2010 Industries, with the concurrence of Chesterton, resolved to sell its business and assets within South Africa and entered into negotiation with the first applicant. An agreement (the sale agreement) was duly concluded and the first applicant purchased the business and assets (save for some excluded assets which are not material for purposes of this application), subject to certain conditions precedent.

[5] One of the conditions precedent to the sale agreement was that a distribution agreement be entered into and that all the conditions precedent in such an agreement be fulfilled in accordance with its terms. The first applicant, being the purchaser in terms of the sale agreement, was a related company to Unitrading, as more fully set out

below. In these circumstances the distribution agreement, which was envisaged in the condition precedent in the sale agreement, was concluded between Unitrading and Chesterton. In terms of the distribution agreement Unitrading was granted the distribution rights of certain specified Chesterton products within the demarcated territorial areas of Richards Bay, Durban, Port Elizabeth, Mossel Bay and Cape Town. Two clauses of the distribution agreement have featured large in the disputes between the parties. Clause 14 of the Distribution Agreement provides:

> "Competitive Products
>
> Distributor shall not, during the term of this Agreement, stock or sell any products that are competitive with products marketed by Supplier. Marketing or sale of such competitive products by Distributor shall be deemed a material breach of this Agreement."

[6] The second provision which was much debated during argument is clause 26, which provided:

> "Distributor Partner / Joint Venturer
>
> Distributor has informed Supplier that it wishes to accomplish and fulfill its obligations under the Agreement in the Territory with the assistance of certain companies that are affiliated with and/or subsidiaries of Distributor that are located in the Territory assigned hereunder to Distributor and with whom Distributor will enter into contractual relationships. Distributor agrees and acknowledges that it may only do so if, and to the extent that: (a) Distributor provides ***prior*** full disclosure to Supplier of the full legal name, ownership details, type of legal entity, principal and trading addresses and principal business contacts of such potential sub-distributors; (b) Distributor confirms in writing to Supplier that such contractor sub-

> distributors have been shown a copy of this Agreement and have agreed in writing to act in accordance with these terms and conditions; and (c) upon review of such information, Supplier consents to Distributor's relationship(s) with such sub-distributors for purposes of assisting in the fulfillment of the Distributor's obligation in the Territory hereunder. …"

[7] The sale agreement and the distribution agreement were concluded in December 2010. At the same time the first applicant established and registered Sizonke Trading Richards Bay (Pty) Limited, Sizonke Trading Durban (Pty) Limited, Sizonke Trading Port Elizabeth (Pty) Limited and Sizonke Trading Cape Town (Pty) Limited (to which I refer jointly as the Coastal Companies) which, upon implementation of the sale agreement, took over the distribution of the relevant Chesterton Products to the end-user customers from the various branches of Industries. Whilst the formal requisites set out in clause 26(b) of the distribution agreement were not complied with, Chesterton was at all times aware of the existence and activity of the Coastal Companies, which, in turn, were all fully aware of the terms of the distribution agreement through their common directors. The inescapable conclusion is that the Coastal Companies were the entities contemplated in clause 28. I shall set out the reasons for this conclusion more fully later.

[8] The effect of their structure was that the first applicant, Unitrading and the Coastal Companies were all related or interrelated companies as defined in section 2 of the Companies Act 71 of 2008 (the Act) and, with the exception of first applicant, were distributing Chesterton products in terms of the distribution agreement. During 2015 the first applicant caused Sealmech (Pty) Limited to be established and registered.

Sealmech procured other products utilised in the same fields of industry as, and which are competitive with, the products of Chesterton. Both the Chesterton products and those procured by Sealmech were distributed and marketed through the Sizonke Group.

[9] Sealmech joined the Sizonke Group as a related company as envisaged in section 2 of the Act. Save in the case of the first applicant, which is a black empowerment company, the Ashcra Trust and the LB Trust together hold the majority of shares in all the remaining companies. The Ashcra Trust is described as the family trust of Simon Bennett, the deponent to the founding affidavit, and the LB Trust as the family trust of his son, Craig Bennett. Either or both of the Bennetts are directors in all of the companies in the Sizonke Group. The applicants allege that the business of the Group is *de facto* one conglomerate business that operates over the whole of Sub-Saharan Africa and that the Bennetts are the controlling minds of all of the related companies. There is much dispute between the parties, flowing from these facts, in respect of the interpretation and impact of the sales agreement and the distribution agreement on the adjudication of the dispute between the parties. I shall revert to these agreements, to the extent that it is necessary to adjudicate the dispute between the parties, later.

[10] Although the third respondent is at times equivocal about its distribution rights, it is apparent that from approximately 2016 Chesterton awarded distribution rights of certain of its products to the third respondent and later also to the fourth respondent. During February 2019 Chesterton cancelled the distribution agreement with Unitrading.

Its entitlement to cancel the agreement is not in dispute in the present proceedings. Chesterton awarded the distribution rights which Unitrading and its Distributor Partners had previously held to the third and/or fourth respondents. Whilst neither Chesterton nor Unitrading are parties to the present dispute the respondents contend that many of the rights asserted by the applicants in fact accrue to Chesterton and that the third, fourth and fifth respondents are entitled, by virtue of the distribution agreement with Chesterton, to the exercise of such rights. I shall revert to these issues too, to the extent necessary later.

[11] Against this background and during 2015 and 2016 respectively, the first and second respondents, father and son, were employed. In each case the employment contract and the covenant in restraint of trade were signed simultaneously, although they are embodied in separate documents. Sadly, these documents are not a model of clarity and there has been much dispute as to the proper interpretation of these documents. The disputes relate primarily to the identity of the employer and to the party entitled to enforce the restraints.

[12] There was initially some ambiguity in the responses from the third respondent in respect of the employment of the first and second respondents leading to the initial joinder of the third respondent. It is now, however, common cause that the first respondent is employed by the fourth respondent and the second respondent by the fifth. It is not seriously in dispute that the third, fourth and fifth respondents compete with the first and second applicants in the distribution of industrial lubricants, corrosion

protection products, mechanical sealing and seals, gaskets and related products and that all or some of them are involved in the installation, service, repair and maintenance of pumps, pneumatic and hydraulic cylinders and coatings on metal and concrete applications. Notwithstanding the exclusivity clause to which I have referred earlier in the distribution agreement the applicants allege that the business of the "Sizonke Group" has never been restricted only to Chesterton products and that they have branched out from purely procuring and selling products to providing the additional services referred to above.

[13] As alluded to earlier the employment contracts of the first and second respondents are not models of clarity. Although there are many similarities in the documents I shall deal with them separately.

[14] The employment contract with the first respondent was concluded on 20 February 2015. It appears on a letterhead of "Sizonke Trading" bearing the address of the first respondent in Nelspruit. The dispute between the parties relates to the meaning to be attributed to the introductory portion and the first clause of the employment contract. It provides as follows:

> "Dear Johan
>
> We have pleasure in confirming your permanent appointment with the Sizonke Trading ((Pty)) Ltd Group. The following terms and conditions apply to your appointment;
>
> **1. Employment Details**

1.1 Your first day of employment is 23 February 2015 (or sooner)

1.2 Your place of work is at the premises of SIZONKE TRADING PORT ELIZABETH ((PTY)) LTD, 119 Villiers Road, Walmer, Port Elizabeth. You may at times be required to work at the premises of any associated Company of the group or any client of the Company. This may be in South Africa or abroad.

1.3 You are employed as a Full Line Specialist and your duties include;

- Selling the Chesterton Range of Products

A specific job description will be issued and explained to you.

You may also be required, from time to time, to perform duties outside of your job description that are reasonably expected of you.

1.4 You will report directly to Mr M.R Moore – Director"

[15] Mr Moore, it is common cause, was the branch manager of Industries in Port Elizabeth prior to the sale of the business of Industries to the first respondent. The sale of the business was affected as a going concern and Mr Moore became employed by the second applicant as the manager of the business in Port Elizabeth. He also became a director and shareholder in the second applicant. Shortly after the first respondent had commenced employment Moore resigned from the Sizonke Group and took up employment with Chesterton in July 2015. Moore is not currently bound by any restraint of trade.

[16] The covenant in restraint of trade in respect of the first respondent was concluded on the same day as the contract of employment and in each case the agreement was signed on behalf of Sizonke by Craig Bennett. The agreement in restraint of trade compounds the ambiguity. The heading and first paragraph of the agreement records as follows:

> "**SIZONKE TRADING (PTY) LTD**
>
> Registration Number 2006/014858/07
> (herein referred to as "**THE COMPANY**")
> And
> JOHAN STANDER
> ID No. 6[…]
> (hereinafter referred to as "**THE EMPLOYEE**")
>
> 1. PARTIES
> 1.1 Sizonke Trading (Pty) Limited and its subsidiaries ("**THE COMPANY**")
> 1.2 Mr JOHAN STANDER ("**THE EMPLOYEE**")"

[15] Paragraph 2.5 of the agreement, under the heading "Interpretation" the agreement records:

> "The following expression (*sic*) bear the meanings assigned to them hereunder and cognate expressions bear corresponding meanings, namely:
>
> 2.5.1 "THE COMPANY" means Sizonke (Pty) Limited and its subsidiaries through which THE COMPANY performs the **prescribed services** and contracts with the **prescribed customers** and **prescribed suppliers**;

2.5.2 …"

[16] The covenant in restraint of trade is set out in paragraph 3 of the agreement which commences as follows:

"3.1 THE EMPLOYEE acknowledges that:

3.1.1 he is an employee of THE COMPANY and that he could be employed by any one or more of THE COMPANY'S subsidiaries;

3.1.2 in the course of his being employed with **THE COMPANY**, he will gain access to the names of customers and suppliers with whom **THE COMPANY** does business whether embodied in written form or otherwise;

3.1.3 in the course of his duties, he will acquire considerable know-how in the techniques of **THE COMPANY** relating to inter alia, the marketing and sale of the **prescribed services**.

3.1.4 in the course of his employment with **THE COMPANY**, he will have opportunity of forging personal likes (*sic*) with customers and suppliers of **THE COMPANY**;

3.1.5 in the course of his employment with **THE COMPANY**, he will generally have the opportunity of learning and acquiring trade secrets, business connections and other confidential information pertaining to the business of **THE COMPANY**."

[17] The respondents' main argument, based upon these agreements is that the first respondent was employed by the first applicant and that the restraint concluded is in

favour of the first applicant. The first applicant on its own version, serves merely as the "head office" of the Group and is not itself engaged in any distribution of Chesterton products or any other products. It accordingly has no protectable interest, so it is argued, in enforcing the restraint of trade. All the exposure which the first respondent has had to the business of the Sizonke Group has been in the employ of the second applicant. The restraint of trade, however, so argument proceeds, is not concluded in favour of the second applicant. It accordingly has not acquired any rights under the agreement.

[18] This brings me to the proper interpretation of the contract of employment and the restraint of trade. It is now well recognized that over the last century there have been numerous developments in the law relating to the interpretation of documents. In **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at 603F-604B Wallis JA set out the current state of the law thus:

> "The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

> Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used."

[19] Subsequently in the unreported decision of **Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Limited** (795/11)((Pty)) [2012] ZASCA 126 (21 September 2012) at para 15 Wallis JA again had occasion to consider the interpretation of contract. He stated:

> "In the past, where there was perceived ambiguity in a contract, the courts held that the subsequent conduct of the parties in implementing their agreement was a factor that could be taken into account in preferring one interpretation to another. Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision. It is therefore relevant to an objective determination of the meaning of the words they have used and the selection of the appropriate meaning from among those postulated by the parties. This does not mean that, if the parties have implemented their agreement in a manner that is inconsistent with any possible meaning of the language used, the court can use their conduct to give that language an otherwise impermissible meaning. In that situation their conduct may be relevant to a claim for rectification of the agreement or may found an estoppel, but it does not affect the proper construction of the provision under consideration."

[20] In the context of the history and developments which I have set out earlier it was clearly known to the parties that a number of related companies existed and traded under the name Sizonke Trading and that they operated in conjunction with one another. Sizonke Trading Port Elizabeth (Pty) Limited was established simultaneously

with the sale agreement and the distribution agreement with the purpose of conducting the distribution of Chesterton products in the Port Elizabeth and Mossel Bay areas to end-users. The employment agreements stipulates that the first respondent was to take up employment at Sizonke Trading Port Elizabeth (Pty) Limited and that he was required to sell the Chesterton range of products. Mr Moore, to whom he reported, was stationed at Port Elizabeth and was a director of Sizonke Trading Port Elizabeth (Pty) Limited. Upon taking up employment, it is common cause, he worked under the direction of Moore and was remunerated by Sizonke Trading Port Elizabeth (Pty) Limited. He was, as a fact, employed throughout the period of his employment by Sizonke Trading Port Elizabeth (Pty) Limited. After the resignation of Moore his son, Mark Moore succeeded him as the manager of the second applicant. This arrangement was unsatisfactory which led to the termination of Mark Moore's employment in November 2017. At this stage the first respondent was promoted to manage the business of the second applicant in Port Elizabeth. In these circumstances I consider that reading the provisions of the employment contract in the context of the agreement as a whole, with due regard to the circumstances attendant on its coming into existence, and the purpose for which it was entered into a sensible businesslike interpretation leads ineluctably to the conclusion that the first respondent was to be employed by the second applicant and that he could be required to render services, in future, to other related companies. The conclusion, I think, accords with the definition of an employee contained in the Basic Conditions of Employment Act, 75 of 1997 where an employee is defined to mean:

> "Any person … who works for another person … and who receives … any remuneration."

[21] The first respondent as a matter of fact worked for the second applicant and received his remuneration from the second applicant in the course of carrying on the business of the second applicant.

[22] Reverting to the restraint of trade agreement, it is argued, that the first applicant elected to bind the first respondent to the restraint in favour of the first applicant and "its subsidiaries". Subsidiaries, it is argued, is a specific term with a defined meaning. The defined meaning relied upon is in section 3(1)(a) of the Act and could therefore not sustainably be defined as meaning "associated companies". I have given careful consideration to this argument, however, it think that it places too narrower meaning on the term subsidiaries. It is correct that a subsidiary company is defined in section 3 of the Act. The term subsidiary, however, also carries a general English meaning. The New Shorter Oxford Dictionary (4th ed) defines the term subsidiary as:

> "Serving to help, assist, or supplement, auxiliary, supplementary. Also subordinate, secondary"

[23] Ascribing to the term its ordinary linguistic English meaning I consider that it is perfectly susceptible in the context of the circumstances leading to the restraint of trade agreement and the content of the agreement itself to ascribe to the term of the meaning of "associated companies" or related companies as envisaged in section 2 of the Act. After all, it was at all times known that the first applicant has no subsidiaries as

envisaged in the Act. In the circumstances the first respondent bound himself to a restraint in favour of the first respondent and its related companies within the Group.

[24] The contract of employment entered into with the second respondent is identical to that entered into by the first respondent save that his job description was more broadly circumscribed as including “sales” and that he was to report to “Mark Moore” who, as set out earlier, had succeeded his father as the manager of the second applicant. For the reasons set out earlier I conclude in his case too that he was employed by the second applicant. The restraint of trade agreement entered into with the second respondent is again identical to that concluded by the first respondent save that it was concluded between Sizonke Trading Port Elizabeth (Pty) Limited and the second respondent. The parties in this case were defined as “Sizonke Trading (Pty) Limited and its subsidiaries (*sic)* Sizonke Trading Port Elizabeth” and “André Stander”. In his case therefore, the second respondent bound himself in a restraint of trade in favour of the first and second respondents only and not in favour of the remaining members of the Group. The distinction is, for purposes of this judgment immaterial for the applicants seek the enforcement of the restraint only in respect of the Eastern Cape and Mossel Bay, which is the area in which the second applicant trades and in which the respondents worked.

[25] The applicants seek to enforce the restraint of trade in the said area for a period of twelve months, being the period set out in the covenant of restraint. The restraint itself provided:

"**THE EMPLOYEE** further undertakes that neither he nor any company undertaking or concern in or by which he is, directly or indirectly interested, engaged, concerned or employed will during **the restraint period**, directly or indirectly, whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative, assistant or otherwise in territory and whether for reward or not:

3.6.1 solicit orders from **prescribed customers** or **prescribed suppliers** for **prescribed services**;

3.6.2 canvas business in respect of the **prescribed services** from **prescribed customers** or **prescribed suppliers**;

3.6.3 sell or otherwise supply any **prescribed services** to any **prescribed customers**;

3.6.4 purchase or attempt to purchase services from **prescribed suppliers**;

3.6.5 solicit appointment as a distributor, licensee, agent or representative of any **prescribed supplier** in respect of **prescribed services**;

3.6.6 attempt to do any of the above.

3.7 Each of the undertakings set out in this clause (including those appearing in a single clause) is severable, inter alia, as to:

3.7.1 nature of interest, or activity;

3.7.2 the categories of persons falling within the definition of **prescribed customers**;

3.7.3 the categories of services failing within the definition of **prescribed services**;

3.7.4 the categories of persons falling within the definition of **prescribed suppliers**;

3.7.5 the individual cities, towns and/or states which are defined in **the territory**;

3.7.6 each year or month forming the **restraint period**;

and are acknowledged to be reasonably required for the protection of **THE COMPANY** and are generally fair and reasonable."

[26] Neither the area nor the term of the restraint has been challenged in the papers. The first respondent resigned from the service of the second applicant on 31 January 2019. The second respondent resigned, at the insistence of the second respondent following disciplinary procedures, on 29 August 2018, and was thereafter re-employed on a different basis. The applicants acknowledge, accordingly, that the period of the restraint in respect of the second respondent would commence on 30 September 2018.

Legal framework

[27] Covenants in restraint of trade have been held to be valid and enforceable unless they are unreasonable and contrary to public policy (**Magna Alloys & Research (SA)(Pty) Ltd v Ellis** 1984 (4) SA 874 (A); **Basson v Chilwan and Others** 1993 (3) SA 742 (A) at 767B-E; and **Automotive Tooling Systems (Pty) Ltd v Wilkens and**

Others 2007 (2) SA 271 (SCA) at 277G). It has also repeatedly been held that a restraint is, to the extent that it is found to be reasonably required for the protection of the party who seeks to enforce it, constitutionally valid (**CTP Limited and Others v Independent Newspaper Holdings Ltd** 1999 (1) SA 452 (W) at 468G-H; **Fidelity Guards Holdings (Pty) Limited t/a Fidelity Guards v Pearmain** 2001 (2) SA 853 (SE) at 861F-862G; **Reddy v Siemens Telecommunications (Pty) Limited** 2007 (2) SA 486 (SCA) at 495D**; Den Braven SA (Pty) Limited v Pillay and Another** 2008 (6) SA 229 (D)).

[28] A party wishing to be absolved from a restraint of trade agreement bears the onus to allege and prove that the enforcement of the restrictive condition would be contrary to public policy. (**Magna Alloys** *supra* and **Den Braven** *supra*.) The factual basis for this allegation must be set out in the papers. Two conflicting considerations come into play in assessing whether the enforcement of a restraint of trade is contrary to public policy. On the one hand agreements ought to be honoured and, on the other hand, everyone ought to be free to seek fulfillment in his/her business or profession and has a right to freedom of trade. (**Basson v Chilwin** *supra*; **Townsend Productions (Pty) Limited v Leech** 2001 (4) SA 33 (C); and **Reddy v Siemens Telecommunications** *supra*.)

[29] A restraint which is directed solely at the restriction of fair competition with the covenantee, which is not at the time of the enforcement reasonably necessary for the legitimate protection of the covenantee's protectable proprietary interests, is against

public policy (**Super Safes (Pty) Limited and Others v Voulegarides and Others** 1975 (2) SA 783 (W); **Digicore Fleet Management v Steyn** [2009] 1 All SA 442 (SCA); and **Value Logistics Limited v Smit and Another** [2013] 4 All SA 213 (GSJ)). The protectable proprietary interest may take the form of trade secrets, confidential information, goodwill or trade connections. Liability involves a fourfold test (herein referred to as the "liability test");

(a) is there an interest of the plaintiff which, pursuant to the agreement, warrants protection;
(b) is that interest threatened by the defendant;
(c) if it is threatened, does that interest weigh qualitatively and quantitatively against the interests of the other so that he or she will be economically inactive and unproductive?
(d) is there another aspect of public interest that does not affect the parties but requires that the restraint not be invoked? (**Basson v Chilwin** *supra* and **Digicore Fleet Management** *supra.*)

[30] When the application was launched the applicant initially sought interim relief. By virtue by the manner in which the application has proceeded interim relief was never granted and the application was postponed from time to time. When the matter was called before me the respondents had filed answering papers and the applicants their replying papers. Final relief is now sought. There are numerous factual disputes between the parties and the approach to such disputes in proceedings such as this was

considered in **Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited** 1984 (3) SA 623 (A) at 634H-635C where Corbett J stated:

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co ((Pty)) Ltd v Jeppe Street Mansions ((Pty)) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) *(g)* of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers …"

[31] I shall proceed to consider the enforcement of the restraint of trade mindful of these principles.

<u>The application of the facts in respect of first respondent</u>

[32] First respondent was employed on 23 February 2015 at the age of 53. He is qualified as a fitter and turner and had been employed with Sappi for some years. In

2004 he moved to Jeffreys Bay and purchased a bottle store business which he conducted until he took up employment with the second applicant. Throughout the duration of his employment with the second applicant he rendered services in the Port Elizabeth and Mossel Bay areas. The applicants contend that upon taking up employment the first respondent was allocated a list of existing customers of the second applicant who he was to serve. The primary functions of the first respondent as a sales representative were to serve existing customers, introduce new product lines and services to existing customers and to expand the customer base of the Group. The first respondent, however, did not canvas any new customers for the Group during the period of his employment.

[33] The applicants allege that the first respondent received comprehensive and continuous in-house training on the products and services of the Group. Craig Bennett, it is alleged, visited the second respondent to give training to the staff on products and services as well as the marketing of the Group's products and services to its customers and prospective customers. He often accompanied sales representatives to customers and showed them how to conduct themselves. The first respondent, it is alleged, was sent on a number of training courses including one in Singapore for a week in April 2018 on products of AIGI Environmental Incorporated and in Johannesburg for one day in September 2018 on Valvoline Products. The products of AIGI Environmental Incorporated and Valvoline are products that are competitive with the products manufactured by Chesterton.

[34] In the course of the discharge of his obligations the first respondent dealt with one or more of the key persons of each of the customers, had opportunity to and did in fact build up very good relationships and rapport with his customers. The applicants contend, accordingly, that the first respondent knows the names and addresses of the applicants' customers, how much the customers have spent, who the big customers are, what products and services the customers use, what products and services the customers want, the substitutes for or alternatives to each such product, which customers are difficult, what terms and conditions of the individual contracts are and what the renewal dates of the contracts with customers are. It is argued accordingly that the first respondent acquired and built up a good customer connection with the customers of the applicant which would place him in a position where he could take these customers with him should he join a competitor of the applicants. In addition it is alleged that the first respondent became privy to the applicants' confidential information including who the suppliers of the applicant are, what price and on what terms the products are supplied to the applicant, the applicants' methods of doing business, who the employees of the applicants are, what salaries and commissions these employees earned, and which employees had expressed dissatisfaction and were vulnerable of being enticed.

[35] In summary, the applicants rely on their confidential information, being customer lists and confidential customer information, customer connections (or goodwill) and their interest in the training provided to first respondent during his employment.

[36] The respondents on the other hand, deny that the applicants have any proprietary interests in the customer identity or the customer information. In this regard it is contended that the customer base was the customer base of Chesterton and not that of the applicant. I have referred earlier to the sales agreement. Industries sold their businesses and all their assets to the first applicant. Only the excluded assets were retained by Industries. Customer goodwill is an asset of an employer and becomes a trade connection of the employer which is capable of protection by way of restraint of trade (**Recycling Industries (Pty) Limited v Mohamed and Another** 1981 (3) SA 250 (SE) at 258; **Rawlins and Another v Caravantruck (Pty) Limited** 1993 (1) SA 537 (A); **Paragon Business Forms (Pty) Limited v Du Preez** 1994 (1) SA 434 (SE) at 444; and **Bridgestone Firestone Maxiprest Limited v Taylor** [2003] 1 All SA 299 (N) 303i-304a). Customer goodwill was not an excluded asset under the sale agreement and accordingly the customer goodwill of Industries became the property of the first applicant. There is accordingly no merit in the argument presented on behalf of the respondents that the customer base did not belong to the applicants.

[37] The respondents, however, argue, further that the applicant has no proprietary interest worthy of protection. The foundation of the argument is to be found largely in the content of the distribution agreement. As set out earlier, prior to the sale agreement Industries, acting through its various coastal branches, distributed Chesterton products directly to the customer base which I have found was sold as a part of the sale agreement. The assets of the business of Industries were sold to the first respondent. The distribution rights were awarded in terms of a distribution agreement to Unitrading.

I have recorded earlier that simultaneously with the conclusion of the sales agreement and the distribution agreement the second applicant was established. The material provisions of clause 28 of the distribution agreement are also set out earlier. It records that Unitrading had advised Chesterton that it had wished to accomplish and fulfill its obligations under the agreement in the territory with the assistance of certain companies that are affiliated and/or are subsidiaries of Unitrading. The applicants deny that the second respondent was duly appointed as such an affiliated company and deny that the conditions set out in clause 28, as recorded earlier, were complied with.

[38] In this regard it is common cause that Chesterton has at all times been aware that the Coastal Companies have marketed and sold Chesterton products to the end-user customers, as the branches of Industries had done prior thereto. The applicants do not disclose who these "affiliated" companies were which it had intended to utilise in assisting Unitrading. The applicants' case, however, is that the Sizonke Group was operated as one conglomerate venture and that Simon and Craig Bennett are directors of all the affiliated companies. The sale agreement and the distribution agreement were negotiated by the Bennetts and the distribution agreement is signed on behalf of Unitrading by Craig Bennett. They are, on their own case, the controlling minds of all the companies. The Bennetts, accordingly, had personal knowledge of the pre-conditions required for the utilisation of the related companies in the execution of the distribution agreement. The distribution agreement, as recorded earlier, requires of Unitrading not to stock or sell any products that are competitive with products marketed by Chesterton. The related companies assisting as distributor partners in terms of

clause 28 would be equally bound by the provisions of the distribution agreement. On a consideration of all the circumstances which prevailed at the time I think it must be accepted that the Coastal Companies were the companies referred to in clause 28 and that they derive their right to distribute Chesterton products from this source. For these reasons I arrive at the conclusion set out in para [7] above.

[39] Moreover the distribution agreement provided for Chesterton to provide specialist training in respect of all the products and to be actively involved with Unitrading in preparing an annual distributor business plan which would include any special marketing strategies to be employed, the targeting of particular accounts or market agreements and customer support and documentation objectives. Chesterton was obliged to review with Unitrading the distributor's performance year to date against the current year business plan and objectives.

[40] On behalf of the respondents it is contended that Chesterton did indeed provide ongoing specialist training to Unitrading and to representatives of the various related companies.

[41] In respect of the admitted training provided by the first applicant to the first respondent in respect of AIGI Environmental Incorporated and Valvoline, the respondents argue that such training was in breach of first applicant's obligations under the distribution agreement which cannot now be invoked against the respondents in the

employ of the newly authorised distribution agent for Chesterton. I shall revert to this aspect later.

[42] In respect of the customer identity and confidential customer information the respondents allege that one Williams, previously employed by Industries, and Moore, regularly assisted Chesterton distributors, including Unitrading, with account planning and often visited end-user customers of Chesterton products with Unitrading specialists. They prepared core reports recording the end-user customer visited during each week. A list of such visits is set out in the respondents' answering affidavit. Moore, having previously been the manager of the Port Elizabeth branch of Industries and a director in the second applicant is acutely aware of all the customers of the second applicant. There is therefore, nothing confidential about the identity of the second applicant's customers nor the customer information. It is undoubtedly true that the first respondent knew who the customers were, what they had spent, what services they required and what products they purchased. He knows the particular idiosyncrasies of each client and what contracts they had concluded. So did Moore and Williams, however, through their contact with the end-users and they understood the needs of the various customers by virtue of the point of sale information which Unitrading was required to provide in terms of the distribution agreement. In respect of the customer identity and customer information I do not consider that there was any confidentiality about it and Chesterton, when appointing a new distributor, would be entitled to utilise the information which it had in that regard. All this is therefore at the disposal of the respondents through Chesterton.

[43] I have no doubt that the first respondent did receive comprehensive and continuous in-house training on products and services. It is unquestionably so that in respect of the Chesterton products the training provided by Bennett was originally obtained from Chesterton. That notwithstanding the training was provided to the first respondent by virtue of his contract of employment with the second applicant. He was, however, employed to market Chesterton products and it seems to me that the only basis upon which the second applicant gained any entitlement to sell Chesterton products is by virtue of clause 28 of the distribution agreement. It was accordingly bound to sell only Chesterton products. The knowledge of Chesterton products which the first respondent gained is readily at the disposal of the respondents by virtue of the appointment of third and fourth respondents as distributors of Chesterton. There is accordingly nothing confidential about such expertise. In respect of the general training as to, for example, how sales representatives should conduct themselves and the development of marketing skills the comments of Kroon J in **Aranda Textile Mills (Pty) Limited v Hurn and Another** [2000] 4 All SA 183 (E) in para [33] are apposite. Kroon J stated:

> "A man's skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-

how or skills. Such know-how and skills in the public domain become attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy."

[44] That brings me to the question of customer connections. The ratio for this protection was set out by Nestadt JA in **Rawlins and Another v Caravantruck** *supra* at as follows:

"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 . . .'."

[45] Nestadt JA proceeded at 541G-I to state:

"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."

[46] I have found earlier that the customers serviced by the first respondent were customers of the second applicant. The allegation that he had gained a close attachment to key persons in these industries is not in dispute. I shall accordingly accept that the second applicant has made a case in respect of customer connections. The question which now arises is whether such interest is threatened by the first respondent. The first respondent is currently employed by the fourth respondent. He markets only Chesterton products and only to those customers known to Chesterton which are, of course, the same customers whom he serviced whilst in the employ of the second applicant. The second applicant has been deprived of the opportunity to sell Chesterton products, and, to the extent that customers may wish to utilise Chesterton products the first respondent is well placed to take such customers with him in his new employment. It does not seem to me that the first respondent can hold any threat to the applicant's customers who wish to purchase other products, which he does not sell.

[47] Finally, there arises the question whether there is any other aspect of public policy that does not affect the parties but requires that the restraint not be invoked. The real threat which the applicants perceive is that the first respondent is in a position by virtue of the training which he received in respect of alternative products to take clients who may wish to purchase such products with him to his new employer. Although he is

not employed in the sale of other products he does have the information and knowledge of clients who do purchase such alternatives. Such knowledge and training which he acquired was acquired in conflict with the distribution agreement and I accordingly conclude that it would be contrary to the public policy for a court to sanction and protect the applicants unlawfully acquired "rights" by depriving the first respondent from being employed by the fourth respondent to sell Chesterton products.

Application of facts to second respondent

[48] The second respondent, like his father, is a fitter and turner by trade and had been employed largely in that field prior to taking up employment with the second applicant. He too was employed as a sales representative until his resignation on 29 August 2018.

[49] He has now taken up employment with the fifth respondent as a mechanical fitter and maintenance foreman performing repairs and maintenance on mechanical waterworks and dams. It is alleged on behalf of the respondents, which averment must be accepted (cf **Plascon-Evans** *supra*) that he has "hardly any" contact with clients and spends 99% of his time in the workshop utilising his acquired skill and craft built up over his entire career.

[50] The applicants' case based on the covenant in restraint of trade against the second respondent is founded on more limited grounds than that against the first respondent. He serviced just fifteen customers of the second applicant, but had much the same exposure to key persons in these companies as the first respondent had to

the customers he serviced. The applicants' case against the second respondent, as I understand the papers, is based upon his customer connections and his knowledge of confidential customer information. In respect of customer information I have already held that Chesterton at all times had access to the customer information by virtue of the provisions of the distribution agreement and the contact by Moore and Williams with end-user customers.

[51] As in the case of the first respondent I do not think that it can be gainsaid that he did have access and regular contact with key persons of the customers of the second applicant. I do not understand this to be seriously contested.

[52] I shall accept for purposes of the first issue of the liability test (without making any finding in that regard) that at least the second applicant, does have an interest which warrants protection as against the second respondent. By virtue, however, of the nature of his new employment it is difficult to conceive of any threat which this could pose to the customer connections of the first and second applicant. In any event, even if I err in this regard, I consider that the applicants must fail in respect of the third and fourth requirements of the liability test. When the threat to the applicants' interest in its customer connections, such as it is, is weighed qualitatively and quantitatively against the interests of the second respondent to be economically active and productive, the interests of the second respondent must outweigh that of the applicants for the reasons set out hereafter.

[53] Firstly, the second respondent has already been in active employment of the fifth respondent for some time and the term of his restraint has virtually expired. To ask of the second respondent to resign from his current employment by virtue of approximately six weeks of the restraint period which remains binding would, in my view, not be in the public interest.

[54] Secondly, the threat, if any, which his employment could pose to the customer connections of the applicants is minimal by virtue of the nature of his employment. Moreover, the customer information which he holds, I have already found, is not confidential to the applicants.

[55] To the extent that he may have serviced other customers of the second applicant which do not utilise Chesterton products, that, for the reasons already set out, offended the terms of the distribution agreement concluded between Unitrading and Chesterton. In the circumstances, where the fourth issue of the liability test arises, I consider that public policy requires that the restraint should not be invoked as against a duly appointed distributor of Chesterton's products.

Unlawful competition

[56] That brings me to the second leg of the applicants' attack upon the first and second respondents' employment with the fourth and fifth respondents respectively, namely unlawful competition. Unlawful competition involves the wrongful interference with the rights of another trader. It may justify the grant of an interdict or found a claim

for damages under the *lex aquilia*. (See **Schultz v Butt** 1986 (3) SA 667 (A) at 678.) In either case, where relief is sought based on unlawful competition, it does not suffice to establish that an ex- employee has taken up employment with a competitor who has knowledge of a covenant in restraint of trade. An actual infringement must be established.

[57] The events which occurred after the resignation of the first respondent from the employ of the second applicant are not seriously in dispute. The third respondent has been an authorised distributor of limited Chesterton products since 2016. In February 2019 the fourth respondent was appointed as the distributor of the Chesterton products which the Sizonke Group had previously marketed. Unitrading's rights to such distribution were simultaneously cancelled. Chesterton and Moore, who was employed at the time by Chesterton or its subsidiary, in Southern Africa, and who was not bound by any restraint with the applicants, informed it of all the end-users of Chesterton products in the area. For the reasons set out earlier Chesterton had at its disposal all the material customer information relating to end-users of Chesterton products. The fourth respondent employed the first respondent at the time and he interacted with such Chesterton product users, who were also customers of the second applicant, advising them that the first respondent had left the employ of the second applicant and was now employed by the fourth respondent. He also conveyed to such users of Chesterton products that the second respondent could no longer provide Chesterton products as its distribution rights had been cancelled and awarded to the fourth respondent. This was all true.

[58] The applicants contend that first respondent and/or Moore had in fact informed various customers of the second applicant:

(i) that the second applicant was no longer able to supply Chesterton products to them;

(ii) that the second applicant was no longer able to supply products to meet the needs of the customers; and

(iii) that Sizonke had “closed its doors” and that all the staff had been transferred to the third respondent.

[59] The applicants contend further that the allegation that they were unable to service the needs of their customers was false in that they have sufficient alternative products to service the needs of those customers. I pause to record that the allegation that the first respondent had advised customers that Sizonke had “closed its doors” and that its staff had been transferred to the third respondent, is founded solely on a hearsay allegation attributed to one “Yolande” whose surname is not known and who has not deposed to a confirmatory affidavit.

[60] The first respondent, for his part, denies that he advised anyone that the second applicant was unable to provide products, other than Chesterton products, or that he had advised the said “Yolande” that the second applicant had closed its doors or that its staff had been transferred to the third respondent. Whereas the applicant has not

sought that the matter be referred to oral evidence the respondents' averment in this regard must be accepted.

[61] Reverting to the alleged unlawful competition, there is no closed list of conduct which would constitute unlawful competition in **Pexmart CC and Others v H Mocke Construction (Pty) Limited and Another** 2019 (3) SA 117 (SCA) Navsa ADP at para [63] remarked that the following were well-known acts of unlawful competition:

> "*(a)* trading in contravention of a statutory prohibition;
> *(b)* fraudulent misrepresentations made by a rival trader as to that trader's own business or goods;
> *(c)* the publication by a rival of injurious falsehoods concerning the competitor's business;
> *(d)* the passing-off by a rival trader of that trader's goods or business as being that of a competitor;
> *(e)* the employment of physical assaults and intimidation designed to prevent a competitor from pursuing her or his trade;
> *(f)* the unfair use of a competitor's fruits and labour;
> *(g)* the misuse of confidential information in order to advance one's own business interests and activities at the expense of a competitor's;
> *(h)* the inducement or procurement of a breach of contract: an action for damages (and, in appropriate cases, for an interdict) will lie against any person who intentionally and without justification induced or procured another to breach a contract made with any other person; and
> *(i)* interference with character merchandising rights."

[62] I have already held that customer identity and the alleged customer information was not confidential to the applicants. Chesterton was therefore in my view entitled to

provide that information which it held to the third and fourth respondents to utilise that in the marketing and sales of its products.

[63] Absent a restraint of trade agreement (with which I have dealt earlier) there does not seem to me to be any impediment to the first respondent advising customers of his change of employment. The fact of the cancellation of Unitrading's distribution rights and the award thereof to the third respondent was true and necessary for the advancement of the marketing of Chesterton. The necessary corollary of that is that the applicants could no longer supply Chesterton products. Whereas the legitimacy of the cancellation of the distribution agreement is not attacked, I do not think that the disclosure of the fact and the necessary consequence thereof can be said to be wrongful.

[64] The test for wrongfulness is one of fairness and honesty, having regard to the *bona mores* and general sense of justice in the community. Questions of public policy such as the significance of a free market and of competition, are important. (See *Amlers Precedents and Pleadings* (9th ed) page 367; **Schultz v Butt** *supra* at 679 and the cases there cited; **Phumelela Gaming and Leisure Limited v Gründlingh** 2007 (6) SA 350 (CC); **Masstores (Pty) Limited v Pick 'n Pay Retailers (Pty) Limited** 2017 (1) SA 613 (CC); and **Mullane and Another v Smith and Others** [2015] 3 All SA 230 (GJ).)

[65] No active conduct on the part of the second or fifth respondent which may interfere with the business of the applicant has been alleged. In the circumstances I conclude that the applicants have not established an unlawful infringement with their business which can be categorised as unlawful competition.

Costs

[66] The general rule is that costs should follow the result. No reason has been advanced to deviate from the rule and I can conceive of none.

[67] There remains two reserved costs orders for consideration. First, on 26 March 2019 Beyleveld AJ granted a postponement of the application to allow the respondents to file answering affidavits. He reserved the wasted costs occasioned by the postponement.

[68] The main application was launched as one of urgency and set down for hearing on 26 March 2019. The applicants allege that the respondents, in seeking a postponement, sought an indulgence and accordingly the applicants ought to be entitled to the costs of the day. Ordinarily that would be correct.

[69] The history shows that the first respondent resigned from the second applicant's employ on 31 January 2019. On the same day the applicants learnt that Moore had advised the Nelson Mandela Metropolitan University of the cancellation of the distribution agreement between Unitrading and Chesterton. On 12 February the

applicants learnt from PG Bison that the first respondent had advised them of his employment with the “new distributor” of Chesterton products.

[70] The application was, however, only launched on 15 March 2019 and then on an urgent basis. The applicants unilaterally imposed the restrictive time periods bringing the respondent to court on 26 March 2019. To compound the respondents’ difficulty the Easter weekend intervened with 19 and 22 March being public holidays. In these circumstances the respondents sought a postponement in order to file answering affidavits. Their application was resisted, unsuccessfully, hence the order by Beyleveld AJ.

[71] I consider in these circumstances that it would be fair to the parties that these costs be costs in the cause.

[72] The second issue of reserved costs arises from the judgment delivered by Goosen J on 30 April 2019. The history leading to this order is set out hereafter. On 20 March 2019 the respondents filed a Rule 35(12) notice seeking the production of certain documents. The applicants responded on 29 March 2019. They produced some of the documents sought and declined others on the ground that they were irrelevant. An opposed application followed in which Goosen J ordered the production of some, but not all of the documents sought. This required a further postponement of the application. Goosen J reserved the costs of the application to compel the production of the documents and the wasted costs occasioned by the postponement.

[73] On behalf of the applicants it is argued that the production of the documentation has now proved that it was in fact irrelevant and therefore requests that the first to third respondents (they were the only respondents before court at the time) pay these costs. The respondents, on the other hand, argue that the documents were material and point out that a significant number of distribution contracts were in fact concluded with Unitrading which are annexed to the answering affidavit.

[74] It is true that a number of different distribution agreements concluded from time to time are annexed to the papers. That does not make them relevant to the dispute. The only agreement upon which reliance is being placed and which is annexed to the answering papers is the distribution agreement relied upon by the applicants, which already formed part of the papers. In these circumstances I am of the view that the submission made on behalf of the applicants has merit. There was clearly no relevance in the documentation sought and accordingly I consider that the first and third respondents should be ordered, jointly and severally, to pay the costs reserved by Goosen J.

[75] In the result, the following order is made:

1. The fourth and fifth respondents are joined as parties to the application.

2. The application is dismissed with costs, including the costs occasioned by the postponement on 26 March 2019.

3. The first, second and third respondents are ordered, jointly and severally, to pay the costs reserved by Goosen J in his judgment delivered on 30 April 2019.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv G Richards instructed by Schoeman Oosthuizen Inc, Port Elizabeth

For Respondent: Adv W N Shapiro instructed by Joubert Galpin & Searle, Port Elizabeth