IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 06/14002

In the matter between:-

MULTISOURCE TELECOMS (PTY) LIMITED Applicant

and

GRAHAM, RIAAN JACOBUS First Respondent

AIRSPAN COMMUNICATIONS LIMITED Second Respondent

AIRSPAN NETWORKS SOUTH AFRICA (PTY) LTD Third Respondent

JUDGMENT

BECKERLING AJ:

This is an application for final relief to enforce a restraint of trade and related confidentiality undertakings given by the first respondent in favour of the applicant in a written agreement. The conclusion of the agreement and its terms are not in dispute. Its enforceability is. The period of the restraints, if they are enforceable, is twelve months, terminating on 1 June 2007 and the prescribed area encompasses South Africa, the remainder of the African continent and the adjacent Indian Ocean islands.

The first respondent is a former employee of the applicant and an employee of the second respondent, a company registered and incorporated in the United Kingdom of Great Britain and Northern Ireland. The third respondent is a local company doing business from an office in Sandton and it is a wholly owned subsidiary of the second respondent. No relief is sought against the second and third respondents and they do not oppose the application. In the context of an alleged non-joinder, the first respondent alleges that his employer, the second respondent, does not have a presence in South Africa and does not do business in South Africa. This point was not pursued before me in the context of the question of whether or not the applicant and the second or third respondents are competitors. However, on first respondent's own version, this appears to be an incorrect assessment of the true position. The first respondent, informed one Pinto of Skyband (a customer of the applicant) that he would be working out of the *"office in South Africa"* and in earlier communications with his prospective employer on 4 May 2006 ("RA3"), the first respondent sought confirmation from one Luisette Mullin in the following terms *"I was told that the position would be for running the Local office is this correct?"* By all accounts that is precisely what he is doing now. There is no suggestion on the papers that the third respondent has any business other than the business of its parent company, the second respondent. In the papers, and before me, both parties dealt with the matter on the basis that, save for the joinder point (which was not argued nor pursued before me) there was no distinction between the second and third respondents for purposes of determining whether they were or any one of them was a competitor of the applicant. In shall do likewise and in what

follows I refer to the second respondent and third respondent simply as *"Airspan."*

Procedural history

The application initially came before **Blieden J** as a matter of urgency on 28 June 2006. On 6 July 2006 **Pandya AJ** granted interim relief in the terms agreed upon between applicant and first respondent, subject to a reservation of first respondent's rights and he postponed the matter to 8 August 2006. The interim order contained an undertaking by the first respondent to take unpaid leave until 11 August 2006.

The matter came before me on 10 August 2006. I allowed the filing of a further affidavit by the first respondent. After hearing argument on the merits, I indicated to the parties that it was unlikely that I would be in a position to hand down a judgment before the lapsing of the undertaking embodied in the interim order and invited them to try and resolve the difficulty. Mr. Viljoen indicated that the first respondent was not in a position to extend or substitute the undertaking embodied in the interim order, as this required the co-operation of the second respondent, which could not be obtained in the respect required. Mr. Whitcutt for the applicant thereupon asked for an order in terms of part A of the notice of motion, such to endure pending the finalization of the application. On Friday morning, 11 August 2006, I granted an interim order pending the finalization of the Application in the following terms:

1. *The first respondent is restrained and interdicted from performing any function or duty in connection with his employment with the second respondent;*

2. *An order in terms of prayers 2.2 and 2.3 of the notice of motion dated 15 June 2006.*

Introduction

The first respondent put up several defences. The first respondent's main defence on papers is that he is not in breach of the restraint agreement as the applicant and the second respondent, whom he admits has employed him as its Regional Sales Director (Africa), are not competitors (this contention is not based on the first respondent's allegation that his employer, the second respondent, does not have a presence in South Africa and does not do business in South Africa). He also contends that the conclusion is inevitable that the restraint agreement is unreasonable and unenforceable particularly as the restraint agreement does not offer any protection to a cognisable interest that the applicant may have.

In argument before me, Mr. Viljoen contended that the second respondent does not compete directly, or indirectly with the applicant and that the restraint agreement is unenforceable because the terms thereof are unreasonably wide. He contended that to the extent that there may possibly be competition, it is extremely limited both in respect of the degree in which the second respondent deals directly with end-users and the also the products offered. These factors, so Mr. Viljoen contended, if weighed up qualitatively and

quantitatively against the interest of the applicant, should tip the proverbial scales in the first respondent's favour and also show that the restraint goes further than is necessary to protect the applicant's interests.

Facts

The first respondent commenced employment with the applicant in November 2003 and the written restraint agreement ("HM3") containing the restraint provisions and confidentiality undertakings, the enforcement of which forms the subject matter of this application, was entered into early in December 2003.

The first respondent remained in the applicant's employ until 31 May 2006. He resigned effective 31 May 2006 and took up his present employment with the second respondent as its Regional Sales Director (Africa) immediately after terminating his employment with the applicant.

The applicant is a leading specialized wireless telecommunications provider in South Africa. It also conducts its business throughout the continent of Africa and the adjacent Indian Ocean areas. It specializes in three areas of telecommunications, being: telecom network solutions, radio network solutions and network services. For present purposes it is the activities of its telecom network solutions division of its business that is relevant. This division of the applicant designs, supplies and supports customized network equipment for broadband wireless solutions, including a range of wireless technologies to enable its customers to use public or private network services. The applicant has supplied broadband wireless solutions to inter alia cellular

telephony network providers, Internet service providers and customers operating private networks in South Africa and elsewhere in Africa.

As part of its business the applicant has established various strategic partnerships with manufacturers of wireless access products, including a strong relationship with Alvarion Limited (*"Alvarion"*), a multi-national company and one of the market leaders in broadband wireless technology internationally.

The applicant is a distributor of Alvarion products and uses their products extensively in the network solutions it supplies to customers. One of these Alvarion products employs WiMAX technology, which is a new worldwide standard to support broadband wireless access from many different chip and equipment manufacturers. WiMAX is an innovation in broadband wireless technology, and, so it is said, is set to supersede GSM as the world standard for broadband access.

The applicant has participated in pilot projects, tests and technical discussions and evaluations regarding the use and implementation of the WiMAX technology with MTN South Africa and other entities both in South Africa and elsewhere in Africa. Significantly Airspan and other competitors have been involved in the same or similar WiMAX studies.

It is anticipated that MTN South Africa will put out a tender later this year relating to the implementation of WiMAX in the cellular network operated by it. This tender will probably be for services and equipment of a value running into several hundred thousand millions of Rands.

In the wireless communications field, which concerns *"two-way radio"* technology (and which is not the primary focus of this application), the applicant has secured distribution rights with a number of manufacturers to supply a broad range of radio terminals, receivers and accessories produced by these manufacturers, as well as a range of radio network solutions. The only relevance of this area of business to this application is that the applicant has established a network of non-exclusive dealers or distributors throughout the prescribed area on whom it can rely to provide backup and support to the applicant's end-user customers. It contends that the information relating to these reliable dealers/distributors must also be preserved from falling into the hands of Airspan.

In addition to supplying products and total solutions in the area of telecom network solutions, the applicant also offers various services to its customers, including technical support, preoperational studies, technical and operational training for customers, project management, system design, network planning and the facilitation of regulatory issues pertaining to the use of its technology and products.

Airspan is a manufacturer of broadband wireless networking equipment and, in particular, of WiMAX products. It has a reseller arrangement with Ericsson (known worldwide for its cellular telephony and network solutions). It is, in the words of the first respondent *"particularly in this area that the business activities of Airspan and the applicant on the face of it overlap."*

However, to my mind a proper reading of the papers shows that it is more than a mere apparent overlap. There is also no real factual dispute in this

regard that cannot be resolved on the papers as contemplated in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 3 SA 623 (A) at 643H-635.

The first respondent has sought to establish a case in answer that there is no real competition because the applicant is one of several resellers of the WiMAX product manufactured by Alvarion whereas Airspan is an OEM (original equipment manufacturer) of its own range of WiMAX products.

On the papers it is clear that the applicant is a major distributor of Alvarion products as a substantial part of its business. This flows from the nature of its activity: the supply of telecom network solutions, which includes, as a very significant portion thereof, the broadband wireless networking equipment supplied by it in connection with the network solutions provided.

It matters not then in my view that it is a reseller and not an OEM, nor does it matter that it has no exclusivity in relation to the equipment it supplies to its customers.

In my view it is a certainty that when it comes to the competition for business of selling solutions that include WiMAX products to customers in South Africa, such as the much anticipated MTN tender or the Cape Town Municipality tender and other broadband wireless access customers, the applicant and Airspan will compete directly for such business.

The first respondent also sought to establish a case that there is no real competition because, so it alleges, Alvarion's WiMAX products are not interoperable with those of Airspan. The lack of interoperability, and I may

add, the alleged fact that the Alvarion products are not WiMAX certified (a status which the first respondent says the Airspan products have) but may be merely WiMAX compliant, is of very little significance.

Assuming that WiMAX certification only follows once a product has passed prescribed conformance tests and interoperability testing (something which I do not think appears from any admissible evidence before me and in regard to which I express no view), its only possible suggested relevance appears to be that customers of the applicant that recently acquired Alvarion's products from the applicant would be unlikely to acquire Airspan products unless the two products were interoperable.

Leaving aside the question of whether the interoperability or otherwise has been established by means of admissible expert or other evidence, it seems to me that this argument has little to commend it. It assumes that a customer who has recently incurred capital expenditure in respect of the acquisition and commissioning of broadband wireless networking equipment is likely to do so again in the immediate short term, something that I find unlikely.

In addition both the applicant and Airspan have a potential customer base that goes much wider than the applicant's existing customers that use Alvarion hardware.

Moreover, it seems to me that the mere lack of interoperability (even if established and relevant) does not exclude the fact or likelihood of competition.

It according is false to conclude that the products are not or are unlikely to be offered in competition to end user customers of the applicant and Airspan. It is clear that a very substantial portion of the applicant's business is centered on broadband wireless access and the supply, installation and support of inter alia Alvarion products and specifically its broadband wireless networking equipment.

By way of example I mention that when the applicant tendered for the broadband wireless networking business of MTN in Rwanda and Uganda, delivering Alvarion products, it competed directly against Airspan and Ericsson delivering Airspan products. Airspan also submitted a tender to the Cape Town Municipality in direct competition against the applicant's tender and it is anticipated that, when the MTN South Africa business is put out for tender the applicant and Airspan will put in competitive tenders. I am accordingly satisfied that it is clear from the papers that Airspan and the applicant are direct competitors in the broadband wireless access market, specifically in relation to the respective WiMAX products that they supply which are similar and used for the same purpose.

I am fortified in my view by the view expressed by the first respondent prior to the commencement of the present proceedings. Most significantly, despite what he now says in his answer it is clear that he regarded Alvarion and Airspan as direct competitors. As appears from Annex *"HM11"* to the founding papers one David Pinto, a director of Skyband (a customer of the applicant) enquired from the first respondent (by e-mail and on the eve of first respondent's departure early in May 2006): *"Where you going to or is it still*

under wraps" (sic). The first respondent, quite tellingly in my view, responded (also by e-mail) as follows: *"Still under wraps, but I can tell you it is direct competition to Alvarion, I will be the Regional Sales Director for African Operations working out of Office in South Africa."*

Mr. Viljoen conceded, correctly so in my view, that a finding that applicant and Airspan are competitors had to follow if I held that it had been established that the products offered by the applicant and the second respondent respectively are similar. I do so find and the conclusion that they are competitors follows logically on the facts before me.

Mr. Viljoen also conceded, once again quite correctly so in my view, that if the applicant and the second respondent are held to be direct or indirect competitors that the first respondent is in breach of the restraint agreement. To me it is plain that he is in such breach.

Mr. Viljoen submitted that even if I arrived at the conclusion to which I have, the applicant bears an *onus* to establish that *"the restraint is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"* and that this *onus* has not been discharged by the applicant.

Mr. Viljoen based his submission on certain *dicta* in the case of **Triangle Canon KwaZulu Natal (Pty) Ltd t/a Cannon Office Automation v Booth and Another** 2005 3 SA 205 (N). He drew my attention to the fact that the Triangle case was not followed in a later decision in that same division, **Rectron (Pty) Ltd v Ruthnavani Shantal Govender and Another** [2006] 2 All SA 301 (D) on the basis that it was held to be clearly wrong. He did

however submit that the Triangle case had nevertheless found favour in this division in the unreported judgment of **Gildenhuys J** in **Bearing CC v Selepe Electrical Wholesalers CC t/a Selepe Bearing and Others** WLD 05/7935 at par [15] -[17] and that I should follow it. **Gildenhuys J** gave no reasons for expressing his agreement with **Kondile J** in the Triangle case. In the Triangle case, **Kondile J** did not consider himself bound by, and did not follow, the *dicta* in **Magna Alloys and Research (SA) (Pty) Ltd v Ellis** 1984 (4) SA 874 (A) and **Basson v Chilwan and Others** 1993 (3) SA 742 (A) at 776I - 777B.

The principle underlying the Magna Alloys- and Basson cases is that expressed in the maxim *pacta sunt servanda*. It is a principle that finds universal application in open and democratic societies based on human dignity, equality and freedom in the Western World and is not inimical to our constitutional values.

In South Africa the principle has been affirmed repeatedly, also by the SCA. See **Brisley v Drotsky** 2002 (4) SA 1 (SCA) par [23] for a recent example.

There is a long line of cases in which the issue decided by **Kondile J** in the Triangle case has been anticipated (as to which see **Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain** 2001 (2) SA 853 (SE) at 861F-862G).

Those cases (and other cases) are dealt with by **Maclaren J** in the Rectron case (paras 9 to 15). None of these cases are referred to by either **Kondile J** or **Gildenhuys J**.

Ordinarily the judgment of **Gildenhuys J** would bind me, unless I were to form the view that he was clearly wrong. Although I incline to the view of **Maclaren J** in his rejection of **Kondile J**'s *dicta* in the Triangle case, I do not find it necessary to determine this or the incidence of the *onus*. The usual approach to disputes of facts on the full papers as set out in Plascon-Evans Paints renders a result.

I have no difficulty in finding on the papers that the applicant has shown a justifiable interest which requires protection and that this interest was prejudiced by the first respondent taking up employment with one of applicant's competitors. I say so for the following reasons:

The applicant's telecom network solutions division is the key growth area of the applicant's business and the applicant has invested over R20 million in developing this area over the past four years. The first respondent has been central to the growth of this area and has been intimately involved in every facet of its expansion. His attempt to downplay his importance to that of a mere salesman is not convincing. He was appointed as the *"Business Development Manager within the Telecoms Networks business unit"* at an early stage of the development of this area of the applicant's business. His duties included sales and he was required to service a number of existing customers and to develop further opportunities with both existing and new customers. There is ample evidence that his involvement was not limited to mere sales, as he now seems to suggest. The minutes of a weekly sales meetings dated (RA21 and RA27) show that first respondent attended these meetings and that the nature of the discussions the first respondent's

responsibilities and the level of access he enjoyed to the running of this key part of the business was much more involved than now suggested by him. It also illustrates that he was privy to strategic business discussions; prepared financial forecasts; knew and applied prices and margin policies for the different categories of customers; had knowledge of the basis on which tenders to big customers were prepared; was responsible for a substantial level of customer contact and had to compile list of prospective customers. The first respondent admits that he has knowledge of the list of customers of the applicant including potential customers (being parties whom the applicant intends contacting for the purpose of doing business) as he and one Myers developed together the target list that was provided to Alvarion of potential customers' specific requirements for the products and services supplied by the applicant.

It is also applicant's case that the first respondent had access to and has knowledge of the strategies and strategic plans developed and implemented by the applicant to counteract the actions of the applicant's competitors and although the first respondent denies this in general terms he does not deny that he attended a strategy session at the offices of Sasfin (the applicant's major shareholder) at which all aspects of the applicant's strategic approach to the pending MTN SA tender were discussed. As set out elsewhere it is not disputed that Airspan will probably be one of applicant's competitors in bidding for the MTN SA tender. MTN SA is presently the applicant's customer in respect of telecom solutions. The papers demonstrate that the first respondent, by virtue of his employment with the applicant, knows MTN's requirements intimately.

It is not in dispute that the first respondent has detailed knowledge of the applicant's contractual relationships with its suppliers, principals, customers and business associates and even those with its employees. He also does not deny that he has knowledge of computer software programmes and of the products and of the adaptation and development thereof for the purposes generally of achieving the objectives of the applicant; he was involved in regular discussions (every 6-8 weeks) with Alvarion and had access to papers on the company server that outlined Alvarion's research and development plans for the next 18-24 months, which is highly confidential information.

The first respondent had access to drawings and technical information relating to the products sold by the applicant. In addition to access to the Alvarion brochures and Alvarion website (which is in the public domain), he had access to detailed technical documentation available on the server, which is not in the public domain, although he now says it is impossible to memorize such information.

It is common cause that the first respondent has knowledge and business relationships with key members of the applicant's customers and persons in companies with whom the applicant had formed strategic alliances. As the sole salesperson he was primarily responsible for maintaining a commercial relationship with all the applicant's telecom networking customers.

Significantly, the first respondent continued to be exposed to this level of information and close customer contact in May 2006, despite the fact that he had resigned.

The applicant says it is because he lied about his intentions when he resigned and thereafter when his restraint obligations were pertinently discussed. Despite the fact that he was joining one of the largest OEM manufacturers of broadband wireless networking equipment he said instead that he would be joining *"a small London-based microwave manufacturer"* (microwave being a generic term for a point to point wireless system an area of minor concern to the applicant) and thereby deliberately created the impression that his restraint obligations would not be an obstacle to joining his new employer. In his answer the first respondent admits giving what he describes as *"vague answers to questions regarding my future employment."* He does not deny the statement attributed to him. In the light thereof, I find his denial that he deliberately mislead the applicant, unconvincing and false.

Significantly he continues to say that he could not be candid about his new employment as he feared an adverse reaction from the applicant (he describes this as *"an unreasonable reaction"*, which he says is borne out by the present application).

In the light of the facts set out above, and the fact that in May 2006 Airspan submitted a tender in competition with the applicant to the Cape Town Metropolitan Council, his fear was more than justified. It now appears that whilst still in the applicant's employ, the first respondent introduced one of the applicant's a BEE partners to the second respondent, which then teamed up with the BEE partner as part of its competing tender to the Cape Town Metropolitan Council.

I have little doubt that if the first respondent made full disclosure of his true position and the identity of his prospective employer he would have been met with an immediate suspension from office duty and, more likely than not, proceedings similar to those now before me.

The only question really is whether the applicant is unreasonable in seeking to enforce the terms of the restraint and the confidentiality undertakings. In my view it is not. It has demonstrated a clear protectable interest both in respect of the *"confidential matter"* (which is useful for the carrying on of the business of the applicant to which the first respondent was exposed and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage) and also in relation to the goodwill (that attaches to the applicant's relationships with its customers, potential customers, suppliers and others) that go to make up what is usually referred to as the *"trade connection"* of a business.

In **Ilr South Africa BV (Incorporated In The Netherlands) t/a Institute For International Research v Hall (aka Baghas) and Another** 2004 (4) SA 174 (W) at 179H-180B where SCHWARTZMAN J (writing for the full court) summarised the requirements that an applicant must establish in connection with the enforcement of a protectable interest in a restraint, as follows:

> *"Where the ex-employer seeks to enforce against his ex-employee a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has in fact utilised information confidential to it - merely that the ex-employee could do so. (See International Executive Communications Ltd (Incorporated in the*

Netherlands) t/a Institute for International Research v Turnley and Another 1996 (3) SA 1043 (W) ([1996] 3 B All SA 648) at 1055D - F (SA).) In short, the ex-employer 'has endeavoured to safeguard itself against the unpoliceable danger of the [ex-employee] communicating its trade secrets to a rival concern after entering their employ. The risk that the [ex-employee] will do so is one which the [ex-employer] does not have to run, and neither is it incumbent upon the [ex-employer] to inquire into the bona fides of the [ex-employee] and demonstrate that [he or she] is mala fide before being allowed to enforce its contractually agreed right to restrain the [ex-employee] from entering the employ of a direct competitor'...."

In the restraint agreement here in issue, the parties recorded their agreement as follows:

The first respondent acknowledged that by virtue of his association with the applicant, he would have access to and become privy to the applicant's trade secrets and confidential information, as defined (clause 2). The applicant's trade secrets and confidential information in turn are defined as including, without limitation, the following: the know-how, processes, techniques, methods of operating and strategies used and applied by the applicant in the development and implementation of its marketing, sales and distribution plans, the strategies and strategic plans developed and implemented by the applicant to counteract the actions of the applicant's competitors in the market place, knowledge of the list of customers of the applicant including potential customers (being parties whom the applicant intends contacting for the

Internet; details of Alvarion's research and development programme and marketing strategy and also the applicant's marketing strategy vis-à-vis MTN South Africa have been circulated to an unrestricted number of people; Alvarion prices are freely available on the Internet; particulars of the applicant's tender to MTN Rwanda including pricing and payment terms formed part of the public tender documents; and, information relating to the applicant's BEE status and its audited financial statements also form part of tender documents which are by their very nature circulated to third parties. I remain unpersuaded by these arguments. The level of information in the public domain is clearly substantially less comprehensive than that to which the first respondent had access. It is also wrong in my view to suggest that confidentiality is lost where a person includes technical or other information in a tender aimed at soliciting business.

During argument I asked Mr. Viljoen to identify the basis for so contending. He relied upon a single passage in the rejoinder reading *"The said prices quoted to MTN Rwanda were included in the tender which was a public document"* (p352 par 56.2). He sought to apply this to pricing generally and to the applicants BEE status and its audited financial statements.

Quite arguably the applicants BEE status is not confidential in the sense required. The rest of the information plainly is and it does not lose its confidentiality merely because it is disclosed in a tender document.

Mr. Viljoen also argued that the first respondent's exposure to this information in certain instances, and the level of such exposure in other instances, were contentious. I am satisfied from the papers that the first respondent was

purpose of doing business) and of customers' requirements for the products and services; knowledge of prices, terms and conditions relating to the sale of the products and services; details of the applicant's contractual relationships with its suppliers, principals, customers and business associates and with its employees (including remuneration packages); knowledge of computer software programmes and of the products and of the adaptation and development thereof for the purposes generally of achieving the objectives of the applicant; drawings and technical information relating to the products; training and other strategic initiatives implemented by the applicant to achieve the optimum utilization of its staff; knowledge of and influence over the applicant's customers, principals and business associates; and, any other information relating to the business of the applicant, including the applicant's financial structure and operating results, which is not readily available in the ordinary course of business. As already indicated above this acknowledgment in my view substantially reflects the first respondent's true exposure to confidential matter.

Mr. Viljoen submitted that there were a number of disputes, both factual and legal in this regard to the protection of the confidential matter. Firstly, the classification of many of these as *"confidential"* was contentious and did not qualify as objectively confidential material in that it did not (a) relate to and was not capable of application in trade or industry, and/or (b) was not secret in the sense of only being known to a restricted number of people or a closed circle, i.e. not public knowledge, and/or (c) it was objectively viewed of no economic value to the applicant. So for instance, he submitted that the technical specifications of Alvarion products are freely available on the

exposed to a substantial amount of information confidential to the applicant. I do not think it is necessary to go into any greater level of detail than that already set out above.

Mr. Viljoen also argued that *"...the remainder of the applicant's information mentioned in the papers is of no or insignificant value to a competitor"* and included in this category information regarding the applicant's radio network, its competitors, applicant's by now outdated price-lists and the like. Even if this submission is correct in some respects, there is sufficient information confidential to the applicant to warrant protection. As far as the respondent's customer connection is concerned, the first respondent does not deny that, in the course of his employment, he had contact with most of the applicant's clients. He asserts that his contact was at such level that it poses no threat to the applicant. He indicates that, particularly in the case of MTN South Africa the meaningful business connections were fostered at directors' level. This, even if correct, does not in my view detract from his obvious and extensive contact with the applicants customers and it is no answer to the applicant's claim that the first respondent is in a position to infringe the applicant's proprietary interest in its customer connections by virtue of his employment with the applicant.

Mr Viljoen also argued that in evaluating the criteria enumerated in **Basson v Chilwan and Others** *supra* at 767G – and more specifically the question of whether the applicant's interests weigh up qualitatively and quantitatively against the interest of the respondent that the latter should not be economically inactive and unproductive, and also in considering the question

whether the restraint goes further than is necessary to protect the applicant's interests (as applied in **Kwik Kopy (SA) (Pty) Ltd v Van Heerden and Another** 1999 1 SA 472 (W) at 484, that these factors which are indicative of what he expressed as the *"...extent of possible competition between the applicant and the second respondent is (being) extremely limited both in respect of the limited degree in which the second respondent deals directly with end-users and the products offered"* should be considered.

As appears from the above I am satisfied that the competitive threat is substantial and real rather than limited in the sense contended for.

In weighing up the first respondent's interests with those of the applicant I take into account that he is a husband, father and the principal breadwinner in his family as well as the fact that his wife is pregnant and that his prime area of activity for the past decade or so has been in his current area of employment. These scant facts do little to establish that the restraint undertakings are unreasonable and therefore unenforceable *"having regards [sic] to its scope, the interest of the applicant allegedly protected thereby, the geographical area and the influence it has upon my rights to be economically active"* (p152 Para 29.3).

Before me it was not in dispute that Airspan is part of a global business with its corporate headquarters, Airspan Networks Inc., situate at Boca Raton, Florida, in the United States of America; with its main operations conducted by the second respondent in Uxbridge, United Kingdom from where it has *"worldwide networks"* of which the Sandton office (i.e. the third respondent) is but a part. It is the London based second respondent that is the first

respondent's employer and I find no suggestion in the papers that curtailing the first respondent's activities in the prescribed area will result in him being economically inactive and unproductive.

Moreover, and even if his continued employment with the second respondent is in jeopardy, there is no evidence before me to suggest that he would be economically inactive and unproductive if that were to happen. These are matters peculiarly within his knowledge and I would have expected him to say so if there were any such threats. He did not do so.

Mr. Viljoen also submitted that the restraint goes further than is necessary to protect the applicant's interest inasmuch as the interest itself is of very little real value.

This submission is simply not born out by the facts nor is his related submission that this was particularly pertinent to the extremely broad geographic borders and the extended time set for the restraint. In my view the very nature of the competitive arena here in issue, i.e. that of very new and cutting edge technology such as WiMAX marketed into a competitive environment with massive potential contracts, and the nature and location of the customer base, neither the geographic area nor the duration of the restraint is unreasonable.

I am accordingly satisfied that the applicant has established a clear right and an injury actually committed or reasonably apprehended as required by the authorities in relation to the relief sought in prayers 1.1, 1.2 and 1.4 of part B of the notice of motion. In my view there is also no other satisfactory remedy

available to the applicant nor has any been suggested in respect of the case made out. See in this regard: **Setlogelo v Setlogelo** 1914 AD 221 and **Plascon-Evans Paints Ltd** *supra*; **Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums and Pails** 1997 (3) SA 867 (N).

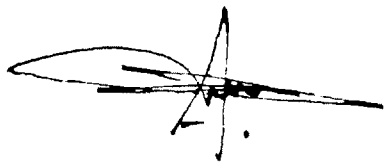
Although I was asked to grant relief for the whole of part B of the notice of motion, no case is made on the papers of any actual or apprehended injury in relation to the relief sought in prayers 1.3 and 1.5 of thereof.

In view of the above conclusion I need say no more about the reasons for the interim relief I granted.

In the result I grant the following orders:

1. Orders in terms of prayers 1, 1.2 and 1.4 of PART B of the notice of motion dated 15 June 2006.

2. The first respondent is ordered to pay the costs of the Application, such costs to include the costs of all previous hearings.



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