IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA **REPORTABLE**

CASE NO: 3113/2011

In the matter between:

SOUTHGATE ELECTRICAL
WHOLESALERS CC APPLICANT

and

AKASH RABILAL FIRST RESPONDENT

ARB ELECTRICAL WHOLESALERS
(PTY) LIMITED SECOND RESPONDENT

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**JUDGMENT**

Heard: 13th April 2011
Delivered: 27th May 2011

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P. GOVINDASAMY AJ

[1] This application concerns the enforceability of a restraint of trade and confidentiality/trade secrets clauses in an employment agreement entered into between Applicant and First Respondent. I shall refer to the Applicant as “Southgate”, the First Respondent as “Rabilal” and the Second Respondent as “Arb”.

[2] On 11 March 2011 this application was brought as a matter of urgency before Mbatha AJ (as she then was) and she granted the following order:

a) That a Rule Nisi is hereby issued calling upon the Respondents to show cause, if any to this Honourable Court on or before 24 March 2011 at 09H30 why an Order in the following terms should not be granted:

i) the First Respondent be and is hereby interdicted from being interested or concerned either directly or indirectly and whether as a director, partner, member, employee, financier, advisor, or in any way whatsoever, in a business similar to that being conducted by the Applicant, or in any business which competes or is likely to compete, with the business being conducted by the Applicant's company;

ii) the First Respondent be and is hereby interdicted from being so interested or concerned, including as employee, in the business of the Second Respondent;

iii) the First Respondent be and is hereby interdicted from directly or indirectly canvassing for, soliciting of, any business from clients of the Applicant as at 7 February 2011, including Electrotech Electrical CC;

iv) the said restraints are to remain in force until 3 February 2012, and are to apply with the Province of KwaZulu Natal;

v) that the First Respondent be ordered to pay the costs of this application unless it is opposed by the Second Respondent, in which event the Second Respondent is to pay the costs of the application jointly and severally with the First Respondent;

b) That pending the return date or any extension thereof, paragraph 1.3 above will operate as an interim order with immediate effect;

c) That the Respondents are to deliver their answering affidavits on or before 17 March 2011.

d) That the Applicant is to deliver its replying affidavit on or before noon on 23rd March 2011.

After the usual filing of affidavits and the fixing of the return date, the matter was given priority on the opposed motion court roll, causing the application to be fully argued before me on 13 April 2011. I am indebted to both Mr Kamp on behalf of Southgate and Mr Whitcutt who represented Rabilal and Arb for their useful heads of argument.

[3] In Southgate's replying affidavit, it raised for the first time certain evidence which is material to the determination of this application and which was not set forth or foreshadowed in it's founding affidavit. In particular Southgate raised the issue of Rabilal's knowledge of it's customer lists, price lists, settlement and trade discounts none of which is referred in Southgate's founding papers. Southgate also raised further instances in which Rabilal is alleged to have solicited customers form Arb. At the hearing of this application Rabilal requested that I exercise my discretion, as contemplated in Rule 6 (5)(e) of the Uniform Rules of Court, to permit the filing of a supplementary affidavit as a fourth set of affidavits so as to allow it to place all the facts before the

Court in order to properly ventilate the issues between the parties and to avoid any prejudice to it. I have taken into account the fact that Southgate ought to have made out its case in its founding affidavit but did not do so. In the circumstances, Rabilal in my view has made out a proper case for the exercise of my discretion in his favour to allow the fourth set of affidavits to be filed.

[4] By way of background it is important to mention that Southgate's business operates primarily in the electrical components industry in KwaZulu Natal. Rabilal is a sales representative, a position which he has held since 2000, having been originally employed by Arb. He first moved to Southgate for a period of two years and more recently returned to work at Arb. It is common cause that Southgate and Arb are competitors, both being wholesalers of electrical components, *inter alia*, within the province of KwaZulu-Natal. Southgate is a small "family run" outfit set up by Allan Christian Sprenger in March 2001 after he left Arb where he was a director and shareholder. It now comprises 25 employees operating out of one office in Durban. It services approximately 120 customers, mainly in KwaZulu-Natal.

[5] By comparison, Arb has been in operation for 31 years and employs approximately 450 staff in 12 offices across the country. It is the second largest wholesaler of electrical components in South Africa and one of the four largest suppliers of electric cable in the country. Arb has approximately 3000 regular customers on its books. By Southgate's own admission, Arb is in a different league and Southgate's customer base cannot even be compared to that of Arb.

[6] Approximately 75% of Southgate's business is the sale of overhead line cables (colloquially referred to as "OHL" products) to a small market of niche customers. The remainder of Southgate's customers purchase the broad range of electrical products on the market. Arb also sells OHL products but it's primary sales are of electrical components and electrical cables to a panoply of customers ranging from corporations, industries, and corporations to hardware stores and electricians.

[7] Both Southgate and Arb purchase their products from the

same suppliers, most of whom are local suppliers. Being a much larger operation, Arb is able to store much of its products on offer for immediate sale to its customers. Southgate stocks far fewer products, which must consequently be ordered and thereafter delivered to it's customers. Southgate and Arb compete in the same market, along with dozens of other electrical component wholesalers. The regular customers who purchase components are well known in the industry and the market is a competitive one.

[8] Rabilal's function, initially as a salesman and later as a branch manager, since 1 June 2009, in the employ of Southgate, was to, inter alia, secure contracts and orders for Southgate as well as maintain contact and a relationship with existing clients so as to maintain clients as customers and where possible, to conclude new contracts and further to seek new customers for Southgate.

[9] The employment agreement between Southgate and Rabilal contained two clauses giving rise to this dispute, a restraint of trade clause and a trades secrets/confidentiality clause, which read as follows:

**Restraint of trade**

The employee may not for a period of one (1) year from the date of termination of your employment with the Company for any cause whatsoever, in connection with any business which carries on business in South Africa and which is similar to or competes with or endeavours to compete with the Company directly or indirectly, offer employment to, or employ, or cause to be employment to, or employ, or cause to be employed any person who is employed by the company at the date of termination of your employment with the company for any cause whatsoever or within any time within six (6) months immediately preceding such termination.

You shall not, for a period of one (1) year after termination of your employment with the Company for any cause what so ever, either solely or jointly or together with or as an employee, manager or agent of any person, firm or body corporate or incorporate, directly or indirectly:

- Carry on or assist financially or otherwise be engaged or concerned or interested in;

- Be a director or shareholder directly or member of:

- Act as a consultant or advisor to:

Any company, closed corporation or business which carries on business in South Africa which is similar to or competes with the business carried out by the employer as at the date termination of your employment with the company.

The restraint imposed on you in terms of the aforegoing shall:

- Be deemed to be in respect of each part thereof, entire, separate, severable , and separately enforced in the widest of sense from the parts thereof:

- An undertaking or restraint shall be deemed to be a separate undertaking or restraint notwithstanding the fact that it appears in the same clause, sub clause or sentence of any other undertaking, or is imposed by the introduction of a word or phase conjunctively from or alternatively two other words or phases.

- Be for the benefit of the Company as well as all its shareholders to protect their financial interest in the company.

- Company trade secrets shall mean without purporting to constitute an exhaustive list.

All internal systems including the company's accounting and administration

Financial details of the Company's relations with its clients, customers and suppliers.

Details of the company's financial structure and operating results

The contractual agreement between the Company and others within whom it has business arrangements of whatsoever nature, including, but not limited to financial arrangement and supply agreements.

Details of any customers or suppliers of the Company.

Any marketing or price structure utilised by the Company

**Trade secrets/confidentiality**

The employee undertakes, without prejudice to any general duty of confidentiality, not to disclose during the continuance of this contract or afterwards, any of the trade secrets of the employer or any information which is confidential to the employer's business

> Trade secrets include the following, any documentation or records (including written instruction, drawings, notices, memoranda, customer lists, or lists of suppliers) relating to the company's business Trade Secrets which are made or concluded by you or which came into your possession during your period of employment by the Company, shall be deemed to be property of the Company and shall be surrendered to the Company on demand and in any event, upon termination of your employment and you will not retain any copies or extracts there from.
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> The employee further undertakes immediately after the termination of his/her services to hand over to the employer all documentation and data in his/her possession belonging to the employer, whether in hard copy, contained on computer disc or any other recording medium, including documents made by him/her in the course of his/her employment. The aforementioned implies that any copy, abstract, or any précis of any document belonging to the employer made by the employee or any other person shall itself belong to the employer.

[10] It is trite law that an agreement in restraint of trade is enforceable unless it is unreasonable.[1] It is generally accepted that a restraint will be considered to be unreasonable, and thus

1 Automotive Tooling Systems (Pty) Ltd v Wilkens & Others 2007 (2) SA 271 (SCA) para 8 at 277G;) Magna Alloys & Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at 891B-C; Basson v Chilwan & Others 1993 (3) SA 742 (A) at 767A-D; Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2SA 486 (SCA) [10] at 493E-G; Den Braven SA (Pty) Ltd v Pillay & Another 2008 (6) SA 229 (D) para 3 at 233J-34A.

contrary to public policy, and therefore unenforceable, if it does not protect some legally recognisable interest of the employer but merely seeks to exclude to eliminate competition.[2]

[11] A party seeking to enforce a contract in restraint of trade must invoke the contract and prove the breach thereof. Thereafter, a respondent who seeks to avoid the restraint bears an onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.[3]

[12] In the light of the test set out in *Basson*[4] in determining the reasonableness or otherwise of a restraint of trade clause there are four pertinent questions to be answered:

(a) is there an interest of the one party (Southgate) which is deserving of protection at the termination of the agreement?

b) If so, is such interest being prejudiced or threatened

2 Automotive Tooling Systems (Pty) Ltd v Wilkens & Others, supra para 8 at 277G-H- 78A;

3 Basson v Chilwan & Others supra at 767F-I; Magna Alloys supra at 892I-93E; Sibex Engineering Services (Pty) Ltd v Van Wyk & Another 1991 (2) SA 482 (T) at 502D-F; Reddy v Siemens Telecommunications (Pty) Ltd supra para 10 at 493 G; Den Braven, supra, para 3 at 234A-B

4 At 767G-H; Reddy v Siemens Telecommunications (Pty) Ltd supra para 16 at 497; Den Braven SA (Pty) Ltd supra para 4 at 235A-B.

by the other party (Arb)?

c) In the event of such interest being prejudiced or threatened, does such interest weigh up qualitatively and quantitatively against the interest of the latter party [Rabilal] that he should not be economically inactive and unproductive?

d) is there another facet of public policy, having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?.

[13] The party seeking to avoid enforcement of the restraint is required to prove, on a balance of probabilities, that, in all the circumstances of the particular case, it will be unreasonable to enforce the restraint. In this connection, in *Reeves & Another v Marfield Insurance Brokers CC & Another*,[5] the Court observed -

> "The circumstances to which regard may be had cover a wide field and include typically those pertaining to the nature, extent and duration of the restraint and the legitimate interests of the respective parties in relation thereto…Even factors such as the equality or

5 1996 (3) SA 766 (A) at 776E-F

> otherwise of the bargaining power of the respective parties may be taken into account."

[14] Insofar as the first leg of the test in *Basson,s* case, is concerned, it is well established that the proprietary interests that can be protected by a restraint agreement are essentially of two kinds, namely:

(a) all confidential matter which is useful for the carrying on of business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage; and

2. the relationship with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "trade connection" of the business, being an important aspect of its incorporeal property known as goodwill.[6]

[15] Whether information constitutes a trade secret is a factual

6 Sibex Engineering, supra, at 502D-E-F

question. For information to be confidential it must be –

a) capable of application in trade of industry, that is, it must be useful and not be public knowledge and property;

b) known only to a restricted number of people or a closed circle; and

c) of economic value to the person seeking to protect it.[7]

[16] As to customer connection the court in Rawlins and Another v Caravantruck (Pty) Ltd[8] the court said that the need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with a customer so that when he leaves the employer's service, he could easily induce the customers to follow him to a new business. *Heydon* *The Restraint of Trade Doctrine* *(1971) at 108*, quoting an American case, says that the

7 Townsend Productions (Pty) Ltd v Leech, 2001 (4) SA 33 (C) at 53J-54B; Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd [1999] (3) All SA 321 (W) at 333F;
8 1993 (1) SA 537 (A) at 541C-F.

"customer contact" doctrine depends on the notion that the "*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 employer acquires "*such personal knowledge of and influence over the customers of his employer … as will enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection…*"

[17] What is clearly established is that the proprietary interest must be one that might properly be described as belonging to the employer, rather than to the employee, and in that sense "proprietary to the employer". The rationale for this policy was succinctly explained by Kroon J in *Aranda Textile Mills (Pty) Ltd v Hurn & Another* [9] as follows:

> "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 workmen. 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 workmen, his know-how or skills. Such know-how and skills in the public domain

9 [2000] 4 All SA 183[E] para 33 at 192; referred to with approval in Automotive Tooling Systems supra 278E-G-279A

> 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."

[18] All agreements, including agreements in restraint of trade, are subject to Constitutional rights obliging Courts to consider fundamental Constitutional values when applying and developing the law of contract in accordance with the Constitution of the Republic of South Africa 1996.[10]

[19] As Southgate seeks final relief, in evaluating the evidence on the papers, the Court is bound to follow the approach set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[11] Where the facts concerning the reasonableness or otherwise of the restraint have been fully explored in the evidence, any of those facts that are in dispute must be resolved in favour of the respondent.[12] Consequently, regardless of the incidence of the onus, the above Honourable Court may only find in favour of applicant "if the facts as stated by respondent together with the admitted facts in applicant's affidavits justify such an order..." The

10 Napier v Barkhuizen 2006 (4) SA 1 (SCA) para 6 at 6
11 1984 (3) SA 623 (A) at 634H - 635B
12 Plascon-Evans Paints, supra at 634 E-I

Court is, in effect bound by what respondent states in his affidavit, unless it is "so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers".[13] If the facts disclosed in the affidavit, assessed in that manner, disclose that the restraint is reasonable, then an applicant may succeed. If, on the other hand, those facts disclose that the restraint is unreasonable, then respondent must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus will play no role.[14]

[20] A Court must make the value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint.[15] The first is that the public interest, fashioned by Constitutional values, requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law, but also Constitutional values.[16]

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13 Plascon-Evans Paints supra at 634 – 635
14 Reddy v Siemens at 496C-D
15 Reddy v Siemens at 496D-E; Reeves & Another v Marfield Insurance Brokers CC & Another 1996 (3) SA 766 (A) at 775J-776F
16 Reddy v Siemens, supra para 15 at 496D-F

[21] In applying these two principle considerations, the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from participating in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest.[17]

[22] It is well established that the determination as to the reasonableness or otherwise of a contract in restraint of trade is determined at the time the contract is sought to be enforced.[18]

[23] The evidence reveals that Rabilal was a monthly paid employee of Southgate and when he resigned with immediate effect on 4 February 2011, he had been employed by Southgate for no less than 2 ½ years. He commenced employment with Arb on 7th February 2011 as a sales representative. Rabilal, whilst employed by Southgate, had access to Southgate's full customer list, including their names, telephone numbers and contact persons

17 Reddy v Siemens, supra para 16 at 497C-D
18 Reddy v Siemens, supra, para 16 at 497

details. Rabilal copied at least some of Southgate's customer details from his work phone . Rabilal upon taking up employment with Arb on 7th February 2011, sent an sms to at least some of Southgate's customers. The sms reads as follows:

> "Hi everybody. Please note that this is my new cell number: 082 320 2553. My new email address is akashr@arb.co.za. My office line is: 031 9100200."

[24] There is no dispute that Rabilal concluded a restraint of trade agreement with Southgate and that he left Southgate's employment on 4 February 2011 to work for one of its competitors, Arb. The question which arises is whether Southgate has an interest which is sufficiently deserving of protection to render the enforcement of the restraint reasonable in the circumstances. In contending that it has a protectable interest, Southgate primarily relies on the alleged damage to its "customer connections" as well as the risk of disclosure of confidential information. Southgate professed fear is that the customers with whom Rabilal interacted whilst working as a salesman at Southgate will now take their business to Arb. Without doubt, this movement of customers would have to be causally linked to Rabilal's move in order for the

restraint undertakings to be invoked. To establish customer connections worthy of protection, it must be evident from the papers 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 . . ."*[19].

As stated in *Rawlins v Caravantruck*, establishing customer connections 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'.*[20]

[25] Whether the criteria are satisfied is a question of fact in each case, and in many, one of degree to be determined by: the duties of the employee; his personality; the frequency and duration of

19 *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709.
20 *Rawlins v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D–H.

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.[21]

[26] In order to qualify as a protectable interest, the relationship must not simply come into being because the former employee had contact with the employer's customer in the course of his or her work: the connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business.[22]

[27] In this matter, just as in *Rectron (Pty) Ltd v Govender & Another*, Southgate and Arb serviced the same customers, but for a few exceptions which in my view does not materially affect the

21 *Rawlins supra* at 541 G–I.
22 *Den Braven*, *supra* at 236 D–E.

outcome of the dispute between the parties. As Southgate and Arb share the same customers, it is not open to Southgate to assert an exclusive customer connection with any of these customers. At best for Southgate, both competitors may regard the relationships between their sales people and their common customers as a customer connection. One must, therefore, be all the more cautious in assessing the limits of Rabilal's influence, if any, over Southgate's customers. It is not enough, where customers are shared, to point to movement and blame Rabilal. Unless the enforcement of the restraint would prevent such movement, it would be unreasonable to preclude Rabilal from being employed by Arb, because no corresponding interest would, in fact, be protected thereby. This is an issue that falls pertinently into the third leg of the enquiry in *Basson*. For it is only where an employee is able to carry those common customers across in his pocket, that the customer connection may be regarded as worthy of protection.

[28] Based on the papers, the extent which Rabilal did interact with customers at Southgate could never cause them to move their business to Arb, the driving force in the market being price, and to

a lesser extent, availability of stock. Moreover, factually, none of Southgate's customers have followed Rabilal in the wake of his departure. According to Rabilal, there is little customer loyalty in the industry. Like most sales industries, price is the most important factor. As far as industries, municipalities, contractors and hardware stores are concerned, which make up the bulk of Arb's regular customers, a prerequisite to any order being placed is the initial procurement of at least three quotes from three separate suppliers. The standard procedure enables customers to establish the relative price of the goods on the market at any one time, and to place their order on the most competitive terms. Far from blindly following personalities, customers "shop around" to find the best prices on offer from the applicant and all its competitors.[23] In my view therefore it is not realistic for Southgate to maintain that price is not the driving force in the market.

[29] It is this bargaining tool which customers have at their disposal, the ability to play one wholesaler off against another, which ensures that prices remain competitive and that customers achieve the most favourable deal.[24] It should be easy to open an

23 *Rectron (Pty) Ltd v Govender and Another* [2006] 2 All SA 301 (D) para 35.7 at 318 where the Court was also faced with customers who were common to both competitors and considered the importance of customers' bargaining power.

24*Rectron*, *supra* para 35.7 at 319 where the learned McLaren J held that it is this aspect of the relationship between customer and supplier which allows the customer to say to its supplier at the

account with an electrical wholesaler. In addition, for some customers the value of their credit with a wholesaler may gradually improve over the years. Southgate is much smaller than Arb and will not satisfy their common customers with the same level of credit which Arb is in a position to offer. Moreover, Arb holds more stock than Southgate and is therefore able to offer its products immediately. It is the availability of stock which may also lead customers to move away from Southgate, as was the case with Electrotech. Therefore personal relationships could never clinch a deal in the face of a more lucrative offer, especially in today's market.

[30] Rabilal formed no "customer connections" at Southgate, this fact is borne out by the dearth of evidence before the Court that any of Southgate's customers have, in the two months since his departure from Southgate, followed him to Arb. Rabilal acquired the majority of his knowledge about customers in the electrical components industry from his work at Arb where he was employed from February 2000 to February 2008. In the seven years of his employment, Rabilal learnt everything he knows about the industry,

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appropriate time, "I can always go to my other supplier."

rising through the ranks from his initial appointment as a trainee to the position of general sales representative in July 2007. Rabilal did not meet any new customers when he moved across to Southgate, all of whom he had already met or known about from his years at Arb. In his affidavit he emphasised that during the two years of his employment at Southgate he did not form close relationships with any of his customers which included socialising with them, etc.

[31] At Southgate, customers deal with the same sales representatives more out of habit and convenience, but when one representative is on the road, the customer will deal with whoever is in the office. Moreover, sales representatives at Southgate did not have the authority to vary prices to the extent that they may have formed a close relationship with customers or influenced them to place orders with the applicant. This is most probably due to the fact that considerations of price outweigh considerations of personal influence. It should not be forgotten that Rabilal was also required to run almost all price reductions past Sprenger prior to providing quotes to customers. For all these reasons, the position held by Rabilal did not engender the kind of relationship that would carry customers with him. Significantly, when Rabilal moved across

from Arb to Southgate in March 2008 none of these customers with whom he had done business at Arb ceased placing orders with Arb, and followed him to Southgate. In this regard reference should be made to Rabilal's supplementary affidavit in which he denies any knowledge of Neville Nels or the business known as 'Rooms Electrical". Similarly, with this move, Southgate has failed to furnish any evidence of those customers diverted to Arb by Rabilal. There has been speculation that has been refuted with reference to the true facts, from the papers.

[32] A salient feature of Southgate's case against Rabilal is a claim that commission is payable to a sales representative for each order placed by a customer through that sales representative and this incentive compels the sales representative to see to it that the bond between him/her and the customer is maintained. Rabilal denies that he is entitled to a commission on his individual customer sales and points out that Southgate has misrepresented the true position because commission is only received on the total branch sales. What this means is that there is clearly no individual benefit for sales representatives in fostering relationships with customers. Significantly Sprenger in his replying affidavit admits

that Rabilal has described the commission structure more accurately and that commission is earned only on total branch sales and not individual sales. Southgate's contention that Rabilal was compelled to maintain the bond between him and his customers due to the commission earned from sales from these customers is therefore misconceived and should be rejected.

[33] I am acutely aware that Rabilal was responsible for sales in Southgate's business and the need for the restraint clause was to protect Southgate's interest and prevent industrial espionage by moving Southgate's customers with him to it's competitor, Arb. This would cause Southgate to go insolvent in no time. However Southgate loses sight of the fact that Rabilal initially moved over to it from Arb in 2008, Rabilal bringing with him the customers lists of Arb to Southgate. Whatever sympathy I may have for the family business of Southgate, is thrown out of the window, when I consider that the fundamental issue in this matter is the customer lists or at least 80% of them are common to both Southgate and Arb. It should be borne in mind Rabilal disputes that he dealt with approximately 70% of Southgates 125 customers. He contends that he only dealt with Southgate's general electrical market which accounts for 25% of it's overall business and in this regard he only

handled 70% of these customers. He denies that he dealt with the OHC customers. For this reason Southgate cannot lay claim to the customer list as an interest worthy of protection and I am not persuaded by Mr Camp that Southgate has discharged the onus of showing that it has an interest that is deserving of protection.

[34] While damage is not necessary to hold that a restraint is enforceable, it is relevant as to whether Southgate has in fact established a proprietary interest in customer connections. In *Rectron (Pty) Limited v Govender and Another*, it has held to be the "single most important factor".[25]

[35] The first of Southgate's fears, that Rabilal had caused its longstanding customer, Electrotech Electrical CC to redirect its business to Arb, is misconceived and incorrect. As is evident from the facts contained in Rabilal's and Arb's interim and answering affidavits, Rabilal played no role whatsoever in Electrotech's placing of orders for electric cables. It is clear from the evidence that:

a) Electrotech requested quotations for cables from

25 [2006] 2 All SA 301 (D) para 35.9 at 319

Southgate and Rabilal .

b) On 19 January 2011, Electrotech placed an order for materials and poles with Southgate.

c) Southgate confirmed that it would order the materials but advised Electrotech that it needed to source the conductor cabling from SA Asia Cable Company Limited in the Far East.

d) A letter of confirmation was sent to Electrotech by Southgate on 25 January 2011 advising that a delay of 6 weeks was expected on account of the conductor cabling being sourced from abroad. In the facsimile, Southgate requested confirmation that the time delay was acceptable.

e) On 26 January 2011, Electrotech wrote to Southgate cancelling the order of conductor cables. The reason for cancellation was due to the long waiting period for the cable… and that it could not wait for delivery as it had to meet a deadline on the project…".

f) As Arb was able to make the cabling available immediately, on 16 February 2011, Electrotech proceeded to place an order for a portion of the conductor cabling with Arb in accordance with the terms of Arb's original quotation.

g) Rabilal had nothing to do with the placing of the order with Electrotech and did not receive any commission for the order. In other words, enforcement of the restraint would have made no difference whatsoever to the outcome. Where no practical benefit is afforded to Southgate by enforcement, the prejudice to Rabilal of being rendered economically inactive (the third leg of the test in *Basson*) renders enforcement of the restraint contrary to public policy.

[36] Similarly, Southgate's fears that Rabilal has taken the business of Harbour View Electrical are assuaged when it is apparent that Arb closed its account with Harbour View on 2 February 2011. Avishkar Rabilal, the brother of Rabilal confirmed

that Harbour View placed orders with his new employer. Once again Southgate's (speculative) fears are dispelled when the true facts are known. And, it bears emphasising, enforcement of the restraint would again have no bearing on the Harbour View issue, since whether or not Rabilal remains in Arb's employ it poses no threat in relation to Harbour View. This has a bearing on the second leg of the test in *Basson* (infringement) as well as the third leg (the weighing of interests).

[37] Rabilal has also denied that he has had dealings with other customers named by Southgate, including Jack's Paint and Mervyn Padayachee. He disputes that he has attempted to poach one Neville Nels / Rooms Electrical, demonstrating that he doe not even know of such a customer. Southgate's own assertions about that customer are not borne out by the investigations conducted by Rabilal who points out that this customer is based in Pietersburg which is outside of KwaZulu-Natal.

[38] In the absence of any evidence that Southgate's former

customers are now placing orders with Arb, Southgate has assumed that those who have not placed orders since February 2011 are doing so as a consequence of the first respondent's departure to work for a competitor. It is evident from the facts however, that Southgate's conclusion is pure conjecture.

[39] If it is true that Southgate suffered a 20% drop in sales for the months of February and March 2011, then in my view this is not attributable to Rabilal diverting business from Southgate to Arb. The more cogent explanation for any downturn in Southgate's business is due to the fact it lost all three of its sales representatives, namely, Rabilal, his brother Avishkar Rabilal and Logan Ramachandradoo in its electrical section in February 2011. Avishkar Rabilal and Logan Ramachandradoo have taken up employment with competitors who are now servicing Southgate's customers, which in all probability is the cause of Southgate's drop in sales.

[40] Annexure "AR3" to Sprenger's replying affidavit, is a list of

customers who Southgate claims have failed to place any orders with it since February 2011. From the papers, it is evident that Rabilal has not dealt with any of the customers which are exclusive to Southgate since leaving its employ, rather he has been handed customers at Arb to canvas. Furthermore Rabilal has also not opened any new accounts at Arb nor sought to introduce any new customers to its business. To make matters worse Rabilal's brother Avishkar and Ramachandradoo who are working as sales representatives for Natal Electrical Supplies and All Electrical 4 Supplies respectively are presently doing business with almost all of the customers listed in annexure "RA5" of Sprenger's affidavit and other customers as well.

[41] There can be no suggestion that Southgate may assert a proprietary interest in cash customers, who are almost always once-off customers, and it is improbable that sales representatives, including Rabilal form relationships with them.

[42] In the circumstances I am of the view that none of Southgate's customers have been diverted to Arb and Southgate cannot assert a customer connection through Rabilal. Despite this

conclusion which would have made it unnecessary for me to deal with the other questions laid down in the test in *Basson's* case, I am compelled to consider the other issues raised by Southgate, particularly it's claim to trade secrets.

[43] As far as its trade secrets are concerned, Southgate has in its replying affidavit, belatedly and without any real conviction, also sought to assert a protectable interest in its price lists, costings, discount and trade settlements, which it alleges that Rabilal may take with him and use for the benefit of Arb. There is no explanation at all as to why any of the information identified truly constitutes confidential information in the requisite sense. Rabilal sets out with clarity the detail of his day to day activities whilst he was in Southgate's employ, and demonstrates that his knowledge was confined, firstly, so as to exclude any OHL products and also that Sprenger was the person who had knowledge of the kind of information which may be of assistance to a competitor.

[44] It is salutary to bear in mind that confidential information does not become confidential simply because the parties to an agreement refer to it as 'confidential information'. This is illustrated

by the following passage from *Cansa (Pty) Ltd v Van Der Nest* [26]*:*

> "*Respondent's counsel contended that the matters relied on by applicant were not secrets but matters of common knowledge in the business world. He relied on Heydon, the Restraint of Trade Doctrine, at page 107 where the learned author quotes the following –*
>
> > *'You can't have vanilla ice-cream without having ice-cream. You can't have business or trade secrets without secrets. You don't make the multiplication tables a secret merely by calling them a secret.'*

[45] In *Metre Systems Holdings Ltd v Venter and Another* [27] Stegmann J pointed out that:

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26 1974 (2) SA 64 (C) at 69 A-B
27 1993 (1) SA 409 W at 430E-H

> "*The knowledge gained by an employee of a trader relating to the method of conducting the business, and relating to the identity of the suppliers to such business, need not necessarily be confidential at all ...*"

[46] Significantly, in concluding the evaluation of Southgate's alleged proprietary interests (the first leg of the *Basson* enquiry) it must not be overlooked that by Southgate's own admission, it has no real proprietary interest in Rabilal either in the form of customer connections, or in the form of trade secrets. At paragraph 28 of its replying affidavit, Sprenger tellingly states:

> "*The Applicant would not have enforced the restraint against the First Respondent if the First Respondent had used his skills and experience by taking up employment elsewhere and even in opposition without having solicited Applicant's customers and causing harm to Applicant's business.*"

[47] The admission by Southgate gives the lie to its assertion of a legitimate protectable interest and reveals that the true motivation for seeking to enforce the terms of the restraint is not that it has a

proprietary interest recognisable in law, but its impression that Rabilal has solicited its customers and caused it to suffer a loss in business. That impression is, as a fact, incorrect, is evident from the papers.

[48] It is apparent from what has already been stated that Rabilal is not the cause of the applicant's downturn in business. The facts also reveal that none of Southgate's suspicions that Rabilal has been soliciting customers amounts to anything.

[49] Much is made in Southgate's affidavits of the text messages sent by Rabilal to its cellphone contacts. Rabilal's intention in sending the "group text" was not to divert customers, but only to pass on his new contact details to all his contacts. His intention is both credible and plausible given the number of contacts on his cellular telephone. Of the 120 contacts, only 27 were business companies, 23 of whom/which are customers common to both Arb and Southgate. The other business contacts comprised two suppliers, friends of Rabilal and one of Southgate's cash customers.

[50] Perhaps most importantly, however, there is no suggestion that any further text messages will be sent, indeed, on the contrary, Rabilal's explanation makes it plain that no further messages will be sent. Having regard to the fact that Southgate seeks a final interdict, the requisites for such relief have not been established: the text messages were sent before the application was launched. It is well established that an interdict cannot be granted in relation to prior conduct.

[51] The second question which arises, is whether such interest is being prejudiced by Rabilal should Southgate have demonstrated a protectable proprietary interest in either customer connections or confidential information which I have found it has failed to do. Rabilal's day to day to day responsibilities at Arb as a marketer on the road, are different from those he discharged at Southgate, as a salesman. Moreover, the fact that the majority of Southgate's turnover is derived from OHL business, with which Rabilal had no involvement whatever, whereas the majority of Arb's turnover is derived from the sale of electrical components and cables, is also relevant to a determination of infringement.

Lastly, the admitted overlap between customers of Southgate and Arb directly raises the question whether enforcement of the restraint against Rabilal, in circumstances where customers will stay or leave Southgate regardless, can ever be justified.

[52] The third question which arises is, (if Rabilal has caused prejudice to such interest) whether such interest weighs up qualitatively and quantitatively against the interest of Rabilal that he should not be economically inactive and non productive?. Whitcutt submitted that, in all the circumstances, Rabilal's interests in remaining economically productive manifestly outweigh Southgate's interests (if any) in its customer connections and confidential information. The following relevant facts should be considered - the circumstances under which the restraint undertakings were obtained from Rabilal, when it was cleared by Sprenger that the restraint undertakings would not be enforced against Rabilal for reasons which are explored in the papers and which are completely inconsistent with Southgate's concerns about protecting its legitimate proprietary interests. Furthermore Rabilal has been involved only in the electrical industry for his entire working life. He has no experience in any other field or industry.

He is the sole breadwinner for his extended family. He cannot relocate outside of KwaZulu-Natal. In my view the enforcement of the restraint will confer no proportionate benefit upon Southgate, whilst seriously affecting Rabilal's ability to be economically productive.

[53] I agree with Mr Whitcutt's submission that this application has little to do with the protection of legitimate proprietary interests but has much to do with bad blood and animosity. Indeed, on Southgate's own version it would have been content for Rabilal to have taken up employment with a direct competitor, provided that no approaches were made to customers. As is demonstrated in Rabilal's papers, he has not solicited Southgate's customers and Southgate contentions in that regard are mistaken and should be rejected. Moreover, properly understood, a customer connection is in any event of very limited influence in the industry. There is, furthermore, no discernible proprietary interest in confidential information. In the circumstances, enforcement of the restraint would weigh heavily against Rabilal without protecting any corresponding interest on the part of Southgate which is contrary to public policy.

[54] In the result Rabilal is entitled to the discharge of the rule. During argument Southgate sought costs from Arb as at 18th March 2011 when the latter withdrew from the case. I do not agree with this argument for the reasons aforesaid, particularly since Southgate was in no position to seek any relief from Arb whatsoever. In my view the restraint clause against Rabilal can have nothing whatsoever to do with Arb. In fairness Arb is entitled to its reasonable costs up to the time of its withdrawal from the case. Accordingly I make the following order:

a) the application against First Respondent is dismissed with costs, such costs to include the costs consequent upon the employment of two Counsel;

b) the Applicant shall pay Second Respondent's costs up to and including 18th March 2011.

P GOVINDASAMY AJ

For Applicant: Advocate A Camp
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For Respondent: Advocate C Whitcutt

Advocate J Nicholson

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