IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WILLEM BASSON .................... APPELLANT

AND

FARIED CHILWAN .................. FIRST RESPONDENT

SEDICK CHILWAN .................. SECOND RESPONDENT

THABID CHILWAN .................. THIRD RESPONDENT

ARDIEL CHILWAN .................. FOURTH RESPONDENT

COACH-TECH CC ................... FIFTH RESPONDENT

Coram: BOTHA, VAN HEERDEN, MILNE, EKSTEEN *et*

NIENABER, JJ A

Heard: 8 March 1993

Delivered: 17 May 1993

# J U D G M E N T

EKSTEEN, JA :

This appeal concerns the enforceability of a restraint of trade clause in an agreement entered into between the appellant and the first four respondents. The respondents brought an application on notice of motion before the Cape Provincial Division against the appellant to enforce this clause. The application succeeded and the present appeal is against that order.

The appellant failed to file his power of attorney and lodge the record of the proceedings before the Court a quo timeously, and was also out of time in providing security for the

respondents' costs of appeal. He was there-fore compelled to bring an application for the condonation of his failure to comply with the Rules of this Court. The respondents oppose the condonation solely on the basis that the appellant is unable to show a prospect of succ-ess on the merits of the appeal. This entails a consideration of the merits and therefore of the appeal itself.

From the papers-filed it appears that the first four respondents ("the Chilwans") were the owners of Chilwans' Bus Service "which at the time operated approximately 100 buses count-ry wide in South Africa". The appellant

("Basson".) was a man with a wealth of experience in the design and construction of bus and coach bodies. From his answering affidavit it appears that he obtained a Technical Matriculation Certi-ficate at the Technical High School at Oudtshoorn in 1958. He then became an apprentice plate metal worker at the factory of African Explosives at Somerset West. On completion of his app-renticeship in 1961 he entered the employ of a company called Busaf. They were bus body build- -ers in Port Elizabeth. He seems to have remain-ed in their employ for 18 years - at first in Port Elizabeth, then in Germiston and ultimately in Letaba. He describes Busaf as one of the

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largest bus body builders in the country.. While stationed in Germiston he trained per-sonnel in the construction of bus bodies with a view to establishing a bus body construction industry for Busaf in Letaba, and then he work-ed for them in Letaba for seven years. He does not say what prompted him to terminate his employment with Busaf but in 1980 he and "some others" took over a bus building company in Randfontein. This venture was not a success, and so in 1982 he went to work for Muller Engin-eering - another bus construction company - in Pretoria. He progressed in their employ to the position of production manager and designer

of buses, but in 1986, after a mere four years, he left. He then went to work for the Sentraal-Suid Kooperasie in Swellendam as their workshop manager. This only lasted for a year. In 1987 he joined du Preez Busdienste in Stellen-bosch where he designed and built buses for them. While thus employed, he says, the Chil-wans approached him and asked him to build a bus for them. He did, and they were apparently so satisfied with his work that discussions were set in train with a view to Basson joining the Chilwans in setting up a bus construction firm which would build busses on a large scale. In their replying affidavits the

Chilwans say they met Basson while he was work-ing for a firm called Neurock Engineering in Paarl and that it was Neurock Engineering that built a bus for them. They also attach to their replying affidavits an affidavit by one Joubert who alleges that during 1970 or 1971 Basson work-ed for a firm called Gelding Investments in the Strand, and that thereafter he established a firm called Basson's Crafts in Mossel Bay where he built boats and made glass-fibre canopies. These allegations, however, are not contained in the Chilwans' founding affidavits but have been raised for the first time in their reply-ing affidavits. Basson did not apply for leave

to file further answering affidavits as he could well have done. In fact, in the circumstances of this case, where the Chilwans were simply relying on Basson's breach of his contractual undertaking for the relief they sought, and where the onus was on Basson to justify such breach, one might have expected Basson to have applied for leave to file further replying affidavits, and such relief could hardly have been refused him (cf Minister van Wet en-Orde v Matshoba 1990 (1) SA 280 (A) at 293 B-E). He did not, however, do so and I am prepared, for the purposes of this judgment, to accept that the matter must be decided on the three sets of

affidavits before us, and that the ordinary rules of procedure in such a case will apply. These rules have been crystallised in the well-known dictum by Corbett JA in Plascon-Evans Paints Ltd v Van Riebeeck Paints (pty) Ltd 1984 (3) SA 623 (A) at 634 H - 635 C where he held that -

> "where in proceedings on notice of motion disputes of fact have arisen on the affi-davits, 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. ... 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. ... If in such a case the respond-ent has not availed himself of his right to apply for the deponents concerned to be

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> called for cross-examination under Rule 6 (5)(g) of the Uniform Rules of Court .... 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......."

Applying these principles in the pre-sent matter I shall not have regard to those allegations to which I have referred and which were raised for the first time in the replying affidavits. On Basson's own showing, however, it appears that in the nine or ten years imme-diately preceding the conclusion of the agree-ment presently under consideration, and after he had left the employ of Busaf, he had

been associated with four different firms, one of which was not engaged in bus construction at all.

The negotiations between Basson and the Chilwans aimed at the establishment of a joint venture to construct buses on a large scale would seem to have commenced late in 1988 and to have been concluded early in 1989. From the agreement itself it appears that du-ring the negotiations it was contemplated by the parties that the proposed business would be conducted as a close corporation in which the four Chilwans and Basson would have an equal interest. This close corporation ("Coach-Tech")

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which is the fifth respondent, was incorporated on 16 January 1989, so the negotiations must have commenced before this date. The agree-ment itself was only concluded after that date. The Chilwans simply aver that it was concluded "early in 1989" whereas Basson says to the best of his recollection it was signed in "about May 1989". Nothing, however, turns on the exact date. Each of the parties is referred to in the agreement by his first name - Basson being referred to as "Willem".

The agreement provided i a that the interest of each member - i e the four Chilwans and Basson - would be 20%, (clause 3.1) and

that each member would pay a nominal contribution of R20 "to the corporation" (clause 3.3). Each of them was "hereby appointed and employed by the Cor-poration" as an "Executive" of Coach-Tech (clause 4.1) with equal rights "to participate in the carrying on of the business of the corporation" (clause 4.2.1) and "to manage the business of the corporation" (clause 4.2.3). It also provided in clause 4.5.3 that -

> "4.5 Each Executive shall for the duration of each Executive's employment - ......
>
> 4.5.3 exercise the utmost good faith to-wards the Corporation and use his best endeavours to promote its in-terests both in carrying out its duties hereunder and also in all his dealings with the Corporation; in this regard he shall not devote

any time or attention to any other concern or business unless so authorised by resolution of Members;"

The restraint clause which gives rise to the central issue in this case is Clause 11 which reads as follows:

"CONFIDENTIALITY AND RESTRAINT

11.1 Willem acknowledges that, it is in the interest of the protection and maintenance of the Corporation's Trade Secrets (which for the pur-pose hereof means the Corporation's goodwill, technical and busi-ness know-how, trade secrets, con-fidential information and the Cor-poration's intellectual property in general), to maintain confi-dentiality and therefore Willem undertakes to the Corporation that -

11.1.1 he shall not during or at any time

after his employment by the Corporation, either himself utilise and/or directly or indirectly divulge and/or disclose to any third party (except as may be necessary in accordance with the nature of Willem's employment as executive with the Corporation ('employment'))any of the Corporation's Trade Secrets;

11.1.2 any trade secrets, including those acquired by the Corporation from a third party or any documents or - records (including written instructions, drawings, notes or memoranda) pertaining to the Trade Secrets of the Corporation which are made by Willem or which came into Willem's possession during the period of Willem's employment with the Corporation, shall be deemed to be the property of the Corporation, and shall be surrendered to the Corporation on demand, and in any event on the termination of Willem's employment with the Corporation and Willem will not retain any copies thereof or extracts therefrom;

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11.1.3 he shall not, within a period of 5 years of the Termination Date (as hereinafter defined) and within the Territory (as herein-after defined), directly or in-directly offer employment to or cause to be employed any person-tion:

11.1.3.1 as at the Termination Date; or

11.1.3.2 at any time within 2 years immediately preceding the Termination Date;

11.1.4 he shall not directly or indirectly for a period of 5 years after the Termination Date either solely or jointly:

11.1.4.1 be employed by; or

11.1.4.2 carry on or assist fi-nancially or otherwise be engaged or concerned or interested in; or

11.1.4.3 act as consultant or ad-viser to; or

11.1.4.4 act as agent or repre-

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sentative for;

any person or firm or body corporate or incorporate which within the Territory carries on:

11.1.4.5 the business of manufacturing and/or refurbishing and/or distribution of buses albeit light, medium or heavy duty buses and/or coaches of whatever nature.

11.1.4.6 any business which is similar to or in competition with such business as the Corporation may be carrying on at the Termination Date.

11.2 For the purposes of this clause 11:

11.2.1 'the Termination Date' means the date upon which-Willem ceases to be an employee of the Corporation for whatsoever reason;

11.2.2 'the Territory' means the following areas as presently constituted, namely the Republic of South Africa, South West Africa/Namibia, Ciskei, Venda, Transkei, Lesotho, Swaziland and Zimbabwe.

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11.3 The restraints imposed upon Willem in terms of this clause 11 shall be deemed in respect of each part thereof to be separate and separa-tely enforceable in the widest sense from the other parts thereof and the invalidity or unenforce-ability of any clause or part there-of shall not in any way affect the validity or enforceability of any other part of the clause or the agreement.

11.4 Willem:

11.4.1 acknowledges that he has carefully considered the provisions of this clause 11; and

11.4.2 agrees that this clause is, after taking all relevant circumstances into account, reasonable and that if he should at any time dispute the reasonableness of this clause, then the onus of proving such un-reasonableness shall be upon him.

11.5 The restraints imposed on Willem in terms of this clause 11 shall

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> not preclude Willem from holding by way of <u>bona fide</u> investments any shares, stocks, debentures, debenture stock or other securi-ties of any companies which are quoted and dealt with on any recog-nised Stock Exchange; provided that such holding (which shall in-clude any interest in any such holding), when added to any hold-ings of any relative of Willem, does not exceed 5% of the total shares, stock, debentures, debenture stock or other securities in issue of the class in question; provided always that nothing herein con-tained shall permit Willem from directly or indirectly being acti-vely engaged or concerned or inter-ested in any way in the affairs or management of any such public com-pany."

The parties - i e the Chilwans and Basson - accepted that the finance required to

set up a factory for the construction of buses, and for conducting the business generally would be provided by the Chilwans. Basson had no financial responsibility towards the business - even his R20 contribution required by clause 3.3 was paid by the Chilwans. Basson was to be the production manager responsible for the design and layout of the factory and for the design and construction of buses. The fourth respondent . ("Ardiel Chilwan") was appointed ad-ministrative manager.

Basson alleges in his answering affi-davit that despite his one-fifth interest in Coach-Tech, he received no other benefit from

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it. He says that he worked for a salary of R2500 a month and that the Chilwans treated him as a mere employee of the corporation. This is denied by the Chilwans in their replying affi-davit. They say that initially he received a salary of R3000 a month which was increased to R4000 a month from 1 June 1990. In addition he received a motor car for his personal use. They also deny that he was treated as a mere employee, and allege that in addition to attending all management meetings Basson also played an active part in the running of the business. These allegations, as I have pointed out, were made in the Chilwans' replying affi-

davits, but they receive considerable support, in certain respects at any rate, in other passa-ges of Basson's answering affidavit. In deal-ing with his resignation as "director" and his departure from the firm he refers to the handing over of the keys of the "company car" that he used, to Coach- Tech's legal adviser Mark Gordon. One may therefore accept that the use of a motor car also formed part of his remuneration toge-ther with whatever salary he received. Further-more, in dealing with the dispute which arose between himself and the Chilwans in September 1990 he alleges that one of Ardiel Chilwan's complaints was that he (Basson) did not keep

Ardiel Chilwan informed of his daily activities and the way in which he assigned duties to his workmen.

> "Dit is korrek" he goes on "dat ek horn nie hierin geken het nie. Die rede daarvoor is dat die produksie van die busse was aan my oorgelaat, en in elk geval was hy voor September 1990 baie selde daar om geraad-pleeg te word."

In another passage of his answering affidavit Basson repeats that Ardiel Chilwan's complaint that Basson did not inform him of his daily acti-vities in the workshop and the way in which he assigned duties to his workmen, was to a large extent true, but that it was impossible to refer to him because he was seldom there. These alle-

gabions are hardly consistent with his earlier assertion that he was treated as a mere employee. They rather tend to show that Basson was given a pretty free hand in running the business, and that he was very much the production manager and a "director" of the firm, not only in name but also in deed. In these circumstances it seems to me that the apparent dispute of fact on the papers is not a real or genuine one, and that in the absence of any request by Basson to file a further set of affidavits, or an application to call Ardiel Chilwan for cross-examination, the Chilwans' allegations in these respects may also be accepted in determining the issue between

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the parties.

The rift between the parties came in September 1990. The Chilwans complained of Basson using the firm's employees for "doing private work for his own account" more particu-larly for a Mr Johan Fourie, and for not liasing with Ardiel Chilwan in concluding business deals on behalf of Coach-Tech. Basson apparently proffered no explanation for his conduct when confronted with these complaints on 4 September 1990. He alleges that he was not given a chance to explain. He does proffer an explanation in his answering affidavit. It is not necessary to consider the pros and cons of this dispute

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but suffice it to say that it led to Basson re-

signing as a director of Coach-Tech. He agreed,

however, to remain on as production manager un-til

he had completed two coaches which were under

construction. He finally left Coach-Tech's employ

on 7 or 8 January 1991. Later that same month he

commenced working for a firm called Engineering

Agencies, and when he visited the premises of

Coach-Tech towards the end of Jan-uary 1991 he told

Ardiel Chilwan that he was working for Engineering

Agencies as a supervisor. At that stage Ardiel did

not consider Engineer-ing Agencies to be a

competitor, as they were merely suppliers of steel

and tubing. Very

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soon thereafter the Chilwans received further intelligence on this score and when their legal adviser, Mark Gordon, phoned Mr Nick Rust, a director of Engineering Agencies, on 13 February Rust told him that Basson had been employed by Engineering Agencies for the specific purpose of building a super-luxury coach. He assured Gordon, however, that this would not be in com-petition with Coach-Tech as the coach was intend-ed for the export market. In an answering affidavit Rust concedes that this was not the truth; that his firm was conducting a feasibi-lity study for the building of luxury buses for tour operators in South Africa, and that he

considered Coach-Tech to be a possible competi-tor. That was why he did not want to tell them what the true position was. Two days later the same information which Rust had conveyed to Gordon, was conveyed to Ardiel Chilwan by one Wehmeyer, a sales manager of Engineering Agen-cies, who had been sent by Rust for that very purpose. Ardiel Chilwan immediately realised that this proposed business would be in direct competition with Coach-Tech and that Basson was likely to play a significant role in its estab-lishment. A letter of demand dated 21 February 1991, was written to Basson by the Chilwan's attorneys in which he was reminded of the terms

of his agreement with the Chilwans and referred

to his breach of that agreement by undertaking

the construction of buses for Engineering Agencies,

and which concluded as follows:

"7 In the circumstances our client demands that not later than 17h00 on Friday 22 February 1991 -

7.1 you deliver to our offices the ori-ginals or copies of any documents, records, instructions, drawings or memoranda belonging to our client or pertaining to its trade secrets;

7.2 you resign your present employment immediately;

7.3 you furnish our client with a written undertaking that you will not:

7.3.1 breach any of the provisions of the agreement set out above, and in particular, that you will not be asso-ciated, whether directly or indirectly, with Engin-eering Agencies or any other

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person, firm or body cor-porate which, within the Republic of South Africa, carries on the business of manufacturing, refur-bishing or distributing busses or coaches of what-ever nature or with any business which is similar to or in competition with, Coach Tech CC's business, namely the manufacture and refurbishment of passenger busses; 7.3.2 either directly or indirectly offer employment to any person who was employed by Coach Tech CC in January .1991.

8 Should you fail or refuse to comply with the above timeously, our client shall, without further notice, apply to Court for immediate relief and a costs order against you."

When no such undertaking was forthcoming the

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present application followed.

In the application the Chilwan brothers were cited as the first four applicants and the close corporation Coach-Tech as the fifth applicant. The restraint clause (clause 11 of the agreement) however provides that the undertaking not to be associated with any competitor of Coach-Tech was an undertaking given by Basson to Coach-Tech and it might, at first blush, appear that only Coach-Tech could enforce it. If however one has regard to the whole agreement it would seem that it may well be seen as an association agree-ment as provided for in section 44 of the Close Corporations Act No 69 of 1984 ("the Act").

On this view the agreement would therefore constitute a contract between the corporation and the members, and between the members themselves. They might in effect therefore be seen as co-partners in the under-taking. In such circumstances it would seem that any member can hold the corpora-tion and the other members to the terms of the agreement, and that any member can be held -to the agreement by the corporation or by any other member. ("Introduction to the Close Corporations Act" by H J Delport and J T Pretorius p 33.) In any event the effect of the agreement we are considering was to

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bind Basson not only to Coach-Tech but also to each of the Chilwans. The four Chilwans and Coach-Tech were therefore properly cited as applicants before the Court a _quo_, and as respondents before us.

In his answering affidavit Basson alleges that he was then employed by Neulux Coaches (Pty) Limited - apparently a subsidiary of Engineering Agencies - and that he was designing super-luxury buses for them,-which were being produced under his super-vision. These buses, he contends, are more luxurious than those he produced for

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Coach-Tech and he seems to imply that for this reason Neulux would not really be in competition with Coach- Tech. The buses he built for Coach-Tech he describes as "semi-luxury buses". The Chilwans deny this in their replying affidavits and contend that they too build and have built super-luxury buses that are as luxurious as any. In his answering affidavit, however, Basson attaches a brochure issued by Coach-Tech in order to show how simple bus construction really is. This brochure reflects that Coach-Tech undertakes to build three types

of buses viz a "utility bus", a "semi-luxury bus", and a "super luxury bus" or coach. Photographs of the three types of buses and of their interior appointments are included in the brochure. Here again it seems to me that there is no real or genuine dispute of fact and that Neulux Coaches is in direct competion with Coach-Tech. In fact, as I have indicated, Rust conceded as much.

The restraint clause provided i a that Basson would not, after termination of his association with Coach-Tech, "offer employment to or cause to be employed by any person who

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was employed by the corporation". The Chilwans alleged that shortly after Basson left Coach-Tech his brother Andries Basson, his son Leon Basson, and an auto-electrician called Hayman, all of whom had been employed by Coach-Tech, left and went to work for Engineering Agencies. This, it was suggested, was due to the machinations of Basson. Basson denied any involvement, and the Court a quo found that it had not been shown that Basson could be held responsible for these people leaving. This finding was not contested before us and need not be referred to any further.

So too, the Court a quo found that it

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had not been shown that Basson took any documents away with him when he left Coach-Tech and refused to make an order for the return of documents. This aspect need not, therefore, detain us any further.

The order made by the Court a quo reads as follows:

"IT IS ORDERED: 1 That the Respondent is interdicted and restrained from:

1.1 Utilising and/or directly or indirectly divulging and/or disclosing to any third party, and in particular ENGINEERING AGENCIES, or NEULUX COACHES (PTY) LTD, any of the Applicants' trade secrets in the form of designs of buses built for Fifth Applicant, its construction methods, the names of its customers or clients with whom Respondent was in contact and its

cost and pricing structure;

1.2 For a period of five years from 7 January 1991 directly or indirectly offering employment to or causing to be employed, any person who was em ployed by the Fifth Applicant as at 7 January 1991 or at any time within two years immediately preceding the said date;

1.3 Directly or indirectly, for a period of five years after 7 January 1991 either solely or jointly:

(a) being employed by; or

(b) carrying on or assisting financially or otherwise be engaged or concerned or interested in; or

(c) acting as consultant or adviser to; or

(d) acting as agent or representative

for ENGINEERING AGENCIES, NEULUX COACHES (PTY) LTD or any person or firm or body corporate which, within the Republic of South Africa, Namibia, Ciskei, Venda, Transkei, Lesotho, Swaziland or Zimbabwe, carries on the business of manufacturing or refurbishing and/or

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distributing buses, albeit light,

medium or heavy buses and/or
coaches of whatever nature.

2 That the Respondent is forthwith to cease employment or association of any kind with Engineering Agencies or Neulux Coaches (Pty) Ltd in respect of their bus building activities.

3 That the Respondent is to pay the Applicants' costs, including the costs of two counsel."

It was in essence the Chilwans' case -and indeed this seems to be common cause - that they relied heavily on the knowledge, experience, and skill of Basson in the construction of buses and coaches, in embarking on this venture. Relying on his good faith and continued association with Coach-Tech, they were prepared to risk a very considerable financial investment in the business. It is not contested that between the

four of them they invested more than R1 million in setting up Coach-Tech and its business, and, in addition, accepted personal liability for substantial debts incurred by it. Despite the fact that Basson made no financial contribution at all, he became in effect an equal partner with the Chilwans by virtue of the skill and experience which he was going to contribute to the venture. Their case, already made in much the same way in their founding affidavit, is summed up in a passage in their replying affidavit. Although it appears in the replying affidavit, it is, as I have indicated, to a large extent common cause, or it is

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not contested by Basson - in fact he does not join issue with the Chilwans in this respect. In this passage they say:

> "1.5 It was recognised by all concerned from the outset that the new business would be heavily dependent on Respondent's expertise and that, should he leave it, the whole venture would be in jeopardy. While there was no way of locking Respondent into the venture permanently, my brothers and I at least wanted the assurance that if he were to leave it, we would not be confronted with him as a competitor in building and marketing the very vehicles or services such as refurbishment and reconditioning which we had joined forces to provide.
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> 1.6 It was against this background that the restraint clause was incorporated into the contract. My brothers and I were not willing to go into the venture without such protection. Respondent, who is not an unsophisticated

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> man, understood our concern and the implications of the clause in question and was completely agreeable to the restraint which was imposed upon him."

Basson's reply to this case is contained early in his answering affidavit where he says:

> " ... die enigste uitwerking van die beletsel bevat in paragraaf 11 van Aanhangsel 'A' by Vierde Applikant se Beedigde Verklaring, is dat ek daardeur verhoed word dat ek my al-gemene kennis en vaardigheid en ondervind-ing in die busboubedryf tot my eie voordeel kan gebruik en my bestaan maak in die ambag waarin ek reeds ongeveer 30 jaar werk. In-aggenome al die omstandighede waarna ek hier-onder verwys, sou dit onredelik en strydig met die openbare belang wees om voormelde beletsel af te dwing."

In seeking to make their case on the affidavits the Chilwans sought to rely on

Basson's possible misuse of his knowledge of Coach-Tech's trade secrets, methods of production, pricing structures, and clientele to their detriment. Basson denied that there were any such trade secrets. He contended that the knowledge involved in the construction of the busses and the methods of production, was knowledge which he had acquired over the years and which he had brought with him to the firm. He had acquired no new knowledge in the form of trade secrets from Coach-Tech nor had the method of production been any different from what he had been accustomed to over the years. As far as the pricing structure was

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concerned he alleged that that had been left largely to the Chilwans and that he did not really concern himself with this aspect of the business. As regards his knowledge of Coach-Tech's customers, Basson concedes that he did have some dealings with them while designing and constructing their buses, but says he was not involved in canvassing for customers. His knowledge of Coach-Tech's customers was therefore limited and could hardly be used by him to Coach-Tech's detriment.

The Court a quo found that in arguing the matter before it the Chilwans did not "seek to rely on the protection of any trade secrets

in the strict sense of that term" but sought rather to protect a "proprietary interest", and a "threat" to their goodwill should Basson "join a rival firm". It seems to me that the learned Judge's use of the expression "trade secrets in the strict sense of that term" was prompted by the extended definition of "trade secrets" contained in clause 11.1 of the agreement between the parties. That extended definition included "goodwill" which would not ordinarily be regarded as a "trade secret". In the light of Basson's denials to which I have referred and the finding of the Court a quo, I shall accept that there are no trade secrets

which Basson might misuse. I shall also accept that the methods of production require no protection, and that Basson's knowledge of Coach-Tech's pricing structure and of its customers is so cursory and of such a limited ambit that it could not be used in practice to the detriment of Coach-Tech. As I have indicated, the Chilwans' case was that in embarking on what was for them, a new and expensive venture, they relied heavily on the skill and knowledge, and on the personal reputation of Basson as a coach-builder in order to promote and securely establish the new firm. In so doing they looked to the prospect of establishing a name and a

goodwill which would attract customers because of the quality of coaches they hoped to produce. They realized that they could not "lock him into the venture permanently" and that "a claim for damages against Respondent personally will be worthless", and so the restraint clause was included so as to ensure that should he leave the firm he would not compete with them in the coach construction market. Basson was fully aware of this state of affairs - as appears from his own affidavit -and recognized in clause 11.4.2 of the agreement that "taking all relevant circumstances into account", the restraint clause was reasonable.

The English law as to the validity and

enforceability of restraint of trade clauses in contracts is reflected in decisions such as Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd (1894) A.C. 535; Mason v Provident Clothing and Supply Co Ltd (1913) A.C. 724 and Herbert Morris Ltd v Saxelby (1916) 1 A.C. 688. In essence it amounted to this, viz that the public interest demanded that every person should be allowed to carry on his trade freely, and that therefore all agreements in restraint of trade were prima facie void. They could only be justified, and the Courts would only enforce them, if the party seeking to enforce the restraint could show that it was reasonable

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_inter partes_ and reasonable in the interest of the public. Although in _Mason v Provident Clothing and Supply Co Ltd_ (_supra_) and _Herbert Morris Ltd v Saxelby_ (_supra_) the Court seemed to hold that the onus of proving reasonableness _inter partes_ rested on the party seeking to enforce the restraint clause while the onus of proving that the clause was contrary to public policy rested on the party alleging it, the decision in _Esso Petroleum Co Ltd v Harper's Ga-rage.(Stourport) Ltd_ 1968 A.C. 269 held that there could be no real separation of these two considerations and that the onus resting on the party seeking to enforce the clause required him

to show that it was reasonable not only _inter partes_ but also that it was reasonable in the public interest.

Earlier decisions in our own Courts tended by and large to follow the English law in this respect to a greater or lesser extent. In later years, however, this approach was dissented from in cases such as _Roffey v Catterall_, _Edwards and Goudre (Pty) Ltd_ 1977 (4) SA 494 (N) and _Drewtons (Pty) Ltd v Carlie_ 1981.(4) SA 305 (C). In these cases it was held that agreements in restraint of trade were not void ab _initio_ but binding on the basis of _pacta sunt servanda_ unless the party seeking to avoid them could show

that they were against public policy. In Roffey's case (supra) Didcott J refers to the dictum of Jessel M R in Printing and Numerical Registering Co v Sampson (1875) L R 19 Eq 462 with approval, where the learned Judge said at p 465 -

> "If there is one thing that more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this para-mount public policy to consider - that you are not lightly to interfere with this freedom of contract."

In weighing up the public interest involved in the principle of freedom of trade against the

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sanctity of contracts, Didcott J came to the conclusion (at p 505 C-H) that "South African law prefers the sanctity of contracts" and he went on to stress the importance in the public interest that "people should keep their promises". The principle that pacta sunt servanda, particularly where parties contract on a basis of equality, is generally accepted as an important part of our Roman-Dutch law and stems from the basic requirement of good faith. It is grounded therefore not only in law but also in morality.

In Magna Alloys and Research (S A) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) this

Court held (at p 897 F -898 D) that the approach of the English law that agreements in restraint of trade were _prima facie_ void and that an onus rested on the person seeking to enforce them to prove their reasonableness _inter partes_ and in the public interest, was not part of our law. It was held that in our law such agreements were _prima facie_ enforceable and that an onus rested on the party seeking to avoid the restraint clause to prove that its enforcement would be contrary to the public interest. The public interest must be the touchstone for deciding whether the Courts will enforce the restraint clause or not. The party seeking to

avoid the contractual obligation to which he had solemnly agreed, should therefore be required to prove that the public interest would be detrimentally affected by the enforcement of the clause (p 892I - 893D). The mere fact that the clause may be unreasonable inter partes is not normally a ground for attacking its validity, since the public interest demands that parties to a contract be held to the terms of their agreement (p 893 H-I). A second consideration however is this: that it is also generally accepted that a person should be free to engage in useful economic activity and to contribute to the welfare of society by the

exercise of the skills to which he has been trained. Any unreasonable restriction on such freedom would generally be regarded as contrary to public policy. In deciding on the enforceability of a restraint clause the Court would be required to consider both these aspects in the light of the circumstances of each particu-lar case (p 894 B-E). Where public interest is the touchstone, and where public interest may change from time to time, there can be no numerus clausus of the circumstances in which a Court would consider a restraint on the freedom to trade as being unreasonable. There can be no justification, therefore, in the

ordinary course, for limiting the concept of reasonableness to cases where a party has knowledge of trade secrets or trade connections or the established customers of a firm. With the public interest as the touchstone the Court will be called upon to decide whether in all the circumstances of the case it has been shown that the restraint clause should properly be regarded as unreasonable.

The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible, was again stressed by this Court in Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at p 9 B-C, where Smalberger JA remarked

i a that -

> "the power to declare contracts contrary to public policy should be .... exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power."

Where parties to an agreement in restraint of trade contract on a basis of equality of bargaining power, without one party being inhibited by what might be regarded as a position of inferiority as against the other party, Courts,it has been held, will be less inclined to find that a clause, which may be considered to work unreasonably _inter partes_, is contrary to public policy and

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therefore unenforceable, than in the case where one of the parties may well be considered to have contracted from a position of inferiority.. Contracts between an employer and an employee may often fall into this latter category (New United Yeast Distributors (Proprietary) Ltd v Brooks and Another 1935 W L D 75 at 83-84; Van der Pol v Silbermann and Another 1952 (2) SA 561 (A) at 571E - 572A; Wohlman v Buron 1970 (2) SA 760 (C) at 764; Malan en Andere v Van Jaarsveld en 'n Ander 1972 (2) SA 243 (C) at 246 A - 247F).

The difference of approach is often found where the object of the restraint is to

eliminate competition _per se_. Where the parties contract on an equal footing, as was the case in the _New United Yeast Distributors_ case, (_supra_) the restraint has, in the past, normally been upheld. In that case the object was simply to reduce competition in the yeast trade, and in enforcing the clause the learned Judge (Green-berg J) relied heavily on a judgment of Scrutton L J in _English Hop Growers Limited v Bering_ (1928) at 2 K B 174 in which a clause designed to eliminate competition among hop growers was upheld. On the other hand clauses in a contract between an employer and his employee aimed at achieving the same result i e the avoidance of

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competition with the employer, have, in the absence of any other ground such as the possession of trade secrets, knowledge of trade connections or customer contact, not been enforced (cf Gordon v Van Blerk 1927 T P D 770; Aling and Streak v Olivier 1949 (1) SA 215 (T) and Highlands Park Football Club Ltd v Viljoen and Another 1978 (3) SA 191 (W)).

An agreement to protect one party from ordinary trade competition by the other is therefore not an illegitimate aim to pursue (Forman v Barnett 1941 W L D 54 at 60) and is not per se contrary to public policy. Where parties contract on a basis of equality of bargaining power

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the principle of pacta sunt servanda will find strong application in the absence of some other factor of public policy. The other principle of freedom of trade will not in every case be sufficient to outweigh the sanctity of one's contractual undertaking. Whatever the reason for the difference of approach where the parties do not contract on a footing of equality of bargaining power in the past may have been or how it will be affected by the new approach in the light of the Magna Alloys case (supra) need not be considered, since in the present case the parties clearly contracted on a footing of equality. The Chilwan brothers with their extensive bus

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service were desirous of starting a bus construction enterprise - not only to supplement and extend their existing service, but also to provide busses and coaches for the South African market. They had become acquainted with Basson as a result of the bus which he had built for them through Du Preez Busbou or Neurock Engineering (whichever it may have been), and were im-pressed by his ability. They lacked the expertise required to conduct a bus construction industry and were particularly keen to persuade Basson to join in the venture. His wealth of experience and skill in the bus construction industry would be an important, if not an

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indispensable asset in the venture. In order to secure his association and to provide a viable and secure infrastructure for the undertaking, they were prepared to invest a considerable sum of money - in excess of R1 million. Basson's connection with the firm, would, together with this investment, be a significant component in building up a sound reputation for the fledgling firm in the early years of its existence. Basson, they realized, was not a man of any financial means, and, they allege in their founding affidavit, "a claim for damages against the Respondent (i e Basson) personally will be worthless." This allegation is not

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contested by Basson in his answering affidavit. The best they could do in the circumstances, to discourage Basson from breaching his contractual obligations and to protect their investment, they considered, was to include a restraint of trade clause so as to ensure that should Basson leave the firm, he would not go into direct competition with them.

This seems to me to be a reasonable and legitimate consideration. The geographical ambit of the restraint clause and the period of its duration have not been placed in issue and need, therefore not be considered.

Basson was not a servant of Coach-Tech but an

executive "director" of the firm. To seek to protect the firm which as I have indicated was in the nature of a partnership, from competition by him in all the circumstances was therefore a legitimate and reasonable claim for the Chilwans to pursue.

I am not persuaded that Basson has shown that the enforcement of the solemn undertaking that he gave would be so unreasonable, so far as he is concerned, as to be contrary to

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public policy. It is true that he will be precluded from being employed or associated with any business involved in the manufacture, refurbishing or distribution of busses in southern Africa for a period of five years, but this does not prevent him from earning a living or from exercising the construction skills, which he has acquired over the years, in other channels. As recently as 1986 he was employed for a year as the manager of the workshop of the Sentraal-Suid Kooperasie at Swellendam. The skills required for the comparatively "simple" methods of constructing busses, the making of moulds for casting glass-

fibre panels and the casting of the panels themselves, could, on the face of it, be used to good advantage in other spheres of the construction industry. In addition to managerial skills which he displayed as workshop manager at Swellendam and in virtually running the factory for Coach-Tech is also an aspect which he could profitably and responsibly employ in other fields of activity. Enforcement of the clause to which he agreed would therefore not" have the effect of relegating him to a life of idleness to the detriment of the public interest. Enough other spheres of profitable activity would remain open to him.

In these circumstances it seems to me that it has not been shown that it would be contrary to public policy to hold Basson to the terms of his agreement with the Chilwans and to enforce compliance with those terms.

In the light of the view I have taken in respect of the lack of any trade secrets which Basson might divulge, and of his lack of any significant customer contact or knowledge of the pricing structures of Coach-Tech, the first part of the order of the Court a *quo* would fall away. All that was required would be to make an order in terms

of paras 2 and 3 of the order of the Court

a quo.

In the result I would grant the condonation requested by Basson and order him to pay the costs incurred by that application. Furthermore I would dismiss the appeal with costs, such costs to include the costs of two counsel, but would alter the order made by the Court a. quo to read:

"1. Respondent is ordered forthwith to cease employment or association of any kind with Engineering Agencies or Neulux Coaches (Pty) Ltd in respect of their bus building activities.

2. Respondent is ordered to pay Applicants' costs, such costs to include the costs of two counsel."

J.P.G. EKSTEEN, JA

NIENABER AR:

Die uitspraak van Eksteen AR het ek ter insae gehad. Ongelukkig kan ek my, om redes wat hierna volg, nie met sy slotsom vereenselwig nie.

Vir doeleindes van gerief verwys ek, soos Eksteen AR, na die appellant as Basson, na die eerste tot vierde respondente as die Chilwans en na die beslote korporasie as Coach-Tech.

Basson het sy vakleerlingskap as 'n plaatmetaal-werker in 1961 voltooi. Sedertdien was hy, volgens sy eie relaas, omtrent deurgaans in die busbakbou-bedryf doenig, eers in die Oos-Kaap, later in Transvaal, en les bes in die Mes-Kaap. Aldaar is hy vanweë sy kundigheid, vaardigheid en algemene kennis van die busbakbou-bedryf

deur die Chilwans genader om vir hulle 'n bus te bou en dit het uitgeloop op die ooreenkoms om gesamentlik 'n nuwe onderneming van stapel te stuur. Coach-Tech is

gestig om daaraan gestalte te gee. Die Chilwans en Basson word in die ooreenkoms omskryf as "the members". Na Basson word ook verwys as "Willem" en na Coach-Tech wat toe nog nie opgerig was nie as "the Corporation".

Klousule 4.1 van die ooreenkoms lui soos volg:

> "The Members are hereby appointed and employed by the Corporation as executives from the date of its incorporation."

Klousule 4.3 lees soos volg:

> "Each appointment in terms of 4.1 shall be for an indefinite period and may only be terminated by the Executive himself by giving the Corporation three calendar months' notice in writing."

Klousule 11, getiteld "Confidentiality and Restraint" begin soos volg:

> "Willem acknowledges that, it is in the interest of the protection and maintenance of the Corporation's Trade Secrets (which for the purpose hereof means the Corporation's goodwill, technical and business know-how, trade secrets, confidential information and the Corporation's intellectual property in general), to maintain confidentiality and therefore Willem undertakes to the Corporation that ..."

Wat hier veral opval, is die volgende:

(i) Basson se onderneming word spesifiek teenoor Coach-Tech gegee en nie teenoor die Chilwans nie;

(ii) die belange wat beskerm staan te word is dié van Coach-Tech en nie dié van die Chilwans nie;

iii) sodanige belange word spesifiek omskryf deur die woorde wat tussen hakies verskyn;

(iv) geen melding word gemaak van enige belang van die Chilwans in hul belegging in Coach-Tech nie.

Klousule 11.1.1, saamgelees met klousule 4.1, voorsien dat Basson in 'n bestuurshoedanigheid deur Coach-Tech in diens geneem sou word. Teenoor Coach-Tech was Basson dus 'n werknemer en teenoor die Chilwans 'n vennoot.

Klousule 11.1.4 vervolg:

"he shall not directly or indirectly for a period of 5 years after the Termination Date either solely or jointly:

11.1.4.1 be employed by; or

11.1.4.2 carry on or assist financially or otherwise be engaged or concerned or interested in; or

11.1.4.3 act as consultant or adviser to; or

11.1.4.4 act as agent or representative for;

any person or firm or body corporate or incorporate which within the Territory carries on:

11.1.4.5 the business of manufacturing and/or refurbishing and/or distribution of buses albeit light, medium or heavy duty buses and/or coaches of whatever nature.

11.1.4.6 any business which is similar to or in competition with such business as the Corporation may be carrying on at the Termination Date."

Klousule 11.2 bepaal:

" For the purposes of this clause 11:

11.2.1 "the Termination Date" means the date upon which Willem ceases to be an employee of the Corporation for whatsoever reason;

11.2.2 "the Territory" means the following areas as presently constituted, namely the Republic of South Africa, South West Africa/Namibia, Ciskei, Venda, Transkei, Lesotho, Swaziland and Zimbabwe."

In sy geheel gesien is die strekking van die klousule om Basson vir 'n periode van vyf jaar na beëindiging van sy diensverhouding met Coach-Tech ("for

whatsoever reason") in suidelike Afrika as 'n moontlike mededinger van Coach-Tech uit te skakel.

Coach-Tech is opgerig. So ook 'n fabriek met kapitaal wat deur die Chilwans voorgeskiet is. Die vierde respondent was verantwoordelik vir die administrasie. Basson was in beheer van produksie. Daarvoor het hy 'n salaris en die gebruik van 'n motor ontvang. Volgens Basson was hy nie gemoeid met die finansiële sy van sake nie en was hy ook nie betrokke of geken by besigheidsbesluite wat geneem is nie. Twaalf nuwe busse is mettertyd vervaardig, ander is herstel en opgeknap en nog ' n paar was in aanbou. Algaande het die verhouding tussen die partye egter versleg. Beskuldigings is wedersyds gemaak. Alle pogings om op die grondslag van 'n nuwe indiensnemingsooreenkoms tot 'n vergelyk te kom, het oplaas misluk en Basson is na ongeveer twee jaar daar weg sonder om drie maande kennis te gee. Hy het onmiddellik diens aanvaar by 'n ander

firma, Engineering Agencies, 'n verskaffer van staal. Engineering Agencies was op daardie stadium nie 'n mededinger van Coach-Tech nie, maar clit het later geblyk dat Basson juis in diens geneem is om 'n luukse bus te bou. Volgens Basson is sy werkgewer 'n maatskappy, Neulux Coaches (Pty) Limited ("Neulux"), wat skynbaar deur Engineering Agencies opgerig is om luukse busse te vervaardig. Die hof a quo bevind dat Basson se ontkenning dat Neulux met Coach-Tech sou meeding, nie 'n egte geskil geskep het nie - 'n bevinding wat nie werklik in betoog voor hierdie hof aangeveg is nie, en wat vir doeleindes van die beoordeling van die vraagstukke in hierdie saak geredelik aanvaar kan word.

Die vraagstuk of 'n beperkende bepaling van hierdie aard afdwingbaar is, het, soos bekend, 'n lang aanloop, meestendeels in die Engelse reg. Magna Alloys and Research (SA) Pty Ltd v Ellis 1984 (4) SA 874 (A) het 'n nuwe wending aan die verloop van sake gegee: 'n ander

uitgangspunt (dat die bepaling, ondanks sy inperkende werking, geag word afdwingbaar te wees), en dus 'n ander benadering (dat die bewyslas op die party rus wat die bepaling in sy geheel of ten dele probeer aanveg). Maar die oorweginge wat by die beoordeling van die afdwingbaarheid van die bepaling in ag geneem word, bly wesenlik dieselfde.

Dit gaan hier, soos in die Magna Alloys-saak, passim, herhaaldelik beklemtoon word, om die afdwingbaarheid van 'n bepaling in 'n ooreenkoms wat andersins geldig is. 'n Ooreenkoms is in sy geheel of . ten dele aanvegbaar as dit die openbare belang skaad en aldus teen die openbare beleid indruis. 'n Bepaling van hierdie aard wat 'n werknemer of vennoot na beëindiging van die kontrak aan bande probeer lê - en dis al geval wat hier in oënskou geneem moet word - druis teen die openbare beleid in as die uitwerking van die belemmering onredelik sou wees. Die redelikheid al dan nie van die

belemmering word beoordeel aan die hand van die breëre belange van die gemeenskap, enersyds, en van die kontrakterende partye self, andersyds. Wat die breëre gemeenskap betref is daar twee botsende oorwegings: ooreenkomste moet gehandhaaf word (al bevorder dit ook onproduktiwiteit); onproduktiwiteit moet ontmoedig word (al verongeluk dit ook 'n ooreenkoms) (vgl. Sunshine Records (Pty) Ltd v Frohling and others 1990 (4) SA 782 (A) te 794D-E). Wat die partye self betref, is 'n verbod onredelik as dit die een party verhinder om hom, na beëindiging van hul kontraktuele verhouding, vryelik in die handels- en beroepswêreld te laat geld, sonder dat 'n beskermingswaardige belang van die ander party na behore daardeur gedien word. so iets is op sigself strydig met die openbare beleid. Origens mag 'n beperking wat inter partes redelik is nietemin, vir 'n rede wat nie aan die partye eie is nie, die openbare skaad. En besmoontlik ook omgekeerd.

Vier vrae moet in dié verband gestel word:

(a) Is daar 'n belang van die een party wat na afloop van die ooreenkoms beskerming verdien?

(b) Word so 'n belang deur die ander party in gedrang gebring?

(c) Indien wel, weeg sodanige belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy ekonomies nie onaktief en onproduktief moet wees nie?

(d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te make het nie maar wat verg dat die beperking gehandhaaf moet word,

. al dan nie? (Laasgenoemde vraag kom nie hier ter sprake nie.)

Vir sover die belang in (c) die belang in (a) oortref, is die beperking in die reël onredelik en gevolglik onafdwingbaar. Dit is 'n kwessie van beoordeling wat van geval tot geval kan wissel (Sibex Engineering Services (Pty) Ltd v Van Wyk and another 1991

(2) SA 1991 (2) SA 482 (T) te 486H).

Die partye se eie beskouing, soos in die ooreenkoms verwoord, oor wat redelik is, kan nooit deurslaggewend wees nie. (Die Magna-saak supra te 488E-F). Ten eerste word die redelikheid van die verbod eers by nabetragting deur 'n hof beoordeel aan die hand van faktore en maatstawwe wat nie noodwendig deur die partye in oënskou geneem was nie. Ten tweede kan die inhoud van die ooreenkoms nie self die uitsluitlike maatstaf wees van wat redelik is nie want dan word die behoorlikheid van die ooreenkoms aan homself getoets. Dat dit die . partye by die aangaan van die ooreenkoms erns was dat so 'n beperking nodig is, dat hulle die omstrede belange geïdentifiseer en na waarde geskat en die beperking self as hoogs redelik beskryf het, kan dus nie beslissend wees nie (vgl. David Wuhl (Pty) Ltd and others v Badler and another 1984 (3) SA 427 (T) te 434H-I). Hoogstens kan gesê word dat dit 'n faktor kan wees by oorweging van wat

beskermingswaardig en van wat redelik is. Dieselfde geld vir die oorweging dat die partye ten tyde van kontraksluiting nie op gelyke voet verkeer het nie - dit is 'n faktor, een van vele, wat by die bepaling van die redelikheid van die beperking 'n rol kan speel. Maar daar eindig dit. As die verbodsbepaling ten tyde van die beoordeling daarvan deur die hof onredelik geag word, is dit onafdwingbaar, hoe die partye ook al teenoor mekaar gesitueer was en hoe hulle die bepaling ten tyde van kontraksluiting ook al mag beskou en beskryf het. Geen ooreenkoms, hoe noukeurig bewoord, kan 'n andersins onredelike bepaling verskans nie. Kortom, vir die partye is dit regtens net nie moontlik om 'n ooreenkoms te sluit waardeur die handelsverkeer op 'n onredelike wyse gekniehalter word nie.

In sy uitspraak word hierdie twee faktore, outonomie en pariteit, deur Eksteen AR, met agting gesê, oorbeklemtoon. Die eintlike ondersoek wentel om iets

anders: die kompeterende belange van Coach-Tech en/of die Chilwans en van Basson wat deur klousule 11 onderskeidelik bevorder en lamgelê word.

Dit bring my by die eerste van die norme vir redelikheid inter se wat hierbo genoem is: die belange, indien enige, wat deur klousule 11 gedien word en die beskermingswaardigheid daarvan.

Wie se belange? Volgens sy bewoording, is klousule 11, soos reeds opgemerk, slegs ten gunste van Coach-Tech beding, en nie ten gunste van die Chilwans nie. So is die saak in die stukke ook aangevoer. In paragraaf 5 van . die repliserende verklaring verklaar die vierde respondent:

> "This application is being brought in order to protect the proprietary interests of the Fifth Applicant and it is only in respect of the construction of buses and coaches that it is sought to prevent the Respondent from using his general knowledge, skill and experience."

So ook in paragraaf 34:

> "Having now invested a great deal of money to establish Fifth Applicant, this application has been

> launched to protect Fifth Applicant's goodwill."

En ten slotte, in paragraaf 36.8:

> The trade secrets referred to are Fifth Applicant's clientele, pricing structure and marketing techniques and the techniques and methods employed in designing, building and refurbishing buses."

Op die stukke is die saak dus op die belange van Coach-Tech toegespits en nie op die belange van die Chilwans nie. Desondanks is ek bereid om, soos Eksteen AR, maar, anders as hy, sonder verwysing na artikel 44(4) van die Wet op Beslote Koporasies, 69 van 1984, ten gunste van die Chilwans te aanvaar dat klousule 11 bedoel was om verder te strek as wat sy presiese bewoording aandui en dat ook die Chilwans hul teenoor Basson daarop kan beroep, in weerwil van die wyse waarop die saak aangebied is. (In die verbygaan mag ek meld dat die gemelde Wet, artikel 44(4) in die besonder, op geen stadium in die stukke, in die uitspraak van die hof a quo, of in betoog in hierdie hof, aangeroer is nie; en ek vind dit onnodig ommy daaroor uit te spreek of artikel

44(4) van toepassing is selfs nadat die samewerkingsooreenkoms tot 'n einde gekom het.)

Watter belange? Klousule 11 omskryf self, soos reeds gesê, die belange wat volgens die ooreenkoms as beskermingswaardig geag word nl. "the Corporation's trade secrets" soos in klousule 11.1 gedefinieer word. Die belange wat aldus vermeld word, veral waar dit daarop gemik is om die vertroulikheid van sekere gegewens te bewaar, is almal belange wat in beginsel by wyse van 'n beperkende bepaling beskermingswaardig sou wees. Desondanks is daar vir die respondente probleme in dié verband. Eerstens was daar in Coach-Tech se bedrywighede eintlik niks wat werklik vertroulik was nie en tweedens het Basson, selfs op die aanvaarding dat dit wel die geval was, op die stukke aangetoon het dat hy geen aspek van vertroulikheid geskend het nie. "Trade secrets", so is geredelik in die betoog voor hierdie hof toegegee, kan nie as grondslag dien vir die aangevraagde regshulp nie.

So is dit ook deur die hof a _quo_ ingesien. In die uitspraak word verklaar:

> "Applicants, in turn, even if they appeared to do so in their affidavits, do not, as the case was argued on their behalf, seek to rely on the protection of any trade secrets in the strict sense of that term. They look to protect a proprietary interest."

En weer:

> "Although no trade secrets in the strict meaning of that term may be involved, it is in my view clear that what may be described as Coach-Tech' s intellectual property is involved and it is that and their investment in respondent's participation which the Chilwans wished to protect by restraining respondent from, for 5 years, competing alone or in another firm with them in the bus-building industry."

. Wat die "proprietary interest" en die "intellectual property" is, is nie duidelik nie. Blykens paragraaf 36.8 hierbo aangehaal bly net "clientele" oor as mens "trade secrets" weglaat. "Trade connections", naas "trade secrets", is meermale in die regspraak as sogenaamde "proprietary interests" vermeld wat as sodanig beskermingswaardig is (vgl. _Recycling Industries (Pty) Ltd_

v Mohammed and Another 1981 (3) SA 250(SEC) te 258G-H; Rawlins and Another v Caravantruck (Pty) Ltd 1993(1) SA 537(A) te 541B-544C).

Die vraag is dus of die beskerming van klandisie die belang is wat hier ter sake is. Dat so 'n belang beskermingswaardig is en in 'n bepaalde geval swaarder kan weeg as die teenparty se gedwonge onproduktiwiteit, is in beginsel onteenseglik so. Maar weereens is die vraag of Basson in stryd met enige sodanige belang opgetree het.

Op die feite was daar geen sprake daarvan dat Basson bestaande klante van die Coach-Tech (of van die Chilwans) weggelok of probeer afrokkel het nie. Geen gevalle van daadwerklike afrokkeling deur Basson word deur die respondent vermeld nie en op die materiaal wat die hof a quo geregtig was om in ag te neem, was daar ook geen gegronde vrese dat so iets na alle waarskynlikheid in die toekoms sou gebeur nie. Basson was nie 'n

verkoopsman wie se taak dit was om klante vir Coach-Tech te werf nie. Hy was gemoeid met produksie, nie met bemarking nie. Op die gegewens voor die hof a cruo het Basson na my mening wel daarin geslaag om aan te toon dat hy dus nie op enige van die beskermingswaardige belange wat in klousule 11.1 deur die kontrakspartye self omskryf is, inbreuk gemaak het nie. Wat klousule 11.1 betref is die antwoord op die eerste vraag wat hierbo gestel is dus: ja; op die tweede: nee; gevolglik verval die derde vraag.

Nóg "trade secrets" nóg "trade connections" was dus hier in gedrang. Tradisioneel word dit beskou as die twee tipes belang wat by uitstek in 'n geval soos die huidige beskermingswaardig is (vgl. die Rawlins-saak supra op 541B-C). Trouens, daar is al beweer, na aanleiding van Engelse gesag, dat dit die enigste werklike gevalle is waar 'n belang beskermingswaardig is (vgl. die Recycling Industries-saak supra te 258G-H; die

Sibex Engineering-saak 502C-F; 505F-I; 507D-508A). As dit so is, is dit natuurlik die einde van die debat aangesien Basson, soos reeds gesê, daarin geslaag het om aan te toon dat sy geval nie onder enige van dié twee erkende kategorieë tuis hoort nie.

Vir huidige doeleindes vind ek dit onnodig om my oor dié vraagstuk uit te laat. Weereens is ek bereid om, soos Eksteen AR, ten gunste van die Chilwans te aanvaar dat daar nie 'n numerus clausus van beskermingswaardige belange bestaan nie en dat die begrip "redelikheid" in ons reg soepel genoeg is om ook ander gevalle te behels waar 'n andersoortige belang van die een party swaarder mag weeg as die ooreenstemmende beletsel van die ander.

En om 'n stap verder te gaan: ek is ook bereid om in hul guns te aanvaar dat 'n party wat hom op 'n beletsel in die kontrak beroep nie beperk is tot die belange, indien enige, wat in die kontrak self omskryf word nie, mits dit origens uit die getuienis blyk wat sodanige

ander belange wel is.

Die vraag is dan of daar ander belange as vertroulikheid en klandisie-beskerming is wat op die getuienis ter sprake is, wat beskermingswaardig is, wat deur Basson in gedrang gebring is en wat meer tel as die oorweging dat Basson nie sy gekose beroep sal kan beoefen nie. Alleen dan sal die aangevraagde regshulp geregverdig wees. Om hierdie vrae te beantwoord, is dit nodig om stil te staan by die saak wat die respondente op die stukke probeer uitmaak het.

In die funderende verklaring het die klem op "trade secrets" geval. Dit is laat vaar. Wat die repliserende verklaring betref, het ek vroeër verwys na sekere uittreksels waar die belange van Coach-Tech beklemtoon word. Elders in die repliserende verklaring word die hele kwessie weer oor 'n ander boeg gegooi, te wete, die belange van die Chilwans. Die betekenisvolste aanhaling is stellig in paragrawe 1.5 en 1.6 van die repliserende

verklaring te vind wat soos volg lui:

> "1.5 It was recognised by all concerned f rom the outset that the new business would be heavily dependent on Respondent's expertise and that, should he leave it, the whole venture would be in jeopardy. While there was no way of locking Respondent into the venture permanently, my brothers and I at least wanted the assurance that if he were to leave it, we would not be confronted with him as a competitor in building and marketing the very vehicles or services such as refurbishment and reconditioning which he had joined forces to provide.
>
> 1.6 It was against this background that the restraint clause was incorporated into the contract. My brothers and I were not willing to go into the venture without such protection. Respondent, who is not an unsophisticated man, understood our concern and the implications of the clause in question and was completely agreeable to the restraint which was imposed upon him."

Soos reeds vermeld het die Chilwans meer as ' n

miljoen rand in die onderneming belê. Coach-Tech self

het geen belegging gemaak nie. Dit gaan dus suiwer om

die

belegging van die Chilwans. In die gemelde paragrawe

word onomwonde erken dat dit die Chilwans se oogmerk was

om hul kapitale belegging in Coach-Tech te beskerm deur

Basson as 'n potensiële mededinger van Coach-Tech te elimineer - nie alleen vir die duur van die kontrak nie maar vir 5 jaar na beëindiging daarvan.

Van oudsher is aanvaar dat die blote uitskakeling van mededinging as sodanig nie die soort belang is wat, in ' n geval soos hierdie, deur ' n bekamping van handelsvryheid na afloop van die ooreenkoms beskerm kan word nie; oftewel, dat dit nie opweeg teen die nadeel wat die ander party ly as hy sy beroep nie vryelik kan beoefen nie (vgl. die Recycling-saak supra 256B-E, 258G, 259E-F; Magna Alloys-saak supra 904I).

Die situasie verander myns insiens nie omdat die beperking nie sommer na willekeur beding is nie maar om 'n belegging te beskerm - sy dit, soos hier, 'n belegging van kapitaal, sy dit 'n belegging in tyd en aandag wat aan die opleiding van 'n werknemer bestee is, soos in die Sibex Engineering-saak (vgl. ook Highlands Park Football Club Ltd v Viljoen and Another 1978 (3) SA 191 (W) te

200H-201B). Dit beteken nie dat 'n belegging van hierdie aard nie beskermingswaardig is nie; dit beteken alleen dat dit normaalweg nie by wyse van 'n beding wat handelsoutonomie ná beëindiging van die ooreenkoms probeer inkort, beskerm kan word nie; anders gestel, dat die belang wat die beperking op dié wyse trag te beskerm in die reël nie opweeg teen die belang van die ander party om nie in sy gekose veld werkloos te wees nie.

Die aangewese wyse waarop so 'n belang ten beste beskerm kan word, is stellig om die ander party kontraktueel vir 'n bepaalde termyn te bind - in welke . geval die werknemer sy ooreengekome vergoeding ontvang en nie onproduktief is nie, en die werkgewer die gebruiklike gemeenregtelike remedies tot sy beskikking het indien die werknemer voor verstryking van die ooreengekome termyn sou padgee en vir 'n konkurrent gaan werk. Volgens die chilwans sou 'n eis vir skadevergoeding in die huidige geval 'n nuttelose remedie wees aangesien hulle

van oordeel was dat Basson "was not a man of any financial means." Selfs al sou dit so wees, sou dit die Chilwans nie noodwendig sonder 'n remedie gelaat het indien hulle op 'n bepaalde termyn ooreengekom het en Basson kontrakbreuk gepleeg het nie. In beginsel sou hulle, afhangende van die bewoording van hul ooreenkoms, 'n interdik teen Basson kon aangevra het indien hy sy ooreenkoms in die loop daarvan verbreek het en by 'n mededinger in diens sou getree het. 'n Sprekende voorbeeld van 'n geval waar 'n werknemer belet is om vir 'n kompeterende instansie te werk, is Roberts . Construction Co Ltd v Verhoef 1952 (2) SA 300 (W). 'n Interdik is toegestaan teen 'n skrynwerker wat uit Holland ingevoer is en wat onderneem het om vir 'n jaar vir die applikant te werk maar wat na 'n maand of wat gedros het. In dié saak word te 304F op die onderskeid gewys tussen 'n bepaling wat die werknemer belet om by 'n mededinger van sy werkgewer in diens te tree (i) tydens

die duur van die kontrak en (ii) na beeindiging daarvan. In die eerste geval word die werknemer vir die termyn van die kontrak vergoed, in die ander geval nie; in die eerste geval is die werknemer produktief, in die ander geval denkbaar nie. Dit is belangrike oorweginge wanneer dit by die beoordeling van die redelikheid van die inperking kom (vgl. egter Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd 1982 (1) SA 398 (A) te 439B-440B). In die eerste geval geld die beletsel ná beëindiging van die kontrak ook net as die werknemer gedros het, waarvoor hy net homself te blameer het, terwyl dit in die ander geval onder alle omstandighede van kontrakbeëindiging geld, behalwe miskien waar dit die werkgewer self is wat daarvoor verantwoordelik was dat die kontrak tot 'n einde gekom het (vgl. Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C) te 308D-E; Capecan (Pty) Ltd v Van Nimwegen and Another 1988 (2) SA 454 (C) te 460B-C; Botha and Another v Carapax Shadeports (Pty) Ltd 1992 (1) SA 202 (A) te

215C-E). New United Yeast Distributors (Proprietarv) Ltd v Brooks and Another 1935 WLD 75 en Forman v Barnett 1941 WLD 54 ('n koop- en nie 'n dienskontrak nie) waarop Eksteen AR hom verlaat, is albei juis gevalle waar die beletsel gedurende die bestaan en nie na beëindiging van die kontrak van toepassing was nie. Op dieselfde wyse sou die Chilwans Basson se betrokkenheid by Coach-Tech - en sy onbetrokkenheid by enige mededinger - kon probeer bewerkstellig het "in building up a sound reputation for the fledgling firm in the early years of its existence", soos Eksteen AR dit stel. Of so 'n poging sou slaag, sou van die redelikheid van die beperking, alles in ag genome, afhang. Onteenseglik sou hulle dan op 'n vaster voetstuk gestaan het as nou.

Die kwessie van werfkrag ("goodwill") word glad nie deur die Chilwans in hul funderende eedsverklaring geopper nie en in die repliserende verklaring word dit net skrams genoem. Presies wat daaronder verstaan moet

word, is nie so duidelik nie. As dit op die Chilwans en/of Coach-Tech se potensiaal slaan om klante vanuit die staanspoor te werf, of van ander konkurrente weg te lok of om bestaande klante te behou, is dit nie die saak wat op die stukke uitgemaak is nie: op so 'n belang het Basson, soos reeds gesê, in elk geval ook nie inbreuk gemaak nie. Dit was nooit Basson se funksie om klante te werf of te paai nie. As hy 'n "goodwill" help vestig het, was dit nie soseer aan sy persoonlikheid te danke nie as aan die gehalte van die produk wat hy vervaardig het en wat Coach-Tech aan klante kon verkwansel. Dit is 'n werfkrag wat as 't ware aan die produk gekleef het (vgl. <u>Protea Holdings Ltd and Another v Herzberg and Another</u> 1982 (4) SA 773 (C) te 786G-787E; <u>Botha and Another v Carapax Shadeports (Pty) Ltd supra</u> te 211H-2121). Wat die Chilwans beoog het, was om Basson te verhinder om hom ten koste van hul kapitale belegging in Coach-Tech by 'n ander onderneming aan te sluit waar sy

insette 'n beter produk sou verseker as wat Coach-Tech sonder hom kon lewer. Op stuk van sake is dit niks anders as 'n poging om kompetisie ten opsigte van potensiële toekomstige klante te smoor nie. Klousule 11 van die ooreenkoms is 'n blatante poging om 'n monopolie oor Basson se bekwaamheid, vaardigheid en kundigheid as busbakbouer te verwerf deur Basson vir 5 jaar as busbakbouer buite aksie te stel. Daardie belang, met daardie oogmerk, kan na my mening nie opweeg teen die nadeel wat dit vir Basson inhou indien hy verhinder word om sy gekose beroep vir 'n periode van vyf jaar te beoefen nie.

Na my oordeel het Basson daarin geslaag om aan te toon dat die beperking onredelik en gevolglik onafdwingbaar is.

Daar was geen versoek aan die hof a quo, of aan hierdie hof, om die beperking na sy omvang of tydperk in te kort nie. Gevolglik is dit onnodig om verder aan

die hipotese aandag te skenk dat 'n mindere beperking dalk wel redelik sou wees (vgl. die <u>Sunshine Records-</u>saak <u>supra</u> te 795-6).

Die appellant het aansoek gedoen om kondonasie. Eksteen AR verwys in sy uitspraak daarna. Die enigste grond waarop die aansoek bestry is, was die vermeende gebrek aan meriete in die appèl. Blykens hierdie uitspraak moet die appèl daarenteen slaag. Kondonasie word gevolglik verleen. Die appellant is anspreeklik vir die koste wat deur die aansoek verkwis is.

Die volgende bevel word gemaak:

1. Die appèl slaag met koste.
2. Die bevel van die hof <u>a quo</u> word ter syde gestel en vervang deur 'n bevel dat die aansoek met koste van die hand gewys word.

P. M. NIENABER AR

MILNE AR stem saam.

VAN

HEERDEN AR:

Van oudsher word geleer dat beperkings wat op 'n kontraktant se bevoegdhede geplaas word - soos byvoorbeeld sy bevoegdheid om sy goed te vervreem - onafdwingbaar is indien die ander kontraktant nie 'n belang by die beperking het nie. Sien Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd 1968 (3) SA 167 (A) 189 en gesag daar aangehaal. Maar selfs indien die tweede kontraktant wel sodanige belang het, kan die beperking nogtans onafdwingbaar wees. Dit is by uitstek die geval indien 'n beperking op so 'n kontraktant se handelsvryheid onredelik is, en wel omdat 'n dusdanige beperking in die reël die openbare belang skaad en dus strydig met die openbare beleid is: Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) 894, en Sunshine Records (Pty) Ltd v Frohling and Others 1990 (4) SA 782 (A) 794.

Soms word gesê dat 'n beperking wat op A se

handelsvryheid in 'n ooreenkoms tussen hom en B geplaas word, onredelik is indien dit slegs daarop gerig is om B teen mededinging deur A te beskerm. Dit is nie juis nie. Indien B bv sy onderneming aan A verkoop sou so 'n beperking - mits andersins redelik - onaanvegbaar wees selfs indien dit net ten doel het om mededinging deur A uit te skakel. Bogenoemde stelling sou egter in die reël van toepassing wees op 'n beperking wat 'n werkgewer plaas op sy werknemer se handelsvryheid na beëindiging van die diensverhouding. Dit is egter nie 'n onbuigsame reël of een sonder uitsonderings nie. Diensverhoudings kan immers vele gestaltes aanneem, vanaf een waarin die werknemer 'n volslae onderhorige is tot een waarin hy 'n aansienlike mate van seggenskap het oor sy werkgewer se onderneming.

Om te bepaal of 'n beperking op handelsvryheid al of nie onredelik is, moet vanselfsprekend-

nie net gelet word op die belange van die kontraktant op wie die beperking geplaas is nie, maar ook op dié van die ander kontraktant. By 'n opweging van die belange kan 'n groot aantal faktore oorweging ver-dien, soos byvoorbeeld die aard van die verhouding tussen die partye; die redes vir die oplegging van die beperking, en die strekking en omvang daarvan. In hierdie verband bestaan daar dan ook nie 'n beginselsverskil tussen my benadering en dié van my kollega, Nienaber, nie.

Die omstandighede wat tot die oplegging van die onderhawige beperking gelei het, en die tersaaklike inhoud van die skriftelike kontrak, word uiteengesit in die uitspraak van my kollega, Eksteen. Ek beklemtoon slegs die volgende:

1) Tydens die onderhandelinge tussen die Chilwans en Basson wat tot ondertekening van die kontrak gelei hety het Coach-Tech nog nie bestaan

nie. Hulle het egter klaarblyklik mondelings op die bepalings van die latere skriftelike kontrak ooreengekom juis met die oog op oprigting van Coach-Tech en 'n reëling van hul verhoudings onderling asook teenoor die beslote korporasie wat in die vooruitsig gestel is.

2) Dit is onbetwis dat die Chilwans nie die kontrak sou gesluit het indien dit nie die beperking op Basson se handelsvryheid vervat het nie. Trouens, dit is oorweldigend waarskynlik dat indien Basson kapsie daarteen gehad het die onderhandelings sou verval en Coach-Tech nie opgerig sou gewees het nie.

3) Selfs ten tye van die ondertekening van die kontrak was Coach-Tech as't ware nog 'n leë dop.

4) Die kontrak het bepaal dat die Chilwans en Basson elk 'n gelykwaardige belang in

Coach-Tech sou hê; elk 'n sogenaamde uitvoerende lid sou wees, en elk gelyke regte ten opsigte van die bestuur van Coach-Tech se sake sou geniet.

In die lig van bostaande is enkele opmerkings aangewese. Eerstens sou dit kortsigtig wees om Basson as 'n blote werknemer van Coach-Tech te bestempel. Hy was inderdaad veel meer as dit. Net soos elk van die Chilwans was hy 'n lid van die beslote korporasie wat as sulks deelname aan die bestuur daarvan gehad het en in die winste daarvan kon deel.

Tweedens het die Chilwans net so seer as Coach-Tech 'n belang by die beperking gehad. Enige handeling wat tot nadeel van Coach-Tech sou strek, sou onvermydelik nadelig op hul ledebelange inwerk. Bowendien was hulle partye tot die kontrak waarin die beperking op Basson gelê is, en hoewel dit na woord-lui slegs ten gunste van Coach-Tech beding is, was

die beperking klaarblyklik daarop gerig om direk vir Coach-Tech en indirek hul ledebelange daarin te beskerm, te meer omdat beoog is dat die fondse vir die opbou van Coach-Tech se onderneming deur hulle verskaf sou word.

Ek kom dan by 'n opweging van die belange van Coach-Tech en die Chilwans teenoor dié van Basson om na beëindiging van sy verhouding met Coach-Tech vry doende te wees. Ek stem saam met my kollegas dat die beperking nie kon dien om handelsgeheime of vertroulike klanteverhoudings te beskerm nie. Ek aanvaar ook dat die beperking, indien afdwingbaar, slegs sal dien om Coach-Tech teen direkte of indirekte mededinging deur Basson te beskerm. So gesien, dien die beperking ter beskerming van Coach-Tech se werfkrag oftewel die "goodwill" wat dit opgebou het. Dat die beperking o a met die oog hierop beding is, blyk duidelik uit para 11.1 van die

kontrak waarin om aan "trade secrets" 'n uitgebreide betekenis gegee is sodat dié ook "goodwill" ingesluit het. En dat Coach-Tech by Basson se uittrede reeds 'n aansienlike werfkrag opgebou het, ly geen twyfel nie. Op daardie stadium het Coach-Tech immers reeds 12 nuwe busse vervaardig, was ander in aanbou, en het die korporasie ook reeds 'n aantal busse herbou. Dit was hoofsaaklik aan twee faktore te wyte: Basson se kundigheid en die Chilwans se bydrae van meer as Rl miljoen aan Coach-Tech.

By 'n besinning oor die al of nie redelikheid van die beperking vervat in para 11.4 van die kontrak moet die klem na my mening op die volgende val:

1) Indien Basson nie tot die beperking toegestem het nie sou die kontrak nie aangegaan gewees het en sou Coach-Tech nie opgerig gewees het nie.

2) Basson was nie 'n blote werknemer van Coach-Tech nie, maar inderdaad 'n lid van die korporasie met dieselfde bestuursbevoegdhede as die Chilwans.

3) Hoewel Basson beweer dat, afgesien vir 'n tydperk van 'n jaar, hy vanaf 1961 konsekwent in die busboubedryf werksaam was, sê hy nie dat hy nie buite daardie bedryf werk sal kan vind indien die beperking afgedwing word nie, of dat 'n andersoortige pos vir hom aansienlike finansiële verlies sal meebring nie.

Basson se posisie verskil vir my nie noemenswaardig van dié van A in die volgende voorbeeld nie. Drie prokureurs, A, B en C, meen dat hulle 'n winsgewende praktyk in dorp Z kan opbou. Derhalwe spreek hulle af om 'n maatskappy te stig waarin elk 'n gelyke aandeelhouding sal hê; dat die maatskappy kantore vir 'n lang termyn sal huur en

deur middel van beskikbaarstelling van fondse van een of meer van die lede ameublement, 'n boekery ens sal aankoop, en om onder die vaandel van die maatskappy te praktiseer. Al drie is egter begaan oor die moontlikheid dat een van hulle later mag uittree en dan op Z in mededinging met die maatskappy mag praktiseer. Hulle kom dus ook ooreen dat indien 'n lid uittree hy vir 'n bepaalde tyd nie aldaar mag praktiseer nie. Uitvoering word aan die afspraak gegee en na twee jaar tree A uit, verkoop sy aandele aan 'n derde en begin ay eie praktyk op z. In so 'n geval sou die belang van die maatskappy (en vanselfsprekend die oorblywende lede) in die afdwing van die beperking na my mening sterker weeg as A se belang om vryelik as prokureur op z te praktiseer.

My kollega, Nienaber, betwis nie dat Coach-Tech - of meer spesifiek die Chilwans as lede van die korporasie - 'n "beskermingswaardige" belang in

die

afdwing van die onderhawige beperking gehad het nie. Hy meen egter dat dit op 'n ander wyse beskerm moes gewees het; nl deur Basson kontraktueel te verbind om vir 'n bepaalde tydperk lid en werknemer van Coach-Tech te bly. As dit gebeur het, redeneer hy, sou die Chilwans bes moontlik by wyse van die verkryging van 'n interdik vir Basson kon verhoed om voor verstryking van die periode in diens van 'n mededinger van Coach-Tech te tree. By wyse van voorbeeld beroep my kollega hom op die beslissing in Roberts Construction Co Ltd v Verhoef 1952 (2) SA 300 (W).

In daardie saak het 'n dienskontrak bepaal dat die werknemer nie gedurende sy dienstermyn in 'n onderneming anders as dié van die werkgewer werksaam sou wees nie. Dowling R het die beding onderskei van een wat na afloop van 'n diensverhouding 'n beperking op 'n werknemer se, handelsvryheid plaas. Wat die

2 kern van die onderskeid is, is nie vir my heeltemal duidelik nie. Ek sou meen dat in beide gevalle die afdwingbaarheid van die beding aan die hand van 'n afweging van die onderskeie belange beoordeel moet word, waarby die feit dat in die eerste geval die beperking slegs gedurende die dienstermyn van toe-passing is, maar een van die tersaaklike faktore is. Te veel klem kan ook nie geplaas word op die voort-bestaan van die diensverhouding nie, want die werk-gewer is vanselfsprekend nie verplig om die werknemer se salaris te betaal indien hy nie dienste lewer nie. Indien die werknemer in Roberts sou verkies het om nie na sy voormalige werk terug te keer nie, sou hy dus werkloos en onproduktief gewees het.

Die Roberts-meganisme sou ook nie in alle gevalle 'n oplossing bied nie. Gestel dat in bo-staande voorbeeld die drie partye die moontlikheid bespreek om te beding dat hulle vir 'n tydperk van 10

jaar as lede van die maatskappy in Z sal praktiseer, maar dat hulle daarteen besluit byvoorbeeld omdat hulle voor oë het dat een of meer van hulle mag verkies om vroeër op te hou praktiseer of om elders te gaan praktiseer. In gevalle waarin 'n party nie gewillig is om hom vir 'n bepaalde tydperk tot een of ander verhouding te verbind nie, is 'n beperking wat na beëindiging van die verhouding geld dus al uit- weg.

In die lig van al bostaande oorwegings is ek van oordeel dat die belange van Coach-Tech - waarvan dié van die Chilwans nie losgemaak kan word nie - swaarder as dié van Basson weeg of dat, ten beste vir Basson, die skaal balanseer. Die beperking is dus nie onredelik nie vir soverre dit 'n beletsel op Basson plaas om in diens van 'n mededinger van Coach-Tech te tree.

Soos my kollegas tereg daarop wys, is nie

aangevoer dat die beperking onafdwingbaar is vanweë sy omvang en tydsduur nie. Ek stem dus saam met die bevel vervat in die uitspraak van my kollega, Eksteen, en wys slegs daarop dat die wysiging van die bevele van die hof a quo nie substansiële sukses aan die kant van Basson daarstel nie.

H J O VAN HEERDEN AR

BOTHA

JA:-

I agree with NIENABER JA that the appeal should be allowed. I also agree entirely with the reasoning set forth in his judgment. In view of the differences of opinion between the members of the Court I wish merely to mention a few additional considerations which weigh with me in respectfully differing from my Colleagues VAN HEERDEN and EKSTEEN.

The incidence of the onus in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert' enforcement is required to prove on a pre-

ponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the court is unable to make up its mind on the point the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade. In regard to these two opposing considerations of public policy, it seems to me that the operation of the former is exhausted by the placing of the onus on the covenantor; it has no further role to play thereafter, when the reasonableness or otherwise of the restraint is being enquired into. "The paramount importance of upholding the sanctity of contracts", which is emphasized by

EKSTEEN JA, finds its complete expression in the rule of the law that the onus is on the covenantor; it has no bearing on the issue whether the particular restraint in question is unreasonable. Accordingly I cannot agree with the statement that where parties contract on a basis of equality of bargaining power the principle <u>pacta sunt servanda</u> "will find strong application". Equality of bargaining power cannot affect the nature of the onus; it is relevant only as one of the multitude of factors to be taken into account in the enquiry as to the reasonableness of the restraint. And in relation to this enquiry I venture to suggest that it serves no useful purpose to invoke the observation, made with reference to contracts contrary to public policy in general, that the court's power in this regard should be exercised "only in the clearest of cases". By a long process of judicial development it is clearly established-

that, in the particular case of a contract in restraint of trade, an unreasonable restraint is contrary to public policy, and that the covenantor can avoid contractual liability by discharging the onus of proving unreasonableness, according to the ordinary standard of proof required in a civil case.

The view that the restraint clause in the present case has not been shown to be unreasonable rests crucially upon the basis that the Chilwans and Coach-Tech were possessed of a legitimate interest to protect the corporation against competition by Basson, for the purpose of safeguarding the goodwill of Coach-Tech. In this regard VAN HEERDEN JA has referred to the example of the purchaser of a business restraining the seller from competing with it. The example given is, of course, a familiar one; in that kind of situation there is ordinarily no difficulty in enforcing the restraint against competition

if the area and the duration of its operation are found to be reasonable. In my opinion, however, that situation is fundamentally and vitally different from the situation with which we are dealing in the present case. In the case of a sale of a business, its goodwill is an existing asset which is part of the merx which passes from the seller to the buyer; the value of the goodwill is necessarily reflected in the price paid by the buyer and received by the seller. Competition by the seller will impinge upon that value, and the reasonableness of a restraint the object of which is to prevent that from happening is self-evident. In the present case there was no goodwill in existence when the restraint was imposed. Basson had no asset to sell, unless one regards his bus-body building skill and experience as an asset of which he could dispose by a binding contract, irrevocable for a period of at least five years.

That was no doubt the light in which the Chilwans regarded the situation, as appears from their affidavits and from EKSTEEN JA's comment that Basson's "wealth of experience and skill in the bus construction industry would be an important, if not indispensable asset in the venture". But the Chilwans could not appropriate Basson's expertise to themselves or to Coach-Tech, as if it were a freely disposable commodity, by investing their money in the business. If Basson had left Coach-Tech after the Chilwans had invested a million rand in putting up a factory and equipping it, but before the commencement of business, I cannot imagine that the court would have enforced the restraint. And I cannot see how the building up of goodwill during the time that the business was being carried on, as a result of the Chilwan's investment and Basson's skills, can make any difference. In essence, the Chilwans are seeking

to prevent Basson from using his skill and experience, and his innate or acquired abilities, to the potential detriment of their investment. In this respect the case bears no resemblance to the case of the seller and buyer of a business. On the contrary, it approximates closely to the case of an employer and employee relationship, in one respect. In relation to such cases it has often been said in the authorities that a man's skills and abilities are a part of himself and that he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. The impact of that observation in the circumstances of the present case is not detracted from, I consider, by the fact that the Chilwans and Basson had equal bargaining power, nor by the fact that Basson's position in the venture was that of an equal partner, and not an employee.

In his judgment VAN HEERDEN JA poses the

hypothetical example of three attorneys forming a company and investing money in it in order to carry on practice in the town of Z. He considers that a restraint against competition would be reasonable and
enforceable. I beg to differ, in view of what has been said above. But in any event the facts in the example differ in one crucially important respect from the facts in the present case. The difference relates to the area of the restraint, and it is a difference which serves to focus the attention on what I consider to be the single most important, and indeed decisive, feature pointing to the unreason-ableness of the restraint in the present case. In the example, the restraint applies to the town of Z; in the present case, it applies to the whole of Southern Africa. The attorney is still free to practise his profession in the next town; Basson is not to be allowed to carry on his trade

anywhere in

the country of his birth, or even close to it. I am not aware that a restraint so oppressive in scope has ever been countenanced in our courts. It is said by VAN HEERDEN JA that Basson does not allege that he will be unable to find employment outside the bus-body construction industry or that he will suffer substantial financial loss if he is compelled to take up a different kind of employment; and by EKSTEEN JA that the restraint will not prevent Basson from exercising his skills in other spheres of the construction industry. Personally, I find these observations inappropriate. On the evidence it is plain that Basson is an expert in the building of bus-bodies and a master of that trade, to which he has devoted substantially the most of his working life. By way of contrast, it appears that the Chilwans have obtained the services of someone else to replace Basson and it has not been suggested that they

experienced any real problems in doing so. They are simply bent on putting Basson's superior skills out of action. Basson cannot be faulted for not having proposed a lesser area of restraint as being reasonable . The case sought to be made against him was that the respondents required the restraint to be enforced in its entirety. In respect of the area of it, it was alleged inter alia that there are only five or six bus-body construction concerns in the Republic. In meeting that case, Basson said, at the outset of his affidavit, with reference to the effect of the restraint,

> "dat ek daardeur verhoed word dat ek my algemene kennis en vaardigheid en ondervinding in die busboubedryf tot my eie voordeel kan gebruik en my bestaan maak in die ambag waarin ek reeds ongeveer 30 jaar werk",

and on this basis he contended that, having regard to all the circumstances set out in the rest of his

affidavit, it would be unreasonable and contrary to public policy to enforce the restraint. I agree with

his contention, and I concur in the order made by NIENABER JA.

A S BOTHA JA

MILNE JA CONCURS