# THE SUPREME COURT OF APPEAL

# OF SOUTH AFRICA

Reportable

Case no: 251/06

In the matter between:

DAYANDREN REDDY

APPELLANT

and

SIEMENS TELECOMMUNICATIONS (PTY) LTD

RESPONDENT

---

Coram: HOWIE P, NAVSA, NUGENT JJA
*et* COMBRINCK & MALAN AJJA

Date of hearing: 10 NOVEMBER 2006

Date of delivery: 30 NOVEMBER 2006

**Summary: Agreement in restraint of trade – undertaking by employee not to accept employment with employer's competitor – enforceability of – common-law approach to agreements in restraint of trade – *onus* of proof**

**Neutral Citation: This judgment may be referred to as Reddy v Siemens [2006] SCA 164 (RSA)**

**JUDGMENT**

---

MALAN AJA:

[1] This is an appeal with the leave of the court a quo against a judgment and order of Blieden J enforcing a written restraint agreement between the respondent ('Siemens') and the appellant ('Reddy') and effectively interdicting and restraining the latter from being employed by Ericsson in the province of Gauteng for a period of twelve months from 1 March 2006. Ericsson was cited as the second respondent in the court a quo and abided the decision of the court.

[2] Reddy was employed by Siemens from 1 December 1998 but resigned on 26 January 2006 to take up a position with Ericsson from 1 March 2006. When entering into employment with Siemens he agreed not to be employed by a competitor for a period of one year after termination of his employment and undertook not to disclose trade secrets and confidential information belonging to Siemens. In interdicting Reddy from taking up employment with Ericcson, Blieden J held that it was not necessary for the purposes of granting the interdict to find that Reddy would use the trade secrets and confidential information in his new employment but that it was sufficient if he could do so. The restraint, he said, was aimed at preventing a person with knowledge of confidential technologies as a result of his employment from utilising them to the detriment of the employer:

'It is confidential technologies which are to be protected, it is not necessary for the applicant to prove that information is not academic in the hands of [Ericsson]. By its very nature such information in the hands of a competitor may be detrimental to the applicant's business.'

[3] The relevant terms of Reddy's contract of employment with Siemens

provide as follows:

22.1 During your period of employment and subsequent thereto you shall keep confidential and shall not make use, directly or indirectly, and shall not disclose any of the company's trade secrets or confidential information . . . other than to persons authorised by the company or those employed by the company who are required to know such secrets [or] have such information for the purpose of their employment with the company.'

'26.3 [T]he employee [Reddy] . . . agrees and undertakes that, in order to protect the proprietary interest of the employer [Siemens] and/or the group in the group's trade secrets, he or she shall not throughout the period of his employment by the employer and/or the group and for a period of twelve months after the termination date, either directly or indirectly within the prescribed area, be interested, engaged or concerned . . . as . . . employee . . . in any concern which carries on the same business as the employer's business or group's business, or a business allied or similar to the employer's business or the group's business.

[4] The application was launched as a matter of urgency at the end of February 2006. Since the restraint was for a limited period of twelve months the court a quo correctly treated the matter as being substantially an application for final relief.[1] A final order can only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify the order, and this applies irrespective of where the *onus* lies.[2]

[5] Siemens is a subsidiary of Siemens AG which is based in Germany. The latter is one of the world's leading telecommunications providers in voice and data networks. The respondent forms an integral part of the business of Siemens AG. Both Siemens and Ericsson provide telecommunication installations and services to cellular telecommunication networks of which there are three operators in South Africa, namely, Vodacom, MTN and Cell C. Siemens and

[1] *BHT Water Treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W) 55A-B.

[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634H-635B; *Ngqumba en 'n ander v Staatspresident en andere; Damons NO en andere v Staatspresident en andere; Jooste v Staatspresident en andere* 1988 (4) SA 224 (A) 260H-262D; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 430G-431A; *BHT Water* above 55I-56A.

Ericsson are engaged in the same business and are competitors. Vodacom and Cell C are customers of Siemens but Ericsson does limited business with both. Ericsson has been the sole supplier of telecommunications infrastructure and services to MTN internationally and provides these services to MTN exclusively in South Africa. Siemens still has to acquire some of MTN's business. Vodacom, Siemens' main customer, has operations in six African countries including South Africa. Cell C is active on the African continent only in South Africa. Ericsson and Vodacom have concluded a confidentiality agreement in 2003 with the possibility of entering into a transaction in Nigeria. Ericsson provides telecommunications services in forty three African countries and to Celtel and Safricom in Kenya where Siemens does not operate.

[6] Reddy's employment with Siemens as a systems engineer was in the carrier services high level support network platform department which renders 'intelligent network' and value added services to customers. A solutions integrator, as he is called by Ericsson, or systems engineer, is responsible for the installation, commissioning and 'rollout' of hardware and software solutions for a particular customer. The hardware or software involved depends on the needs of the customer and has to be customised or integrated with the customer's systems, organisation and processers.

[7] He was employed by Ericsson from 1 March 2006 as one of ten solutions integrators intended to perform services to Ericsson customers in Sub-Saharan Africa. His duties will not extend to any of Siemens' customers in South Africa but relate only to MTN, a long-standing international customer of Ericsson (and not of Siemens) and to Celtel and Safricom in Kenya (neither of which is a customer of Siemens). Reddy as an employee of Ericsson will have no involvement, at least for the duration of the restraint, with Vodacom or Cell C in South Africa or Vodacom anywhere else.

[8] Reddy gained experience and was trained, both locally and abroad, in

relation to Siemens products and networks, and the use of software in particular in the application of the software and its customisation according to the processes, methodologies and systems architecture developed by Siemens for implementation in the cellular telecommunications industry, which gives its 'intelligence network' platform service its unique identity and competitive edge. This process of customising software is confidential and a trade secret of Siemens. He attended training courses including one shortly before his resignation from 19 November to 10 December 2005 in Vienna. Its costs were borne by Siemens. The course involved an updating of Siemens' processes, methodologies and systems architecture. As a consideration for his attendance Reddy undertook to reimburse Ericsson by 'working back' the costs over a period of eighteen months. Ericsson has offered to reimburse Siemens for the expenses. Reddy was also exposed to the maintenance and installation of networks, projects, support services and project execution and became acquainted with Siemens' strategy and technology employed in regard to its customer base. He was thus skilled in, and in possession of, current knowledge of Siemens' processes, methodologies and systems architecture.

[9] Reddy's response to these averments is that the training he underwent while employed by Siemens would be of no use in respect of Ericsson products and that the training courses in Vienna and elsewhere are entirely academic as far as Ericsson products are concerned. His employment with Ericsson will therefore not involve any of Siemens' customers in South Africa but will entail his working in Kenya servicing Celtel and Safricom, neither of which is a customer of Siemens, and rendering services to MTN, a long-standing Ericsson customer, in South Africa. In addition, he will be working on Ericsson products for which, he said, his training on Siemens products would be academic and of no use.

[10] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,[3] described as a

[3] 1984 (4) SA 874 (A).

'landmark' decision,[4] introduced a significant change to the approach of the courts to agreements in restraint of trade by declining to follow earlier decisions based on English precedent that an agreement in restraint of trade is *prima facie* invalid and unenforceable. In English law a party seeking to enforce such agreement has to show that the restraint is reasonable as between the parties while the burden of proving that it is contrary to public policy is incumbent on the party alleging it.[5] *Magna Alloys* reversed this approach and held that agreements in restraint of trade were valid and enforceable unless they are unreasonable and thus contrary to public policy, which necessarily as a consequence of their common-law validity has the effect that a party who challenges the enforceability of the agreement bears the burden of alleging and proving that it is unreasonable.[6] The effect of the judgment is summarised in *J Louw and Co (Pty) Ltd v Richter and others*:[7]

'Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work. In so far as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with

[4] RH Christie *The Law of Contract in South Africa* 5ed (2005) p 361. For a review of the literature before and after *Magna Alloys* see AJ Kerr 'Restraint of Trade after *Magna Alloys*' in Coenraad Visser (ed) *Essays in Honour of Ellison Kahn* (1989) p 186; JM Otto 'Inkorting van "restraint of trade"-bedinge in kontrakte: *Magna Alloys* se nageslag' 1997 (60) *THRHR* p 282 and his earlier 'Roffrey v Catterall Edwards & Goudre (Pty) Ltd 1977 4 SA 494 (N)' 1978 (41) *THRHR* p 208.

[5] *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 (HL) 319E; *Commercial Plastics Ltd v Vincent* [1964] 3 All ER 546 (CA) 551D. See *Halsbury's Laws of England* 4ed *Volume 47* (2001) para 21 at p 28-9; Simon Mehigan and David Griffiths *Restraint of Trade and Business Secrets: Law and Practice* (1996) 3ed p 45-46 and, on Canadian law, *Elsley et al v JG Collins Insurance Agencies Ltd* (1978) 83 DLR (3d) 1; on Australian law, *Lindner v Murdoch's Garage* [1950] 83 CLR 628 (High Court of Australia).

[6] *Magna Alloys* 893CG, 897H-898D.

[7] 1987 (2) SA 237 (N) 243B-C. See *CTP Ltd and others v Argus Holdings Ltd and another* 1995 (4) SA 774 (A) 784A-B.

reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought.'

[11] All agreements including agreements in restraint of trade are subject to constitutional rights obliging courts to consider fundamental constitutional values when applying and developing the law of contract in accordance with the Constitution.[8] Section 8 of the Constitution is imperative.[9] The Bill of Rights applies to all law, also private law, and binds, inter alia, the judiciary (s 8(1)). Its provisions bind natural and juristic persons if, and to the extent that, they are applicable, taking into account the nature of the right and the nature of any duty imposed by the right (s 8(2)). In their application to natural and juristic persons a court must apply or, if necessary, develop the common law to give effect to the right when legislation does not do so (s 8(3)(a)). A court may also develop the common law to limit the right in accordance with s 36 (s 8(3)(b)).[10] Section 39(2) requires a court when interpreting and developing the common law to promote the spirit, purport and objects of the Bill of Rights.

[12] Brand JA observed in *Afrox Healthcare Bpk v Strydom*[11] that it must be remembered that

[8] *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) para 6 and see *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 88-95; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 18-30.

[9] *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) para 29-33 (and see the discussion by IM Rautenbach 'Overview of Constitutional Court decisions on the Bill of Rights – 2002' 2003 *TSAR* 166 pp 172 ff, 180-181).

[10] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 32; *Phumelela Gaming and Leisure Ltd v Gründlingh & others* [2006] JOL 17421 (CC) paras 27-8.

[11] 2002 (6) SA 21 (SCA) para 30 and cf *Phumelela Gaming and Leisure Ltd v Gründlingh & others* [2006] JOL 17421 (CC) para 38.

‘die bepalings van die Grondwet nie soseer ‘n stel reëls is nie maar ‘n hele waardesisteem. Van die waardes in die sisteem verkeer soms in onderlinge spanning wat dan versigtige opweging en versoening verg.’

The exercise of a right may be limited by the exercise of by another person of his own fundamental right. To determine whether there has been an unconstitutional limitation of a right the purpose of the limitation has to be considered in conjunction with all the other factors referred to in section 36(1).[12] This situation may occur when the enforceability of agreements in restraint of trade and the balancing or reconciling of the concurring private and public interests are considered.

[13] It was submitted on behalf of Reddy that the rule that was laid down in *Magna Alloys* - which has the effect of casting the *onus* upon a party seeking to avoid a restraint to allege and prove that the restraint is unreasonable – is in conflict with s 22 of the Constitution which guarantees every citizen the right to choose his or her trade, occupation or profession freely. The effect of that provision, it was submitted, was that a restraint limits that right, and is enforceable only if it is alleged and proved by the person seeking to enforce it that the limitation is reasonable.[13] What was not contested, however, is that a

[12] IM Rautenbach “The Bill of Rights applies to private law and binds private persons” 2000 *TSAR* 296 p 311.

[13] This submission is consistent with remarks in *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) 861F-862F; *Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth and another* 2005 (3) SA 205 (N) 209E-G; *Lifeguards Africa (Pty) Ltd v Raubenheimer* 2006 (5) SA 364 (D) para 29-34; *Triangle Bearings CC v Selepe Electrical Wholesalers CC t/a Selepe Bearings, Muller Stephen; Dias, Helder Fernando dos Santos, Selepe Bearings CC* (WLD) case 05/7935 and cf *Coetzee v Comitis and others* 2001 (1) SA 1254 (C) para 40 but see *Rectron (Pty) Ltd v Govender* 2006 CLR 1 (D) para 8-16; *Kotze & Genis (Edms) Bpk en ‘n ander v Potgieter en andere* 1995 (3) SA 783 (C) 785I-786I; *Petros Magos and Associates (t/a PMA) v Kenneth Cyril NTA; Afrisun International Gauteng (Pty) Ltd (t/a Carnival*

restraint that is found to be reasonably required for the protection of the party who seeks to enforce it, in accordance with the test that has been laid down in the cases, is constitutionally permitted.[14] The constitutional challenge was restricted to where the *onus* lies.

[14] In the present case we are not called upon to decide that issue. Where the onus lies in a particular case is a consequence of the substantive law on the issue.[15] I have pointed out that the substantive law as laid down in *Magna Alloys* is that a restraint is enforceable unless it is shown to be unreasonable, which necessarily casts an *onus* on the person who seeks to escape it. But if the rule were to be reversed – to provide that a restraint is not enforceable unless it is shown that it is reasonable – which would necessarily cast an *onus* on the person seeking to enforce it to allege and prove that the restraint is reasonable the result in the present case would be the same. For in the present case the facts concerning the reasonableness or otherwise of the restraint have been fully explored in the evidence, and to the extent that any of those facts are in dispute that must be resolved in favour of Reddy (these being motion proceedings for final relief). If the facts disclosed in the affidavits, assessed in the manner that I have described, disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the

*City)* (WLD) case 06/105.

[14] This view was expressed in cases under both the interim (*Waltons Stationery Co (Edms) Bpk v Fourie* 1994 (4) SA 507 (O) 510I-511F; *Kotze & Genis (Edms) Bpk en 'n ander v Potgieter en andere* 1995 (3) SA 783 (C) 786E-I; *Knox D'Arcy Ltd and another v Shaw and another* 1996 (2) SA 651 (W) 657H ff, 661D-F) and the final Constitution (*CTP Ltd and others v Independent Newspaper Holdings Ltd* 1999 (1) SA 452 (W) 468G-H; *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) 861F-862G; *Petros Magos and Associates (t/a PMA) v Kenneth Cyril NTA; Afrisun International Gauteng (Pty) Ltd (t/a Carnival City) (*WLD) case 06/105).

[15] *Tregea and another v Godart and another* 1939 AD 16 32-33; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20A.

incidence of the *onus* accordingly plays no role.

[15] A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint.[16] The first is that the public interest[17] requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*.[18] The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity,[19] and it is by entering into contracts that an individual takes part in economic life.[20] In this sense freedom to contract is an integral part of the fundamental right referred to in s 22.[21] Section 22 of the Constitution guarantees '[e]very citizen … the right to choose their trade, occupation or profession freely' reflecting the closeness of the relationship between the freedom to choose a

[16] *Basson v Chilwan and others* 1993 (3) SA 742 (A) 767C-F; *Reeves and another v Marfield Insurance Brokers CC and another* 1996 (3) SA 766 (A) 775J-776F.

[17] The determination of the public interest and its weight, where it is an element of a common-law principle, must be fashioned by constitutional values. See *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 17; *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as amicus curiae)* 2003 (1) SA 389 (SCA) paras 10-12; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) paras 18-21.

[18] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere* 1964 (4) SA 760 (A) 767A; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 23 and Coenraad Visser's historical survey 'The principle *pacta servanda sunt* in Roman and Roman-Dutch law, with specific reference to contracts in restraint of trade' (1984) 101 *SALJ* 641.

[19] *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) 475 A-B; *Brisley v Drotsky* above para 94. In *Knox D'Arcy Ltd and another v Shaw and another* 1996 (2) SA 651 (W) 660J-661A Van Schalkwyk J remarked that 'the enforcement of a bargain (even one which was ill-considered) gives recognition to the important constitutional principle of the autonomy of the individual.'

[20] CFC van der Walt 'Kontrakte en beheer oor kontrakteervryheid in 'n nuwe Suid-Afrika' 1991 (45) *THRHR* 367 p 383 ff.

[21] IM Rautenbach and MFB Reinecke 'Kontrakte ter beperking van die handelsvryheid en die grondwetlike reg om vrylik aan die ekonomiese verkeer deel te neem' 1995 *TSAR* 551 p 556.

vocation and the nature of a society based on human dignity as contemplated by the Constitution.[22] It is also an incident of the right to property to the extent that s 25 protects the acquisition, use, enjoyment and exploitation of property,[23] and of the fundamental rights in respect of freedom of association (s 18), labour relations (s 23) and cultural, religious and linguistic communities (s 31).

[16] In applying these two principal considerations the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest.[24] Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest. In *Basson v Chilwan and others*[25] Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint: (a) Does the one party have an interest that deserves protection after termination of the agreement? (b) If so, is that interest threatened by the other party? (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Where the interest of the party sought to be restrained weighs more than the interest to be protected the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to

[22] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 59.

[23] Cf *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (CC) para 58.

[24] *Townsend Productions (Pty) Ltd v Leech and others* 2001 (4) SA 33 (C) 50J-51B; *CTP Ltd and others v Argus Holdings Ltd and another* 1995 (4) SA 774 (A) 784A-C.

[25] 1993 (3) SA 742 (A) 767G-H.

the parties and their respective bargaining powers and interests.[26]

[17] The common-law approach in balancing or reconciling the concurring interests in this manner gives effect to the precepts of s 36(1) of the Constitution:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.'

An agreement in restraint of trade is concluded pursuant to 'law of general application' referred to in s 36(1). What is meant by this expression includes the law in the general sense of the legal system applicable to all which, in this case, consists of the corpus of law generally known as 'the law of contract' and which allows for contractual freedom and the conclusion of agreements pursuant thereto.[27] The four questions identified in *Basson* comprehend the considerations referred to in s 36(1). A fifth question, implied by question (c), which may be expressly added, viz whether the restraint goes further than necessary to protect the interest,[28] corresponds with s 36(1)(e) requiring a consideration of less

[26] *Reeves and another v Marfield Insurance Brokers CC and another* 1996 (3) SA 766 (A) 776A-F; *Basson v Chilwan* above 786B-C.

[27] Cf *Fidelity Guards Holdings (Pty) Ltd v Pearmain* 1997 (10) BCLR 1443 (SE) 1451A-B); *Taylor v Kurtstag NO and others* 2005 1 SA 362 (W) para 45 and see IM Rautenbach *Bill of Rights Compendium* (1998) Service Issue 17 (September 2005) p 1A-68 ff.

[28] *Kwik Copy (SA) (Pty) Ltd v Van Haarlem and another* 1999 (1) SA 472 (W) 484D-E added a fifth question, viz whether the restraint goes further than necessary to protect the interest; *Recton (Pty) Ltd v Govender* 2006 CLR 1 para 37 but see *De Klerk Vermaak en Vennote v Coetzer* 1999 (4) SA 115 (W) 125C and *Super Towing (Pty) Ltd v Thomas* 2001 (2) SA 969 (W) para 16.This

restrictive measures to achieve the purpose of the limitation. The value judgment required by *Basson* necessarily requires determining whether the restraint or limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.' I agree with Rautenbach and Reinecke,[29] albeit writing on s 33(1) of the interim Constitution, who remarked that

'dit moeilik [is] om in te sien hoe daar bloot deur die feite deur 'n konstitusionele bril te beoordeel, verbeter kan word aan die wyse waarop die howe ingevolge die gemenereg die private en openbare belange teenoor mekaar opweeg [ten opsigte van ooreenkomste ter beperking van handelsvryheid] . . . '

[18] In its founding papers Siemens relied on both clauses 22 and 26 of the contract of employment but the case advanced essentially centres on clause 26. Neither is intended to preclude Reddy from making use of his own skills and abilities which are 'a part of himself'[30] or an 'attribute'[31] of himself and in which Siemens has no proprietary interest.[32] Clause 26 placing a limit on Reddy from being employed by a competitor is restricted to a twelve month period. It has not been argued that the limitation as to time is unreasonable. Reddy is restrained only in the *choice* of his employer for a limited period not in his being economically active at all. Restraining him from being employed by Ericsson does not affect his employment elsewhere or his ability to engage in the employment he was trained for. The nature and extent of the limitation is therefore restricted.

question fits comfortably into s 36(1)(e) (or, for that matter, s 36(1)(c)).

[29] At p 558 and cf C-J Pretorius 'Covenants in restraint of trade: an evaluation of the positive law' 1997 (60) *THRHR* 6 at p 23-24.

[30] *Basson v Chilwan* above 778D.

[31] *Sibex Engineering Services (Pty) Ltd v Van Wyk and another* 1991 (2) SA 482 (T) 507D-F.

[32] *Sibex Engineering Services* above 507D-F.

[19] Reddy will during the period of the restraint have no contact with Vodacom, nor will he be able to solicit Vodacom to move its business to Ericsson. He will, however, provide services to MTN in South Africa and to Celtel and Safricom in Kenya where Siemens does not operate. The restraint against being employed by a competitor, in addition, applies to Gauteng only despite Siemens being active throughout South Africa. It was submitted on behalf of the appellant that in these circumstances the restraint is unreasonable.

[20] However, all the facts must be considered. Siemens and Ericsson are competitors providing services to telecommunication network operators. Although Vodacom and Cell C are customers of Siemens Ericsson does some business with them. Siemens still has to acquire any of MTN's business. Reddy is in possession of trade secrets and confidential information of Siemens. Moreover, shortly before his resignation from Siemens he attended a training course updating his knowledge of the processes, methodologies and systems architecture developed by Siemens. Information of this kind, if disclosed, could be used to the disadvantage of Siemens. This is not a case such as *Basson v Chilwan*[33] where an employer's application to assert a protectable interest in respect of customer connections against an ex-employee who had no such connections was dismissed. Reddy is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively,[34] is obvious. It is not that the mere possession of knowledge is sufficient, and this is not what was suggested by Marais J in *BHT Water*:[35] Reddy will be employed by Ericsson, a 'concern which carries on the same business as [Siemens]'[36] in a position similar to the one he occupied with

[33] 1993 (3) SA 742 (A) 769I-770B.

[34] *International Executive Communications Ltd t/a Institute for International Research v Turnley and another* 1996 (3) SA 1043 (W) 1056I-J; *Rectron (Pty) Ltd v Govender* 2006 CLR 1 (D) par 40.

[35] 1993 (1) SA 47 (W) 58H-59A.

[36] Clause 26(3).

Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist.[37] The restraint was intended to relieve Siemens precisely of this risk of disclosure. In these circumstances the restraint is neither unreasonable nor contrary to public policy. I agree with the remarks of Marais J in *BHT Water*:[38]

'In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the *bona fides* or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very *ratio* underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given. … In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant. Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the services of a competitor.'

[21] Public policy requires contracts to be enforced. This is consistent with the constitutional values of dignity and autonomy. The restraint agreement in this matter is not against public policy and should be enforced. Its terms are reasonable. What Reddy is required to do is to honour the agreement he entered into voluntarily and in the exercise of his own freedom of contract. While it is

[37] *Turner Morris (Pty) Ltd v Riddell* 1996 (4) SA 397 (E) 409I-410B.

[38] At 57J-58B. See similar remarks in *International Executive Communications Ltd t/a Institute for International Research v Turnley and another* 1996 (3) SA 1043 (W) 1055E-1057A; *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (aka Baghas) and another* 2004 (4) SA 174 (W) 179H-180C; *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearman* 2001 (2) SA 853 (SE) 859C-J; *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and others* 2004 (4) SA 156 (W) 166I-167A.

correct that his employment with Ericsson will be restricted it remains a breach of his contractual undertaking. It follows that it is no answer to suggest that an undertaking would be sufficient to protect Siemens' interests and that less restrictive means could therefore achieve the same purpose as enforcing the restraint (s 36(1)(e)). Such an approach was followed by the High Court of England and Wales in the Queens Bench Division in *Gordian Knot Limited v Kenneth Towers*.[39] However, in *The Littlewoods Organisation Ltd v Harris*[40] Lord Denning MR remarked, and I agree with his observations:

'It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practical solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.'

[22] It follows that the judge a quo was correct in holding Reddy to his contractual undertaking. The requirements for a final interdict have been met: not only has Siemens' clear right been demonstrated but also its breach: the very breach is an 'injury actually committed' in the formulation of the second requirement for a final interdict as an 'injury actually committed or reasonably apprehended'.[41] There is no other appropriate remedy.

[39] No HQ01X04936 (QBD) of 6 December 2001. Wright J said: 'I remind myself again of Mr Read's argument about policing, but I am not prepared to assume that a man who gives a solemn undertaking to the court will not do his utmost to observe his undertaking, knowing, as he does, that if, in fact, he deliberately and willfully breaches that undertaking, he is likely to be faced with a motion to commit him to prison to contempt.'

[40] [1978] 1 All ER 1026 (CA) 1033c-d. See *Scorer v Seymour Jones* [1966] 1 WLR 1419 (CA) 1425B-D; *Freight Bureau (Pty) Ltd v Kruger and another* 1979 (4) 337 (W) 340B-E.

[41] *V & A Waterfront Properties (Pty) Ltd and another v Helicopter and Marine Services (Pty) Ltd*

The appeal is dismissed with costs including the costs of two counsel.

F R MALAN

Acting Judge of Appeal

CONCUR:

HOWIE P

NAVSA JA

NUGENT JA

COMBRINCK AJA

*and others* 2006 (1) SA 252 (SCA) para 20-21.