IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO: 73/2018**

In the Matter Between:

AFRICAN OXYGEN LIMITED **Appellant**

And

TONY COSTER **1ST Respondent**

ELCOR INDUSTRIES (PTY) LIMITED **2ND Respondent**

Neutral Citation: African Oxygen Ltd v Tony Coster and Another (73/2018) [2018] SZSC 6 (09th May, 2019)

Coram: **MCB Maphalala CJ, MJ Dlamini JA, SJK Matsebula AJA**

Heard: **13 February, 2019**

Delivered: **09 May, 2019**

Summary: *Contract – restraint of trade agreement – enforcement of – employer/employee relationship ended – 100 km radius - former employee assumes employment within a stone's throw from former employer – freedom of trade versus freedom of contract – public policy considered – question of onus in light of developments in the law – limitation of entrenched right discussed.*

JUDGMENT

MJ Dlamini JA

Introduction

[1] The is an appeal arising from an alleged breach of an agreement in restraint of trade between the appellant and the first respondent ("the respondent"). The appellant and the second respondent are registered companies engaged in the distribution of liquid gas and having their principal places of business in an area zoned for the purpose in the Matsapha Industrial Estate. As such, the two companies are competitors in the liquid gas industry in the Kingdom.

[2] On or about 1st May, 2013 the appellant employed the respondent as its branch manager. In January 2014, the appellant and the respondent ("the parties") signed an agreement setting out their terms of engagement, *inter alia*, as follows:

> "9.2 That both parties are required to give one calendar-month's notice of termination;

"9.4 That the 1st respondent shall not disclose to any person whatsoever any information of a confidential and protectable nature, without the prior consent of the [appellant];

"11.1 That the 1st respondent shall not in any way, whether directly or indirectly, use any information of the customers of the [appellant] save in the normal course of the 1st respondent's employment nor shall the 1st respondent divulge or disclose this information to any other person whomsoever without the prior consent of the [appellant];

"11.2 That the 1st respondent shall not solicit, pursue and/or engage in business contact (sic) with an enterprise that [appellant] regards as a customer or competitor in a capacity in which 1st respondent may use his specialist knowledge to disadvantage the [appellant] or damage the competitive advantage of the [appellant] for a period of six (6) months from the date of termination of the contract of employment and within a geographic area comprising a radius of one hundred kilometres (100 km) from the region or branch for which the 1st respondent was responsible".

[3] In January 2018 the respondent gave notice of his intention to terminate his employment with the appellant with effect from end of March 2018. However, the parties agreed to have the employment terminated at the end of April 2018.

[4] At about the time respondent tendered his resignation, Easigas, a major competitor of the appellant had been acquired by the 2nd respondent, *"[was] approaching our customers to do business, with them"*, says the appellant. The

resignation of the respondent at about the same time made the appellant suspect that respondent *"might be going to join [the] competitor"*. As a result, the appellant says, the respondent was asked where he was intending to go, and respondent stated *"categorically that he was leaving the [appellant] to join his stepfather in their timber business"*.

[5] It is further deposed on behalf of the appellant that before the final departure of respondent, the respondent *"had visibility of the [appellant's] internal processes and or tenders to the Ministry of Health and Royal Swaziland Sugar Association"*. These were the appellant's major tenders which the respondent was also involved in on behalf of 2nd respondent against the appellant. *"Further, the internal processes and tenders contained trade secrets, including, for example, critical pricing strategy, which was shared with the 1st respondent based on the senior position he held with the [appellant] at the time"*.

Appellant's case

[6] On or about June 2018, avers appellant, *"the [appellant] learnt that 1st respondent was now employed by Elcor Industries, the 2nd respondent, which is a local agent for Easigas, Air Liquid and Weldamax, and all these companies are in direct competition with the [appellant] as they sell and distribute liquid petroleum products. Exacerbating the situation is the fact that the 2nd respondent is even located or situated a stone's throw away from the place of business of the [appellant]"*.

[7] Appellant reckons respondent's act of joining second respondent's employ was "in direct breach of [the] Restraint of Trade Agreement". The appellant further states that at about the end of June 2018 it was "surprised to learn that the 1st respondent was actively pursuing its customers to do business with 2nd respondent". Appellant in support of its allegation names a couple of its customers as having been pursued or 'poached' by the respondent, and the respondent was *"enticing [appellant's] customers by offering them much lower prices than those that were offered by the [appellant]" – this "in direct violation of [the] Restraint of Trade Agreement...solely due to the 1st respondent's intimate knowledge of the customers' requirement, the [appellant's] pricing and or trade secrets, having gained same during his course of employment with the [appellant]".*

[8] Further, in support of its case, the appellant gives the example of a "major tender for welding consumables for the Royal Eswatini Sugar Corporation" that appellant and respondent were working on before respondent left the former's employ. Appellant continues: *"In so working on the tender, the 1st respondent got to know of the pricing structure of the [appellant]".* However, the 1st respondent left the appellant to work for its competitor, which also put in a tender at Royal eSwatini Sugar Corporation. The appellant *"only got to know of this at a site meeting attended by one of [appellant's] local sales representative, Israel Tsabedze",* employed as an Accountant Manager, who confirmed the allegations *"in so far as they relate to [him]."*

[9] Another example deposed to on behalf of the appellant is that of a "medical installation tender to the Ministry of Health", submitted on 6th of June 2018, and *"at*

the tender opening meeting, the 1st respondent was present once again to submit a tender on behalf of the 2nd respondent" and "when the tender prices were read, the 2nd respondent's prices were less than those of the [appellant]". Appellant then concludes: "This clearly creates a reasonable impression that 1st respondent is unlawfully and constantly utilizing the information he got from his employment by the [appellant] to the benefit of 2nd respondent, which information as stated before, constitutes trade secrets of the [appellant]. This is exactly what was sought to be avoided by means of the Restraint of Trade Agreement. The 1st respondent clearly knew the pricing of the [appellant] and now he is using that information against the [appellant]. This clearly results to prejudicial and unfair competition contrary to the signed agreement".

[10] In the founding affidavit, Mr. Coetzee, director of the appellant states:

> *"24 It is to be further noted that the purpose of the Restraint of Trade Agreement was also to avoid an instance where the 1st respondent may use his specialist knowledge to disadvantage [appellant] or damage the competitive advantage of the [appellant].*
>
> *"25. It is humbly averred that six months had not lapsed from the date of resignation of the 1st respondent to the date of the 1st respondent taking employment with 2nd respondent. Moreover, the location of the 2nd respondent is within the prohibited one hundred (100) km radius provided for in the Restraint of Trade Agreement that the parties voluntarily entered into.*
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> *"26 It is the [appellant's] averment that the provisions entered into in terms of Restraint of Trade Agreement were as a result of a clear understanding*

(concerning the 1st respondent's experience in the industry) between the parties of the nature of the business in which the [appellant] is engaged in trade secrets that was being protected. This is clearly now disregarded by the 1st respondent to the [appellant's] great prejudice".

[11] Reckoning respondent to be in breach of the covenant, appellant had accordingly applied for an order *"interdicting and restraining the 1st respondent from breaching the restraint of trade agreement by inducing, approaching and enticing"* appellant's *"customers to do business with his employer"*, as well as *"interdicting and restraining 1st respondent from continuing with his employment with 2nd respondent ..."*

Respondent's case

[12] The respondent denies the accusations leveled against him by appellant. In a letter written by respondent's attorney "WITHOUT PREJUDICE" dated 3rd July 2018, the respondent's attorney counters -

"9 Our client places on record that other than the skills and working knowledge he has acquired in his occupation in the industry in the past 23 years (over which no proprietary rights can arise), he has no intellectual property belonging to your client.

"10. In so far as the restraint would limit our client's employment within a one hundred-kilometer radius, which covers all of Eswatini's commercially active urban areas, such restraint is unreasonable and would amount to

taking away our client's right to earn a living as there is no other industry or occupation that our client knows.

"11. Other than going into the employment of Elcor, client accordingly denies breaching the restraint clauses cited but further reserves his rights to contest the enforceability of the restraint which he considers to be unreasonable and against public policy in respect of their territorial ambit and deprivation of his right to earn a living".

[13] In his answering affidavit respondent repeats his denial of the breach of the restraint of trade agreement as alleged by the appellant. ***In limine,*** the respondent challenged the jurisdiction of the High Court on the basis that the matter "emanates from an employment relationship" purportedly covered under section 8 of the Industrial Relations Act, 2000 as amended.

[14] Substantively, respondent avers, *inter alia*, -

"8 ... the enforceability of the restraint of trade entered into by the parties is unreasonable as the effect of it is that I will have to be forced out of employment and will be without a source of income to maintain myself, children and further meet other financial obligations.

"15 ... I submit that I am aware of the restraint of trade and I have never disclosed any information regarding and / or relating to the [appellant's] business. However, I submit that the restraint of trade entered into by myself and the [appellant] is unreasonable in so far as it relates to the 100km radius.

"16. The contents of this paragraph are not in dispute in so far as they relate to me knowing the [appellant's] internal processes. However, I deny that I used that information to the prejudice of the [appellant]. The [appellant] in paragraph 13 of the Founding Affidavit clearly states that the 2nd respondent is a major competitor and from those words I submit that the 2nd respondent has been in the same business and is also knowledgeable on how to fill in figures that would possibly win them tenders.

"17... both the [appellant] and 2nd respondent's places of business are situated at the Industrial site, which I submit and believe that it is an area designated by the government for those purposes. It is therefore unreasonable for the [appellant] to expect me not to have a job within a radius of 100 km ... that would mean I should not take up employment in Mbabane.

"18. The distance from Matsapha to Nhlangano is almost 70 km, which means that I am also barred from taking employment in that region; similarly the distance from Matsapha to the Lubombo region is almost 70 km and the conclusion this Court is requested to draw is that I am not supposed to be employed in the Kingdom of Eswatini for a period of six (6) months... finding another job nowadays is very hard and the only knowledge and experience I have relate only to this industry.

"21 ... I was not involved in the preparation of the tender document submitted to the Ministry of Health, I only found the tendering documents already prepared, mine was to attend the awarding of the tender.

"23 ... I submit that I have not used any of my knowledge to disadvantage the [appellant]. I have not approached any of the [appellant's] clients. Furthermore, if I were not to apply myself and / or not perform as expected

by the 2nd respondent, I stand to suffer as I might lose employment for failure to work to the best of my abilities. I further submit that the restraint of trade is unreasonable on that aspect".

[15] In short, the respondent submitted that the restraint was "unreasonable in so far as it relates to the issue of 100 km radius" and that he was "not using [appellant's] trade secrets" to disadvantage the appellant's business: *"31 I submit that I do not use the [appellant's] secrets in any way and I do not approach any of its customers with a view to have them join the 2nd respondent. I submit that [appellant's] fears are baseless and this application [appeal] stands to be dismissed".*

In the court *a quo*

[16] The trial court, per her Ladyship M Langwenya J, promptly rejected the issue of jurisdiction as raised by respondent, ***in limine,*** pointing out that section 8 of the Industrial Relations Act, 2000 had no application in the matter since the employer – employee relationship had been ended when respondent left appellant's employment. See ***Reeves and Another v Marfield Insurance Brokers CC and Another*** 1996 (3) SA 766 AD at p. 771J. However, on the merits, the trial court dismissed the application as it found that the restraint clause was unreasonable and unenforceable in that the clause (predicated on a radius of 100 km and a period of six months) sought "to prevent the first respondent from finding employment within the radius of 100 km from the applicant's place of business. The restraint virtually banishes the first respondent from finding employment within the country where he is resident". The learned trial Judge also took into account what she considered to be the "currently sluggish" and "depressed economic climate" of the country.

[17] The trial Judge considered that for any employee to lose a job in the then prevailing economic climate should not be lightly contemplated as respondent stood to "lose far more than the applicant should the restraint be enforced". The learned Judge after balancing the interest of the appellant to keep its trade secrets and customers "against the countervailing right of the first respondent to work in the only trade in which he enjoys any prospects of income commensurate with what he had" dismissed the application with no order as to costs.

The appeal

[18] The appellant has appealed against the trial court's judgement on twelve grounds. The cumulative effect of these grounds is that the court ***a quo*** erred in holding the restraint clause to be unreasonable in the circumstances: the proximity of respondent's new employment to appellant's; the respondent joining forces with an established competitor of appellant's; the respondent had agreed to the 100 km radius (as reasonable) limiting similar employment for the respondent; the respondent made only bare denial of the issues constituting the alleged breach of the restraint clause, and by the court "failing to impose a lesser radius" to render the area of restraint reasonable/ enforceable and not having due regard to the short period of six months.

General

[19] On the assumption that our law, regarding agreements in restraint of trade, is the Roman Dutch common law similar to that of South Africa, it seems fair to start with a reference to the English Law in this regard. The reference helps widen our focus on the subject even though it is accepted that the English and South African

law on restraint of trade somewhat differ even as they share many similarities. Actually, the difference between the two systems is only that by the English law restraint of trade agreements are presumed to be invalid requiring justification by the enforcer to be held lawful and enforceable. In the result the ***onus*** is on the party alleging breach to prove that the agreement is valid. The South African position presumes legality of the agreement and places the ***onus*** of proof on the party resisting enforcement. Otherwise the law is largely similar.

[20] In **Esso Petroleum Co Ltd**,[1] Lord Reid stated as follows:

> *"It is now generally accepted that a provision in a contract which is to be regarded as in restraint of trade must be justified if it is to be enforceable, and that the law on this matter was correctly stated by Lord Macnaghten in the* ***Nordenfelt*** *case (1891 – 94] All ER Rep at p.18; [1894] AC at p 565). He said:*
>
> > *'Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed, it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.'"*

[21] Endorsing the above position in the same case, Lord Morris[2] stated thus:

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[1] **Esso Petroleum Co Ltd v Harper's garage (Stourport)** [1967] 1 All ER 699 (HL) at 708 G-H

[2] **Ibid** pp 711H – 712A

"The law has for many centuries set itself against restraint of trade. Monopolies, likewise, have always been in disfavor with the law. In keeping with this, arrangements are condemned which have as their mere purpose the elimination of competition. ... In general, the law recognises that there is freedom to enter any contract that can lawfully be made. The law lends its weight to uphold and enforce contracts freely entered into. The law does not allow a man to derogate from his grant. If someone has sold the goodwill of his business, some restraint to enable the purchaser to have that which he has bought may be recognised as reasonable. Some restraints to ensure the protection of confidential information may be similarly regarded. The law recognises that, if business contracts are fairly made by parties who are on equal terms, such parties should know their business best".

[22] It is clear then that even though English law does not view with favour contracts in restraint of trade and similar monopolies the law still recognises such arrangements as enforceable if otherwise not irregular or unreasonable or contrary to public interest. The policy of the law is to uphold freedom to contract and freedom to trade subject to some adjustments and considerations as may be necessary. It has then been long recognised that public interest is concerned with both forms of freedom. In other words, the patent policy of the law is to uphold individual freedom, in particular in the sphere of commerce, as far as possible, so that any action that seeks to undermine such freedom is generally frowned upon. In this regard Diplock LJ has noted:[3] *"A contract in restraint of trade is one in which a party (the covenantor) agrees with the other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses...."*

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[3] **Petrofina (Great Britain) Ltd v Martin and Another** [1966] 1 All ER 126 (CA) at 138

[23] In the **Petrofina** case[4] Lord Denning MR observed as follows:

> *"In the result, I take the general principle to be this – every member of the community is entitled to carry on trade or business that he chooses and in such manner as he thinks most desirable in his own interests, so long as he does nothing unlawful; with the consequence that any contract which interferes with the free exercise of his trade or business, by restricting him in the work he may do for others, or the arrangements which he may make with others, is a contract in restraint of trade. It is invalid unless it is reasonable as between the parties and not injurious to the public interest".*

[24] Until the late mid-eighties this branch of our law had not been clearly separated from English law. To that extent, our courts proceeded on the basis that "a covenant in restraint of trade is *prima facie* invalid or unenforceable". That approach was not in accordance with our common law. The Appellate Division stated the law in **Magna Alloys**:[5] *"The position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case, it would be unenforceable".* In that case it is to be noted that the starting point is a general presumption of the validity of the covenant only rendered invalid if contrary to public policy. That being so, it is the resiler and not the enforcer that bears the *onus* of proof. Whilst English law begins on a presumption of invalidity our law begins on a presumption of validity. But the supporting principles are generally similar under both systems of law.

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[4] **Ibid** at p 131 A-B

[5] **Magna Alloys and Research (SA) (Pty) Ltd v Ellis** 1984 (4) SA 874 (A)

[25] Didcott J. in **J.Louw and Co Ltd v Richter and Others**[6] observes:

> *"Some important rules of our law on the subject, or what used commonly to be thought such, have been reviewed during the past decade, at first by the full Benches of three Provincial Divisions which explored and developed a number of fresh ideas, and eventually by the Appellate Division when it accepted these and endorsed them. The cases in the series were* ***Roffey v. Catterall, Edwards and Goudre (Pty) Ltd*** *1977 (4) SA 494 (N),* ***National Chemisearch (SA) (Pty) Ltd v Borrowman and Another*** *1979 (3) SA 1092 (T),* ***Drewtons (Pty) Ltd v Carlie*** *1981 (4) SA 305 (C) and* ***Magna Alloys and Research (SA) (Pty) Ltd v Ellis*** *1984 (4) SA 874 (A). From the judgments that were delivered one learns the following, all of which is now clear. 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 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 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".*

[26] The South African law, which is essentially the Roman Dutch common law, was summarized in **Magna Alloys** a judgment delivered by Rabie CJ as follows:

> *"The approach, followed in many South African judgments, that a covenant in restraint of trade is* prima facie *invalid or unenforceable stems from English law and not our common law, which contains no rule to that effect. The*

[6] 1987 (2) SA 237 (N) at 242 J-243 C

position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be unenforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it be enforced.

"Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the onus *of proving that the enforcement of the condition would be contrary to public policy. The Court would have to have regard to the circumstances obtaining at the time when it is asked to enforce the restriction. In addition, the Court would not be limited to a finding in regard to the agreement as a whole, but would be entitled to declare the agreement partially enforceable or unenforceable."*

[27] The position of our common law regarding agreements in restraint of trade has also been clarified by Scott JA as follows:[7]

"In ***Magna Alloys and Research (SA) (Pty) Ltd v Ellis*** *1984 (4) SA 874(A), this Court rejected the English doctrine that a covenant in restraint of trade is* ***prima facie*** *invalid. It is now settled that whether a restraint is to be enforced or not depends upon whether it would be contrary to the public interest to do so. This is to be assessed in the light of the circumstances prevailing when it is sought to enforce the restraint and involves the weighing up of two main considerations. These were summarized by EM Grosskopf JA in* ***Sunshine Records (Pty) Ltd v Frohling and Others*** *1990 (4) SA 782 (A) at 794 C-D as follows:*

'The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or

[7] **Reeves and Another v Marfield Insurance Brokers CC and Another** 1996 (3) SA 766 AD at 775 I-776 D.

unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession'".

[28] Scott JA (*ibid*) continues:

"In general, the enforcement of an unreasonable restraint on a person's freedom to trade will be contrary to the public interest. The principal inquiry therefore is whether, having regard to all the circumstances of the case, the restraint can be said to be reasonable. The ***onus*** *of proving unreasonableness is upon the party seeking to avert the enforcement of the restraint. As pointed out by Botha JA in* ***Besson v Chilwan and Others*** *1993 (3) SA 742 (A) at 776 I-J, the effect of this in practical terms is that once the covenantee has invoked the provisions of the contract and proved the breach, 'the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint'".*

[29] Heinrich Schulze *et al* write:[8]

"A contract will be contrary to public policy if the contract itself, its effect or the purpose of its conclusion, is harmful to the interests of the public at large... A contractual term which is not ***per se*** *contrary to public policy will not be enforced if its enforcement would be contrary to public policy. Also, courts will not give effect to the implementation of a contractual provision if it will be unreasonable or unfair to do so. Note again that the Supreme Court of Appeal has stipulated that when deciding whether to invalidate a contract on the ground of 'public policy', the courts have to take into account the founding values of the Constitution, namely, those of human dignity, the*

[8] **General Principles of Commercial Law**, 8th edition (2014) p84, para 6.2.1.3

achievement of equality, the advancement of human rights and freedoms, and non- racialism and non-sexism... If it is also kept in mind that public policy generally favours utmost freedom of contract, it becomes evident that the determination of public policy is often problematic".

[30] Schulze *et al* continue:[9]

"Two kinds of contracts in restraint of trade commonly occur.

"First, it often happens that the purchaser of a business enterprise or of a professional practice insists on including in the contract of sale an undertaking by the seller that, for a specified period and / or within a specified geographical area, the seller will not practise his or her profession or carry on business in competition with the purchaser...

"The second kind of contract in restraint of trade commonly relates to the protection of trade secrets and commercial contracts. For example, an employer who trains an employee may convey knowledge to him or her of certain secrets of their business. In their contract they agree that, subsequent to the employee leaving the employer's service, the employee will not render the same kind of labour or service within a specified period and / or within a specified geographical area. ...

"Such contracts bring two principles of public policy into conflict. On the one hand, it is in the public interest that everyone should be able to participate freely in commerce. On the other hand, it is also in the public interest that contacts must be executed. ***Where these two interests are brought into conflict, they set off against each other. Contractual commitment is then regarded as the stronger of the two interests, and takes precedence****". [My emphasis]*

[9] Ibid pp 85-86 para 6.2.1.3 (e)

[31] Scott JA in **Reeves and Another** further writes:[10]

> *"An employee who by virtue of his employment would be in a position to exploit on his own behalf his employer's customer connections is free on leaving his employment, subject to certain limitations, to compete with his erstwhile employer for the business of the latter's customers unless restrained by contract from doing so. .... The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end.*

The case

[32] It may now be convenient to turn to the facts of the present case. As we have seen, by letter dated 3rd July, 2018 from his attorneys, respondent disputed the appellant's claim regarding the breach of the restraint of trade agreement. Respondent argued that his skills and working knowledge had been acquired over a 23-year occupation in the liquid gas industry and therefore the appellant cannot claim to have imparted any protectable skills and trade secrets to him. That the 100 km radius prescribed in the restraint clause was not reasonable as it deprived him the right to earn a living in all of eSwatini's commercially active urban areas in the only industry and occupation respondent is equipped for. Whilst admitting employment by 2nd respondent, the respondent challenged the restraint agreement as unenforceable and against public policy by reason of its territorial coverage and its denying him of his right to freely earn a living.

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[10] Op. cit. p772 D-J

[33] Respondent further denied ever disclosing any information regarding and or relating to the appellant's business. Respondent, however, did not deny knowing the internal processes of appellant's business. But respondent denied that he used the knowledge or information so acquired by reason of his involvement in appellant's business to the prejudice of appellant or at all. Respondent points out that 2nd respondent is also an established operator in the industry and that any apparent competitive edge that 2nd respondent may show should not be attributed to information or trade secrets transmitted by the respondent. Respondent also denied having approached or pursued any customers of the appellant as alleged.

[34] In his answering affidavit, respondent attempted to downplay the seriousness of his breach of the restraint agreement. He argued that he could not help being employed at 2nd respondent's because that area in Matsapha is "designated by the government for those purposes," that is, it is a location for liquid gas industries. Respondent also argued that he was justified to be employed at his new employer's because it was unreasonable of the appellant to expect respondent "not to have a job within a radius of 100 km", since that would mean he could not take up employment in Mbabane. In short, respondent considered himself justified in breaching the restraint clause because it was unreasonable since "finding another job nowadays is very hard and the only knowledge and experience" respondent had related only to the liquid gas industry.

[35] In dismissing the application, the court *a quo* concluded that the entire restraint agreement was unreasonable. This decision was based on the 100 km radius stipulated in the restraint agreement, which according to the trial court,

comprehensively denied respondent employment in the industry of his expertise in the whole of eSwatini at a time when the country's economy was experiencing hardships. The trial court also found that the respondent was not honest in his denial that he approached some of appellant's customers with a view to them becoming 2nd respondent's customers. In this regard respondent's bare denial had been exposed by Nomsa Mngomezulu who stated that specific clients of appellant had reported having been approached and enticed by the respondent to do business with 2nd respondent.

[36] On the question of whether there was any proof that respondent had *actually* made use of the knowledge he had acquired of appellant's business and pricing technique, the trial court properly had before it the case of **Experian (SA) (Pty) Ltd.**[11] That case pertinently states as follows:

> *"[19] It is trite that the law enjoins confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it ...*
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> *[20] ... the* onus *is on the respondent to prove the unreasonableness of the restraint. He must establish that he had no access to confidential information and that he never acquired any significant personal knowledge of, or influence over, the applicant's customers whilst in applicant's employ. It suffices if it is shown that trade connections through customer contact exist and that they can be exploited if the former employee were employed by a competitor. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of*

[11] **Experian (SA) (Pty) Ltd v Haynes and Another** (2013) 34 1LJ 529 (GSJ) [Foot notes not included]

harm to the applicant, if its former employee were to take up employment, becomes apparent.

[21] Where an applicant as employer, has endeavoured to safeguard itself against the unpoliceable danger of the respondent communicating its secrets to, or utilizing its customer connection on behalf of a rival concern after entering that rival concern's employ by obtaining a restraint preventing the respondent from being employed by a competitor, the risk that the respondent will do so is one which the applicant does not have to run and neither is it incumbent upon the applicant to enquire into the bona fides *of the respondent, and demonstrate that he is* mala fides *before being allowed to enforce its contractually agreed right to restrain the respondent from entering the employ of a direct competitor. In such circumstances, all that the applicant needs to do is to show that there is secret information to which the respondent had access, and which, in theory, the respondent could transmit to the new employer should he desire to do so.*

"[23] The ex-employer seeking to enforce against his ex-employee a protectable interest recorded in a restraint, ***does not have to show that the ex-employee has in fact utilised information confidential to it: it needs merely show that the ex-employee could do so. The very purpose of the restraint agreement is to relieve the applicant from having to show*** *bona fides* ***or lack of retained acknowledge on the part of the respondent concerning the confidential information****. Indeed, the very* ***ratio*** *underlying the bargain is that the applicant should not have to contend itself with crossing his fingers and hoping that the respondent would act honourably or abide by the undertakings that he has given. It does not lie in the mouth of an ex-employee, who has breached a restraint agreement with a competitor to say to the ex-employer 'Trust me: I will not breach the restraint further than I have already been proved to have done'".* [My emphasis] See also **Reddy v Siemens Telecommunications (Pty) Ltd** 2007 (2) SA 486 (SCA).

[37] On the finding that the restraint of trade agreement was unreasonable, the learned trial Judge balanced the interest of the appellant to keep its trade secrets and

customers protected against the "countervailing right of the first respondent to work in the only trade in which he enjoys any prospects of income commensurate with what he had". The learned Judge also weighed the effect of the 100 km radius in coming to her conclusion that the restraint clause was unreasonable. Apparently, the learned trial Judge did not consider that once respondent committed to the restraint agreement and the doctrine that contracts must be observed, the respondent in effect voluntarily surrendered the right to work in the only trade in which he allegedly enjoyed any prospects of income commensurate with his work experience. The judgment *a quo* or record does not show that respondent looked for but did not find any other neutral job to bridge the six months' restraint gap.

[38] The trial court also did not venture into the inquiry as to what could have been a 'reasonable' radius if 100 km was unreasonable. In its replying affidavit appellant says that it was the responsibility of the respondent to *"state what a reasonable radius would be"*. Appellant continued this line of thinking in its heads of argument: *"8 The first respondent should have suggested what a reasonable restraint should be but failed to do so"*; and further asserted: *"In addition, the court a quo ought to have applied its mind to what a reasonable radius ought to be in light of its finding that it was too wide. In this regard the honourable court is referred to the case law referred in these heads"*. But the appellant does not cite the specific case law it is referring to. Needless to say, appellant was not entirely correct in this. The weight of the authorities, however, is against appellant. Even though nothing stops a respondent or the court from indicating what might be a reasonable radius, it is the applicant as the enforcer who must propose an adjustment to the agreement if there is a reasonable cause for it. It is the applicant who must motivate the court as to what is reasonable in any given situation. It is, after all, the applicant who wants to

ensure that nothing would render the restraint agreement unenforceable. In the present case in my opinion the attempt to reduce the radius would not have achieved anything beneficial to both parties. The appellant also argued that in assessing the reasonableness of the restraint the period of the restraint was an important factor to be taken into account and this the court a quo did not do. The six months' period was relatively short, thereby supporting the reasonableness of the restraint.

[39] A partial enforcement of the covenant such as by restriction of the radius if it proved too wide was at all material times open to the court *a quo*. The appellant had also raised the option that if the learned trial Judge was of the view that the radius of 100 km was too wide and as such likely to be unenforceable, the Judge could tamper with the agreement and reduce the radius. In para 31 of its founding affidavit the appellant's deponent proposed: *"In the* unlikely *event the Honourable Court finds that the one hundred kilometres (100 km) radius is unreasonable, I humbly aver the same may be reduced to a reasonable radius the Honourable Court will deem fit under the circumstances considering the nature of the industry and the interest of the applicant that was sought to be protected by the Restraint of Trade Agreement"*. In this regard Sharrock writes:[12] *"If a restraint, according to its terms as agreed upon, is too wide in its scope of operation, the court is not necessarily constrained to reject the restraint in its entirety. The court may, if the unreasonable portion of the restraint is severable, excise that portion and enforce the rest (....)"*. The court may of course decline to accept the proposal[13]. The court *a quo* did not interfere with the radius: the court held the covenant unenforceable. For purposes of this judgment

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[12] Robert Sharrock, **BUSINESS Transactions Law**, 8th Ed. 2011 p. 109

[13] **Sunshine Records (Pty) Ltd v Frohling and Others** 1990 (4) SA 782 (A) is said to be a leading case on the powers of the court to apply the principle of restriction. See also **Branco & A nor t/a Mr. Cool v Gale** 1996 (1) SA 163 (E).

the question of the radius is not important. A restriction of 50 km or even 80 km would not solve the problem of the 'unreasonableness' of the radius in this case short of denying the appellant's right to protection of its trade secrets. The case should not have been decided on this point.

[40] The appellant had appealed against that part of the judgment of the trial court holding that the restraint agreement was unreasonable in that it sought to prevent respondent from being employed within the radius of 100 km from appellant's place of business. The appellant argued that the trial court erred in so finding and that, to the contrary, the restraint agreement was not unreasonable as appellant has a right to safeguard its business interests. Armed with appellant's 'internal processes' on the tender to the Ministry of Health and the Royal eSwatini Sugar Corporation as well as "access to [appellant's] trade secrets", which information respondent did not disavow, appellant asserted that respondent was in breach of the restraint clause when he got employed in a senior position at 2nd respondent's business. The respondent could only avoid the full consequences of such a breach by proving on a balance of probabilities that he had no access to the confidential and protectable trade information pertaining to appellant's business. This, respondent could not do. The principles set out in the **Experian** case fully support appellant's case.

[41] The appellant argued its case, in essence, on the basis that the trial court erred in not giving effect to the terms of the restraint of trade agreement in as much as it could not be reasonably disputed that respondent on the termination of his employment relationship with appellant, joined appellant's next-door competitor located about a stone's throw away from appellant's business and inside the period

of six months. This, without more, was a breach of the Agreement between the parties as set out in clause 2.1.2. This clause says that within a period of six months after separation with appellant and within a radius of 100 km from appellant's location in Matsapha Industrial Estate, respondent shall not, *inter alia,* " pursue and / or engage in business contact with an enterprise that the [appellant] regards as a customer or competitor in a capacity in which the [respondent] may use his / her specialist knowledge to disadvantage the [appellant] or damage the competitive advantage of the [appellant]". Instead, respondent, on leaving appellant's service, did exactly what the restraint clause prohibited.

[42] The appellant further submitted that respondent also contravened the restraint agreement by poaching several of its customers and enticing them by offering them lower prices than appellant's. And that respondent was able to do this by reason of his intimate knowledge of the customers' requirements and the pricing structure that the appellant operated. The respondent acquired the intimate knowledge of appellant's operations not only because of the time that respondent spent in appellant's employ, but also, in some instances, because of respondent's involvement in "working on a major tender for welding consumables for the Royal Eswatini Sugar Corporation" resulting in 2nd respondent also submitting a tender for the same job supervised by the respondent as it later appeared at the site meeting which the respondent attended for his new employer. That appellant is justified in entertaining the "reasonable impression" that "respondent is unlawfully and constantly utilizing the information he got from employment by [appellant]" and is using that information "to the benefit of the 2nd respondent": the information in question "constitutes trade secrets of the [appellant]" – the sort of thing intended to be avoided by the Restraint of Trade Agreement.

[43] It must also be assumed from the record that the respondent was employed by 2nd respondent at a senior level as respondent was "involved in the same tenders on behalf of 2nd respondent against the applicant"[14]. It is then also fair to assume that respondent would not have resigned from appellant's employ as branch manager for a junior position at 2nd respondent's business. In terms of clause 2.1.2 of the Agreement, respondent engaged in business contact with a competitor in a "capacity in which the [respondent] may use his/her specialist knowledge" to disadvantage the appellant or damage the competitive advantage of the appellant, contrary to the covenant. Whether respondent *actually* used that information or not is immaterial.

[44] It should be mentioned here that the point raised by the appellant to the effect that the respondent when asked when submitting his resignation stated that he would be joining his stepfather in a family timber business is of no serious bearing in this matter. Whether respondent had lied or not in saying what he would do after resignation from the appellant is neither here nor there. Respondent, however, denied that he ever stated that he would join his stepfather's timber business, further adding that his step father has no such timber business, anyway. Respondent was entitled to resign from appellant's business without giving any explanation for it. Of significance, however, is that respondent left the employment of appellant and joined the employ of appellant's competitor (the 2nd respondent) apparently without wasting any time after separation as if the restraint clause did not exist or was not binding on him. That must have been very presumptuous of the respondent. The respondent was bound by the covenant no matter how unreasonable or unfair it might have seemed to him until he was relieved by a court order.

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[14] See para [31] of Judgment *a quo*

[45] In my view, when respondent decided to resign from appellant's employ – noting that he was not fired – the respondent should have done his calculations, assuming the worst-case scenario, whether he would reasonably pull through a period of six months of unemployment – further noting that the supposed unreasonableness of the 100 km radius was debatable, the outcome of which was uncertain at that time. The six months' period was, in my opinion, not too long a period of restraint to be unconscionable in the circumstances. Respondent should have acted like the reasonable man of 23 years' experience in the industry after committing himself to the restraint covenant. On the contrary, respondent acted as if he had signed an agreement that was not binding on him from the very onset.

[46] It should be pointed out that from the outset the restraint of trade agreement was entered into voluntarily by the parties and by his own reckoning, respondent is a seasoned player in the industry, having regard to his 23 years' experience. The respondent must have known and understood or appreciated the implications of the covenant he signed. The respondent must have realised that the covenant prevented him from taking up employment as he pleased; but he dismissed this restraint by deeming it unreasonable and unenforceable. Respondent was clearly misguided in his thinking. His excuses for not abiding by the terms of the agreement were largely unsubstantiated at the factual level and weak in principle. To his touting of appellant's named customers respondent merely made bare denial. Respondent had to justify or give a credible account for repudiating the agreement. On the other hand, appellant had sufficiently supported the alleged breach of the agreement by the respondent.

[47] Assuming that the 100 km radius may have been unreasonable, in my opinion, respondent had to show that taking up employment with 2nd respondent so nearby was, apart from the 100 km radius, not in breach of appellant's protectable interest in terms of the agreement. Respondent's taking up employment as he did pre-supposed that practically no part of the restraint agreement could be reasonable and enforceable. Didcott J in **J Louw and Co** writes: *"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... Whether it is indeed unreasonable must be determined with 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."*[15] (See also **Magna Alloys** case.) Scott JA in **Reeves**[16] concurs: *"It is now settled that whether a restraint of trade is to be enforced or not depends upon whether it would be contrary to the public interest to do so".*

[48] The principal inquiry therefore is whether, having regard to all the circumstances of the case, the restraint can be said to be reasonable. Question is: Does the case for the respondent meet these public interest-based considerations to render the covenant unreasonable? I think not. I do not think that the respondent succeeded in discharging the *onus* resting upon him to avert the enforcement of the covenant.

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[15] Op. cit. p243 C
[16] Op. cit. p775J – 776C

[49] With respect, respondent has also not shown that the restraint is contrary to public policy in itself or by reason of its geographical coverage. It has to be borne in mind that where a clear balance cannot be determined between the competing public interests of freedom of trade and earning a living on the one hand and of fidelity to contractual obligation on the other hand, the latter must take precedence. It is the responsibility of the trial court to make this determination should the need arise. On the papers before Court, it cannot be concluded that respondent succeeded to show that in all the circumstances of the case his freedom to trade trumped his commitment to contractual obligation on balance of probabilities. The respondent did not show that he had exhausted his work options.

[50] That the respondent did not in fact use the information he obtained from appellant's employ or take part in preparing tender documents on behalf of 2nd respondent is no answer to appellant's claim. The offence committed by respondent and the answer thereto is to be found in clause 2.1.2 of the Agreement. Nowhere does respondent deny that he was employed by 2nd respondent in the capacity described in the covenant. It is clear then that the mere taking up of employment with 2nd respondent as happened contravened the covenant. That respondent actually used or not the information he had acquired from appellant is not important. As Scott JA says:[17] *"The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) ..."* And Sharrock adds: *"The party seeking enforcement ('the enforcer') need do no more than invoke the provisions of the contract and prove that the other party ('the resiler') has acted in breach of the restraint, or that there is a reasonable apprehension that he will do*

[17] Supra, para [31]

so"[18]. The odds are overwhelmingly against the respondent. Professor Sharrock (Op. cit. p108) further writes: *"In* ***Reddy v Siemens Telecommunications (Pty) Ltd*** *2007 (2) SA 486 (SCA) the court confirmed that the test for determining whether there is potential prejudice to the employer's interest is whether the employee could take advantage of what he has learned or the connections that he has formed. It is irrelevant whether he has actually done so or promised not to do so".*

[51] Whether the country's economy is 'currently sluggish' or 'in the doldrums' or whether respondent will be in a position to support his family or not, cannot be the problem or concern of the appellant, unless, may be, the respondent found himself in a truly tight or dire economic *cul-de-sac* attributable to the restraint agreement. Sharrock,[19] after stating that *"a restraint of trade provision is a contractual term which restricts a party from carrying on his trade, business or occupation, in such manner and with such persons as he chooses"*, continues: *"The general objection to restraint of trade provisions is that they derogate from a person's right to earn his livelihood as he pleases and seek fulfilment in the business and professional world"*. This is exactly where respondent found himself consequent upon his signing the restraint covenant: nothing peculiar about the respondent's self-imposed predicament. Accordingly, *"It is reasonable for an employer to prevent his former employee from entering the services of a competitor if the employee has, by virtue of his employment, gained knowledge of trade secrets or acquired professional connections and could exploit these if permitted to work for the competitor"*, rationalizes Sharrock, (p111). See **Paragon Business Forms**

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[18] Op. cit. p107
[19] Ibid, p107

(Pty) Ltd v Du Preez 1994 (1) SA 434 (SE), **Thompson v Nortier** 1931 OPD 147, **Rawlins and Another v Caravantruck (Pty) Ltd** 1993 (1) SA 537 (A).

The question of onus

[52] What remains for final consideration is who really bears the *onus* of proof in restraint of trade proceedings. Professor Sharrock[20] explains:

> *"Prior to 1984, the approach of the courts was that a restraint of trade provision is void unless it is proved to be reasonable as between the parties, the onus of proof being on the party seeking to uphold the restraint. In* ***Magna Alloys and Research (SA) (Pty) Ltd v Ellis*** *1984 (4) SA 874 (A), the appeal court adopted new principles. The law is now that a restraint of trade provision is prima facie valid, but the court will not enforce it to the extent that enforcement would be contrary to public policy. The onus of proving that enforcement of the order sought would be contrary to public policy is on the party alleging this fact".*

[53] But the correctness of the post 1984 position as stated above is now questionable. Sharrock (p 107) pertinently observes: "*The* ***Magna Alloys*** *case was decided prior to the advent of the Constitution. The question has been raised whether, by virtue of the Constitution the onus is now on the enforcer to prove that the restraint is reasonable".* (At the time of Sharrock's writing the issue had not reached the Constitutional Court). The **Magna Alloys** case predates both the Constitution of South Africa (1996) and that of eSwatini (2005). Both these

[20] **Ibid** p 107

Constitutions entrench fundamental rights and freedoms. Schulze *et al* write regarding the South African position:[21]

> *"Although the Constitution entrenches a person's freedom to choose his or her trade, occupation or profession, it does not affect the common law balance between the two interests,"* [that is, the public interest to participate freely in commerce and the public interest that contracts must be executed]. *"Though an entrenched constitutional right can only be limited in accordance with the statutory limitation clause (that is, if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ...) it has been held that a successful application of the common law principles developed by the courts will generally result in the required compliance. In other words, if the limitation on a person's freedom to trade is lawful in terms of proven common law principles, it will not transgress the provisions of the Constitution, and the agreement will be upheld".*

[54] The relevant provision of the South African Constitution is section 22 which guarantees every citizen the right to choose his / her trade, occupation or profession freely. Section 32(1) of the eSwatini Constitution reads: *"A person has a right to practise a profession and to carry on any lawful occupation, trade, or business".* There is no express provision for derogation from this provision. But section 32 (1) does not feature under section 38 which prohibits any form of derogation from certain provisions under the Bill of Rights (Chapter III). The general effect of this constitutional entrenchment of the right to trade is that it is the party seeking to limit this right who must bear the *onus* of showing the limitation to be reasonably justifiable in a democratic society. In other words, it is the enforcer who must prove that the restraint clause is enforceable. This is the reverse of **Magna Alloys.** Section

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[21] **Op. cit.** pp 85-86

14(3) generally guarantees all the "fundamental rights and freedoms of the individual contained in this chapter but subject to respect for the rights and freedoms of others and *for the public interest"*. (My emphasis).

[55] The issue of the *onus* has not been raised head-on in this jurisdiction. During the hearing of this appeal, the constitutional nature of the freedom to trade was briefly mentioned but quickly abandoned by counsel for the respondent. It would seem to have been generally assumed by counsel on both sides that, as counsel for appellant insisted, the *onus* was on the resiler to show that the restraint was unlawful and unenforceable. The learned trial Judge referred to section 32(1) of the Constitution and observed that: *"It is now trite that the common law rules relating to restraints of trade are not unconstitutional"*. However, it is not clear from the judgment what conclusion the learned trial Judge arrived at after taking into account the 'five questions' referred to in **Basson v Chilwan and Others**[22] and **Reddy v Siemens Telecommunications (Pty) Ltd**[23] as well as section 32 (1) of the Constitution.

Conclusion

[56] In coming to the conclusion that the 100 km radius was unreasonable the learned trial Judge did not emphasise the doctrine of public interest. The Judge did not say that the radius was unreasonable on account of public interest. Instead the learned Judge highlighted the restricted personal, economic interests of the respondent. The personal needs and wherewithal of the respondent were not directly

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[22] 1993 (3) SA 742 (A)

[23] 2007 (2) SA 486 SCA para [17]

linked to public interest. The Judge pointed at the respondent's need to earn a living in the only industry he knew. The learned Judge would seem to have been of the view that respondent's freedom to trade was more important than his contractual obligations. The Judge considered that the lack of employment caused by the 100 km radius "does not seem justified in light of all the nature of the interests the applicant has established it has." Appellant's 'interests' were purely contractual arising from the restraint of trade agreement.

[57] In my opinion in deciding the application solely on the basis of the 100km radius, which the learned trial Judge had declared unreasonable, in the circumstances of the case, was technical and unjustified, having regard to all the other contractual issues raised and decided in favour of the appellant. The radius of 100 km was insolated and not considered in context. Considering the place where the respondent had taken up his new employment it should have been obvious that the length of the radius was a non-issue: it was an outside factor that should have had no active role in the decision. The court should then have given effect to the contractual undertakings of the parties as agreed. As Lord Reid says in **Esso Petroleum** (p709A): *"Where two experienced traders are bargaining on equal terms and one has agreed to a restraint for reasons which seem good to him, the court is in grave danger of stultifying itself if it says that it knows that trader's interest better than he does himself";* Lord Morris concurs (ibid at p.712A): *"The law recognizes that, if business contracts are fairly made by parties who are on equal terms, such parties should know their business best".* If the contract could not be rendered reasonable by a reduction of the radius, there was no basis for finding the contract unreasonable on that account.

[58] Respondent on his part cannot reasonably argue that the radius was too wide where he made no effort to meet the terms of agreement by, for instance, finding business further away from appellant. Instead the trial courts judgment gives the impression that appellant had no legitimate protectable interest – contractual interest which respondent could not trample upon with impunity. Respondent freely contracted away his freedom to trade as he pleased. The period between signing of the agreement and respondent's resignation from appellant is not such that a lot had changed in the economy of the country so that respondent might not have reasonably foreseen the sort of limited employment situation he allegedly found himself in after resignation. Surely, the period of six months' restraint went a long way to mitigate and render bearable any adverse employment impact to which respondent might have been exposed. It has not been said that respondent did not find any other remunerative employment in the country, not in competition with appellant. All we were told is that respondent had "no passion for the forestry industry". This attitude could only be true of a person who had full control of his freedom to trade, unaffected by a self-imposed restraint agreement.

[59] In light of all the above and in the circumstances of the present matter, I agree with the appellant that the trial court failed to *"attach any or sufficient weight to the fact that the second respondent's main place of business is a stone's throw from that of the appellant"*. Had the trial court been fully alive to this fact, it would have been obvious that the 100 km radius could not be a determining factor in this case. That being so, respondent's new place of employment was too close for any comfort to appellant and in flagrant violation of the restraint of trade agreement. Respondent

must have known even at the time he committed to the covenant that the liquid gas industries were located at Matsapha industrial estate.

[60] I do not find it necessary to further consider the argument of the respondent that since the six months period of the restraint has long expired, the matter is now only academic. Suffices to point out that when the proceedings started the six months' duration had not lapsed. What may be academic now is the interdict and restraint that appellant had initially prayed for. The present judgment then is more of a declaration of rights. It is for the parties to decide what to make of it.

[61] The order of the court is that the appeal succeeds with costs including costs of counsel.

M J DLAMINI JA

I agree

MCB MAPHALAL CJ

I agree

SJK MATSEBULA AJA

Adv. P Flynn	for the	Appellant
Atty. B Gamedze	for the	1st Respondent
No Appearance	for the	2nd Respondent