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| Reportable: | NO |
| Circulate to Judges: | NO |
| Circulate to Magistrates: | NO |
| Circulate to Regional Magistrates | NO |



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: 1453/2024

In the matter between:-

OMV (PTY) LTD

Applicant

and

JACQUES MARAIS

1st Respondent

INNOVEX READY MIX (PTY) LTD

2nd Respondent

CORAM: MFENYANA J

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 14h00 on **11 June 2024**.

ORDER

- i) The first and second respondents are interdicted from divulging and / or making use of any of the applicant's confidential information, including the applicant's pricing, customer base or business, method of carrying on business, and its suppliers for a period of 12 months in the district of Stilfontein and within a radius of 100 kilometres from the district of Stilfontein.
- ii) The first and second respondents shall return any and/ or all the applicant's confidential information including the applicant's pricing, customer base or business, method of carrying on business, and its suppliers, which is in their possession, to the applicant.
- iii) The first and second respondents are interdicted from contacting and / or approaching the applicant's customers, sales representatives and service providers, for purposes of enticing them to do business

with the first respondent for a period of 12 months.

- iv) The first and second respondents shall pay the costs of this application on Scale B, jointly and severally, the one paying the other to be absolved.
- v) The application to strike out is dismissed with costs.

JUDGMENT

MFENYANA J

Introduction

[1] This is an application which was brought before this Court on an urgent basis. The relief sought by the applicant is *inter alia* that the first and second respondent be interdicted from *inter alia*, making use of, and / or divulging confidential information of the applicant and to return such information to the applicant.

- [2] The dispute originates from an employment relationship between the applicant and the first respondent spanning a period of over 10 years, during the course of which, the first respondent gained knowledge and possession of certain confidential information and business processes pertaining to the applicant's business.
- [3] At the hearing of the matter I found that the matter was sufficiently urgent to be disposed of in urgent court, and ordered that the matter should proceed on that basis. In making the order I considered that the commercial interests of the applicant are equally deserving of protection to justify reliance on rule 6(12), as are matters that concern a threat to liberty, life or some other basic essential of everyday life.¹ Thus the applicant enjoys the same constitutional right of access to courts as any other litigant.
- [4] As stated in *Avis Southern Africa (Pty) Ltd and Others v Porteous and Another*², the applicant need not state with precision what constitutes such commercial interest. In the exercise of my discretion, I was satisfied that the applicant

¹ *Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W).

² (2023/0817898) [2023] ZAGPJHC 1160; 2024 (2) SA 386 (GJ) (16 October 2023).

had demonstrated that there was a prospect of a crippling economic loss should the application not be entertained on an urgent basis.

- [5] Having found the matter to be sufficiently urgent, I proceeded to deal with the merits.

Facts

- [6] The first respondent was employed by the applicant since 2013. When the applicant was bought by Raubex, a JSE listed company, the first respondent was appointed to the position of a junior foreman. Over time he was promoted to various positions, and ultimately the position of a junior plant manager, which he occupied until his resignation on 22 January 2024.
- [7] It is common cause that the applicant's business operations involve the manufacturing and supply of construction materials. It is further common cause that the applicant had operations and projects within the Republic of South Africa (the Republic) as well as in other parts of the African continent, including Beitbridge in Zimbabwe. The first

respondent was responsible *inter alia*, for the site, plant and equipment in respect of the Beitbridge projects, and to see them to completion. As a junior plant manager, he bore the responsibility to manage the applicant's commercial plant in Stilfontein, and attend to the applicant's project ready mix plants in Musina and Beitbridge, Zimbabwe, construct the necessary site, equipment, plant, and manage human resources for the successful completion of contracts received by the applicant.

[8] While the specific details of the first respondent's responsibilities in respect of the Beitbridge projects are in dispute between the parties, the first respondent's involvement as a junior plant manager is common cause.

[9] In terms of the employment agreement, a party who intended to terminate the agreement after 12 months of its conclusion, was required to give the other party "two (2) weeks' notice, thirty (30) calendar days' notice" (*sic*), alternatively pay an amount equivalent to the required notice period in lieu of such notice. It was accepted during the hearing of the matter, that the first respondent had to give the applicant, thirty calendar days' notice.

[10] In terms of Clause 18.1 the first respondent is not entitled to use or divulge or disclose to any other person or entity, directly or indirectly, any of the applicant's trade secrets or confidential information. The terms of the agreement are not in dispute.

Applicant's case

[11] It is the applicant's contention that in his role, particularly as a junior plant manager, the first respondent was privy to confidential and proprietary information of the applicant, including its business models, names and contact details of main suppliers, as well as pricing, the applicant's largest clients, contact details of service providers and trade secrets, including the manner of sourcing raw materials, quality control procedures and client interactions.

[12] The deponent to the founding affidavit, Mr Marthinus Jacobus Van den Berg (Van den Berg), who is also a director of the applicant, asserts that on 22 January 2024, the applicant confirmed to him that he had resigned, as he

wanted to open his own business. According to Van den Berg this would be in direct competition with the applicant.

[13] Having accepted the first respondent's resignation, Van den Berg states that he informed the first respondent to return all of the applicant's equipment and resources which were in his possession which he used in the performance of his duties. Both parties accepted that this was done, as the first respondent returned his laptop, and the applicant's equipment in his possession. It had been assumed that the first respondent had returned all the applicant's items in his possession.

[14] Van den Berg goes on to state that on 16 February 2024 he was contacted by one of the applicant's clients who informed him that the first respondent and representatives of the second respondent had approached him, offering to render to the applicant's client the same services that were rendered by the applicant. From the reading of the papers, it appears that the first respondent had already left the premises of the applicant, albeit serving his notice.

[15] The applicant contends that this conduct by the first respondent is in breach of his employment contract, and is *mala fide*, as he became part of the second respondent on 11 January 2024 as a director, together with a Mr Carl Edman Crous (Crous), whilst still employed by the applicant.

[16] According to the applicant Crous had previously unsuccessfully attempted to obtain contracts from the applicant's clients. The contends that the first respondent's decision to resign was in furtherance of these tactics by the second respondent and Crous.

[17] On 28 February 2024, following a consultation with Van den Berg, the applicant's legal representative addressed a letter of demand to the first respondent. In the letter, the applicant demanded a written undertaking from the first respondent that he would "*desist from divulging and / or making use of the applicant's confidential information, including but not limited to, our client's pricing, customer base or business, method of carrying on business and its suppliers*" and that he returns all such information to the applicant, and refrain from approaching the applicant's personnel and customers for

purposes of enquiring about the applicant's affairs and customers, and enticing the applicant's customers. The demand further stipulated in great detail that the first respondent was prohibited by a restraint of trade, from conducting himself in the manner described.

[18] It appears from the record that pursuant to the demand, Crous and Van Aswegen, the applicant's legal representatives engaged in some negotiations, which ultimately yielded no positive results as the respondents did not reply or accede to the terms proposed by the applicant.

[19] In the interim, so contends the applicant, a supplier of the applicant reported that the first and second respondents contacted them demanding to receive the same price as the applicant. The applicant's contention is that in doing so, the respondents were using the applicant's confidential information relating to its suppliers and the prices they charge, hence they were able to contact the applicant's clients and suppliers. This led the applicant to believe that the first respondent was in possession of the applicant's confidential information which he was not only using, but also disclosing to the second respondent.

[20] The applicant avers that this conduct is wrongful and unlawful in terms of the first respondent's contractual obligations and the common law. It is on that basis that the applicant seeks an interdict against both the first and the second respondents for a period of 12 months.

[21] According to the applicant, the information is time -sensitive, and a period of 12 months is sufficient to dilute its benefit, whereafter the information would not cause as much harm to the applicant, should the respondents be prohibited from using it for the specified period.

[22] It is worth stating that in the notice of motion, the applicant seeks interim relief. At the hearing of the matter, counsel for the applicant informed the court that the applicant was not persisting with interim relief, and was seeking a final order. That being the case, it is not necessary to deal with the contentions pertaining to interim relief. The respondents, in any event have likewise, contended that the relief sought has a final effect.

[23] An applicant who seeks final relief in motion proceedings must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such to raise a real, genuine or *bona fide* dispute of fact, or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.³

Respondents' case

[24] In opposing the application, the respondents contend that the relief sought by the applicant is incompetent for various reasons. They contend that the applicant does not state in the founding affidavit why the interdict should endure for a period of 12 months, and why it is localised to the Stilfontein area, and within a radius of 100 kilometres. According to the respondents this amounts to territorial restraint.

[25] Interestingly both parties rely on the provisions of clauses 17 and 18 of the employment agreement albeit for different reasons. In particular, clause 18 provides:

³ *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C); *Plascon- Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

“18. **Non-disclosure /Confidentiality:**

- 18.1 You shall not, during your employment with the company at any time thereof, wither use, directly or indirectly, or divulge or disclose, directly or indirectly to any other person and/ or entity, any of the company's trade secrets and/or confidential information.
- 18.2 Any written instructions, notes, memoranda records relating to the company and all the company's trade secrets and/ or confidential information and/ or immaterial property rights which are made by you or which fall into your possession during the period of your employment shall be deemed to be the property of the company and in the event of the termination of your employment, for whatsoever reason, shall surrendered to the company on demand.
- 18.3 You furthermore undertake not to retain any copies and/or extracts from such documentation in your private position subsequent and/or during the course of your employ with the company.
- 18.4 For the purpose of this agreement, information shall include all mediums used by way of electronic media, inclusive of any software, modes of storing

and or transferring information, as well as any medium used for the transfer of electronic knowledge, such as internet or intranet.

[26] As far as the respondents are concerned, their reliance is to demonstrate that the said provisions contain no restraint of trade, and that the first respondent did not disclose any information of the nature contemplated in the provision. Curiously, the first respondent further avers that the applicant never demanded the return of any such information or property prior to bringing the application. By contrast, later in the answering affidavit, the respondents admit that the applicant did issue a demand, but that there was no basis for such demand.

[27] As for the applicant, the provision was relied upon to demonstrate that in terms of the agreement, the first respondent was prohibited from using the information of the applicant, of the specified nature, after the termination of his employment. It further sought to demonstrate that the first respondent was enjoined to surrender such information to the applicant upon demand should same come into his

possession.

[28] It is common cause that a day before the first respondent resigned, he sent the applicant's business model to his private email. The first respondent's submission is that this was sent accidentally, and that he later destroyed it. Interestingly, the first respondent further states elsewhere in the answering affidavit, that he does not have any knowledge of the applicant's business model, save for what he learnt in the ordinary day to day fulfilment of his duties with the applicant, and in any event knows the business model by heart as it is in his memory, considering that he worked for the applicant for 10 years. This submission is contradictory.

[29] The respondents take issue with the fact that the founding affidavit was deposed to on 4 April 2024, at which time they had already informed the applicant in a letter dated 26 March 2024 that they had no intention of using or divulging any confidential information or trade secrets of the applicant to any person or entity. What is striking is that in the said letter, the respondents make no mention that the first respondent had not come across any confidential information or trade

secrets as earlier contended in the answering affidavit.

[30] In this regard, it was submitted on behalf of the applicant that on the strength of the Plascon- Evans rule, this Court should reject the respondent's explanation, and draw an adverse inference from it. Applied to the facts of this case, there can be no doubt that the respondent's version is so far-fetched or so clearly untenable that this Court is justified to reject it merely on the papers and without requiring any oral evidence to be led.

[31] Of importance, the respondents deny that the applicant's business model is confidential information. They contend that anyone can see how the applicant conducts its business, how the concrete ready mix is manufactured and loaded for delivery and if anyone were to follow it to any of the applicant's clients, they would be able to see how it is delivered and who the client is. The same goes for the applicant's suppliers, as the respondents contend that this is public knowledge.

- [32] Although the first respondent admits that he was still employed by the applicant, when he became a director of the second respondent on 11 January 2024, he denies that he acted in breach of his employment contract, on the basis that he did not do any work for the second respondent, and therefore the entity was 'dormant'.
- [33] To some extent, the respondents take a swipe at the applicant, and that they have no interest in the applicant's business model as theirs is a better business model which includes treating once (*sic*) employees with dignity.
- [34] The first respondent admits that he phoned one of the applicant's clients/ suppliers, and requested a price on cement. He however denies that he demanded the same price given to the applicant, but simply asked for a discount, but when this was refused, he accepted it. In rather general terms, he denies that the applicant has confidential information, and the information sought to be protected can be easily accessed on Google.

[35] In relation to the second respondent, the essence of the respondents' opposition is that as there is no contractual relationship between them, there is no basis for the applicant to seek an interdict against the second respondent. Thus, they aver that there was no reason for the applicant to bring the application, and that the application is ill-founded.

Legal framework

[36] It is trite that information is considered confidential if it is of commercial value to its owner or the person seeking to protect such information, and is known to a restricted number of persons. It may not be used in a manner that is detrimental to the owner of such information. Unauthorised acquisition and use of such confidential information is legally reprehensible and worthy of protection in law.

[37] It is not in dispute that the first respondent placed itself in possession of the applicant's information in circumstances where it was clear that the relationship between them had dissipated. Ultimately, the issue turns on whether the said information is confidential.

[38] In *Pexmart CC and Others v H. Mocke Construction (Pty) Ltd and Another (Pexmart)*⁴ the Supreme Court of Appeal (SCA) found that the lack of restraint and confidentiality agreements does not detract from a party's enforceable rights.

[39] There can be no gainsaying that the applicant is in the business of making profit. Like any other business, it relies on its business processes and the strategies it has built over the years. A company's business model is no doubt, central to this process. There is thus no merit to the contention that the information sought to be protected is not confidential. As for the second respondent, the information was also used for the benefit of the second respondent.

[40] It is not the respondents' case that they have any entitlement to the business model of the applicant. What they say is that the first respondent accidentally duplicated the applicant's business model by transferring it to his personal email, and deleted it thereafter. Thus they contend they are not in possession of the applicant's confidential information. This does not resonate with the first respondent's assertion that

⁴ (159/2018) [2018] ZASCA 175; [2019] 1 All SA 335 (SCA); 2019 (3) SA 117 (SCA).

he knows the business model off by heart. In this assertion lies a concession that the first respondent is in fact in possession of the applicant's confidential information. Such confidential information deserves the protection of the law.

[41] While it may not reasonably be expected for the first respondent to return information that he stores in his memory, he is barred from using it. This is what the applicant seeks to achieve in this application. To that end, the applicant has made out a proper case. The *dictum* in *Faccenda Chicken Ltd v Fowler & others; Fowler & Faccenda Chickens Ltd*⁵, is instructive, that

“... there are ... specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's.”

[42] In *Pexmart* the SCA placed reliance on J Neethling Van Heerden-Neethling⁶ for the proposition that:

⁵ [1985] 1 All ER 724 (Ch), para 732.

⁶ Unlawful Competition, 'Acquisition and use of competitor's trade secrets or confidential information', 2008) 2 ed at 213-216.

“A trade secret may be described as trade, business or industrial information belonging to a person (usually an entrepreneur) which has a particular economic value and which is not generally available to and therefore known by others. It is evident that an entrepreneur’s trade secret represents a valuable economic interest for him (as proprietor) which is worthy of legal protection. There is currently much support for the view that a trade secret, as an incorporeal product of the human mind embodied in a tangible agent, constitutes *immaterial property* which serves as the *object of an independent immaterial property right*. In, for example, *Harchris Heat Treatment (Pty) Ltd v Iscor* **[1983 (1) SA 548 (T)**, at 555], the court unequivocally described the confidential information *in casu* as “*intellectual property* belonging to the plaintiff”. Accordingly, “the owner of a trade secret [has] the *right to exploit* it”. The independent immaterial value of the right to the trade secret is particularly evident from the fact that this right is freely transferable; moreover, its independent value is emphasised by its applicability outside the competitive context.

Before information can qualify as a trade secret – and therefore as an independent legal object – it must comply with *three requirements* apparent from case law. First of all, and this is really self-evident, the information must not only relate to, but also be capable of application in, *trade or industry*. Secondly, the

information must be *secret or confidential*. The information must accordingly – objectively determined – only be available, and thus known, to a restricted number of people or to a closed circle; or, as it is usually expressed by the courts, the information “must be something which is not public property or public knowledge”. Thirdly, the information must, likewise objectively viewed, be of *economic (business) value* to the plaintiff.”

[43] The respondents bemoan the fact that the applicant seeks to interdict them for a period of 12 months, in the Stilfontein area. They aver that this is a disguised restraint of trade, not sanctioned by the agreement. Whether the order sought by the applicant has the effect of a restraint of trade as averred by the respondent, the fact of the matter is that the application before this Court is for an interdict. By its nature, an interdict has a restraining effect, on a litigant.

[44] The fact that the applicants deemed it prudent to limit the time within which the information could be used, is, to my mind, beneficial to the respondents. It is also reasonable in the circumstances of this matter, as opposed to an indefinite restriction. The applicant has explained that this is because the use of the information in the business sense, has a

lifespan after which its use may be diluted.

[45] In addition fairness and honesty still remain relevant considerations in determining whether competition is lawful. The respondents' version is riddled with contradictions. These are material, as they relate to what information came to the first respondent's possession, as well as the adequacy of the explanation offered by the respondent.

[46] While I agree with the respondents that the employment agreement contains no restraint clause, this does not take away the applicant's entitlement in law to have its confidential information protected.⁷ There can thus, be no justification why the applicant should not be afforded protection for its confidential information. Such protection extends to any person to whom such confidential information is not ordinarily available, including the respondents.

[47] There can be no doubt that the applicant has satisfied the requirements for a final interdict. It has shown that the first respondent is in possession of the applicant's confidential information; that he is sharing the information with the

⁷ *Pexmart CC and Others v H. Mocke Construction (Pty) Ltd and Another, n.3 supra.*

second respondent; that the respondents are using the information to the detriment of the applicant.

Application to strike out

[48] A further issue to be determined by this Court, is an application brought by the respondents to strike out various paragraphs of the applicant's replying affidavit, on the basis that they amount to new matter, and a new case which was not initially pleaded in the founding affidavit.

[49] These paragraphs are set out in an indiscriminate, wholesale fashion and cover numerous issues. The respondents are knit picking on the replying affidavit. This is untenable.

[50] I must say that counsel for the applicant went into detail, cross referencing the said paragraphs with the founding affidavit, and demonstrating that they did not raise any new matter, save for paragraphs 41.2 and 118.2. I do not believe that it is warranted to deal with the paragraphs contained in the founding affidavit individually. I prefer to employ a holistic approach within the context of the matter at hand.

[51] The respondents aver that the introduction of these paragraphs in the replying affidavit, is prejudicial to them as the applicant is required to make out its case in the founding affidavit.

[52] In opposing the application to strike out, the applicant submits that of the paragraphs sought to be struck out, only the two paragraphs stated above contain new allegations, but that was done to counter the respondents' denial in its answering affidavit. While the applicant avers that the said paragraphs should be admitted on the basis that they are relevant to the issue to be decided, the applicant contended that even if they were to be ignored, there is sufficient evidence in the founding affidavit to grant the relief sought by the applicant.

[53] Paragraph 118.2 and the annexures thereto provide details of the first respondent connecting to the applicant's computer through an external device at the same time that he sent the business model to himself. This evidence which was not included in the founding affidavit. This was indeed conceded

on behalf of the applicant, and insisted upon on the basis of relevance. In addition, counsel averred that this Court should draw an adverse inference that the respondents do not want to deal with the contents of this paragraph as well as the annexures thereto.

[54] It is trite that new matter in a replying affidavit may be struck out in terms of rule 6(15) on the basis that it is irrelevant to the case made out in the founding affidavit. The key consideration is whether the matter sought to be struck out is prejudicial to the respondents. In *Msimang v Makhanya*⁸ it was held that irrelevant matter contains allegations that do not apply to the matter at hand, and which do not contribute in any way to the matter at hand. The purpose of an application to strike out is 'to reduce the issues that will have to be canvassed in the pleadings'.

[55] In *Beinash v Wixley*⁹ the court set out two requirements that need to be met for an application to strike out matter from an affidavit to succeed. First, the matter sought to be struck out must be scandalous, vexatious or irrelevant. Secondly, the

⁸ [2008] All SA 509 (W); See also in this regard: *Meintjies v Wallachs Ltd* 1913 TPD.

⁹ 1997 (3) SA 721 (SCA).

court must be satisfied that the party seeking the striking out would not be prejudiced if such matter was not struck out.

[56] If regard is had to the contents of paragraph 118.2, it cannot be said that it extends the scope of the issues to be decided in any way. What it does, is amplify the applicant's case that the first respondent is in possession of the applicant's confidential information. The respondents have admitted this, although they deny that the information is confidential.

[57] To the extent that it may be said that the respondents would be prejudiced, as they would not be afforded an opportunity to respond, the information was already within their knowledge, alternatively, it ought to have been within their knowledge. There is nothing untoward about the applicant, in the face of a denial by the respondents, substantiating the allegation in the manner that they did. That information forms the core of the issues to be decided in this application, and do not bring a new dimension.

[58] In my view there can be no basis that paragraph 118.2 and the annexures thereto, should be struck out simply on the basis that it was not included in the founding affidavit. As I

have already stated, this requirement should be viewed in the context of whether it is relevant to the issue at hand. The application to strike out, thus stands to dismissed.

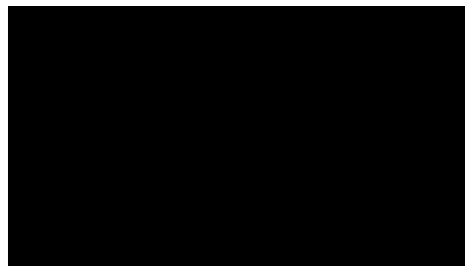
ORDER

[59] In the result I make the following order:

- i) The first and second respondents are interdicted from divulging and / or making use of any of the applicant's confidential information, including the applicant's pricing, customer base or business, method of carrying on business, and its suppliers for a period of 12 months in the district of Stilfontein and within a radius of 100 kilometres from the district of Stilfontein.
- ii) The first and second respondents shall return any and/ or all the applicant's confidential information including the applicant's pricing, customer base or business, method of carrying on business, and its suppliers, which is in their possession, to the applicant.
- iii) The first and second respondents are interdicted from contacting and / or approaching the applicant's

customers, sales representatives and service providers, for purposes of enticing them to do business with the first respondent for a period of 12 months.

- iv) The first and second respondents shall pay the costs of this application on Scale B, jointly and severally, the one paying the other to be absolved.
- v) The application to strike out is dismissed with costs.



S MFENYANA
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

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Date reserved:

18 April 2024

Date of judgment:

11 June 2024