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 No: UM 140/2023

In the matter between:-

CSS SECURITY — **APPLICANT**

AND

CARLO PIETER CLOETE — **FIRST RESPONDENT**

MARISKA CLOETE
(formerly Hamman) — **SECOND RESPONDENT**

HEKSTRAAT SECURITY CC t/a
CPI SECURITY — **THIRD RESPONDENT**

*Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is **12 AUGUST 2024** at **14h00***

ORDER

(i) The application is referred for the hearing of oral evidence on a date to be determined by the Registrar before Reddy J on the issues of the whether the first and second respondents were in possession of:

(a) the confidential information and used same to the benefit of the third respondent.

(b) and whether the third respondent was complicit thereto. It must also be determined whether a restraint of trade agreement existed between second respondent and the applicant.

(ii) Costs are to be costs in the application.

JUDGMENT

REDDY J

[1] This application had its genesis in the urgent court. In urgent court, the application did not pass the muster of the requirements as set out in Rule 6(12) of the Uniform Rules of Court, ("the Rules"). Sequentially, it was struck off the roll for lack of urgency.

[2] The applicant now proceeds in the ordinary course of application proceedings. The relief that is presently sought has been watered down. The applicant seeks interim and final relief within the purview of the same application. This is predicated on the contention that the interim relief sought is and remains interim as this constitutes relief that is capable of enforcement for a specific period. The interim relief is premised on a restraint of trade agreement whilst the final relief seeks the return of confidential information sub-classed into various categories which the applicant contends is in the possession of the first and second respondents. This confidential information the applicant avers has been used by the third respondent with the implicit knowledge that same is the property of the applicant.

[3] A proper description of the parties ensures an easy flow of reading. The applicant is CSS Security Services (Pty) Ltd, ("CSS"), a company with limited liability duly registered and incorporated in terms of the company laws of the Republic of South Africa. The first

respondent is Carlo Pieter Cloete, ("Carlo"). The second respondent is Mariska Cloete (formerly Hamman), ("Mariska"). Carlo and Mariska are former employees of CSS. The third respondent is Hekstraat Sekuriteit CC t/a CPI Security, ("CPI"), a company with limited liability duly registered and incorporated as per the company laws.

[4] As context is key, it is appropriate to set out the employment history between Carlo, Mariska and CSS in fine detail. The conditions of employment with CSS at the origin of the professional relationship required of Carlo and Mariska to conclude written employment contracts. The initial agreement concluded between Carlo and CSS contained a restraint of trade clause. This was followed with a restraint of trade agreement around November 2016. During February 2020, Carlo concluded a confidentiality and non-disclosure agreement. This agreement was to remain extant for a period of five (5) years.

[5] Carlo's employment with the applicant ended on 31 May 2023, having resigned on 2 May 2023. Similarly, Mariska resigned on 15 March 2023, officially departing the employ of CSS on 15 April 2023.

[6] Whilst in the employ of CSS, Carlo and Mariska collectively constituted strategic personnel. Carlo was the head of the Armed Reaction Unit. He was also the designated firearms official. Additionally, he personally dealt with CSS's clients, database, information, pricing structures and was responsible for generating

quotations for CSS's prospective clients and acted as the applicant's general client liaison officer.

[7] Mariska was also central to the operations of CSS. She managed the CC's control room, was responsible for data capturing including but not limited to data of the CSS's clients and was responsible for preparing incident reports, and the protecting of personal information. To this end, Mariska played a key role in the managing of crucial contracts of CSS.

[8] CSS is part of several social media platforms, including but not limited to Facebook and What's app. Mariska and Carlo were tasked by CSS during the course and scope their duties to setup CSS's Zello Group, in the security industry where members can join a specific group and use that group for safety and security purposes.

[9] Whilst Mariska and Carlo were in the employ of CSS they individually and collectively had excess to the confidential information of CSS. This information included but was not limited to CSS pricing structures, clients list, information and the needs of clients as well as strategies. Moreover, CSS provided Carlo and Mariska with cell phones. Equally, these cell phones stored confidential information relating to the operation of CSS. Notwithstanding the resignation of Mariska, it was contended that she continues to conduct herself in a manner that transgresses the sanctity of their contract.

[10] Carlo and Mariska returned the cell phones on 12 May 2023 and 17 April 2023 respectively. An inspection of these cell phones aerated that the information had been wiped which may have been attributable to the cell phones containing personal information. CSS proffered that Carlo and Mariska copied the confidential information of CSS with the sole objective (with specific reference to Carlo) to be used at Carlo's new place of employment at CPI. CPI operates within the security environment in direct competition with CSS. To this end, CSS contends that Carlo and Mariska intended to use the confidential information as a springboard to gain an unlawful and unfair advantage over its direct competitors whilst in the employ of CPI, to the detriment of CSS.

[11] It was averred that at all material times CPI were implicitly aware that Carlo and Mariska possess CSS's confidential information and this duo were subject to a written restraint of trade and protection of confidentiality agreements. Notwithstanding this knowledge CPI on 1 June 2023, appointed Carlo to the staff compliment with the ulterior motive of accessing the confidential information of CSS.

[12] At the outset Carlo and Mariska take issue with the interim relief contending that the interim relief is procedurally deficient as CSS has failed to set a return date for the finalisation of the prayers contained in the notice of motion. Allied to this, CSS has neglected to indicate what must happen in the interim, for example whether CSS wants access to the records to reinforce its version. Moreover, CSS's first port of call on an interim basis should have been an Anton Piller application to ascertain if Carlo and Mariska are in

possession of the items listed. CSS's application, so Carlo and Mariska continued, should have made provision for the interdict once the Anton Piller order put facts to the fore that by and large the interdict was the only appropriate legal remedy.

[13] Carlo and Mariska emphatically deny that any information listed in the notice of motion is being used. This is anchored on the contention that they are not in possession of same and that information that is being used is accessible on public platforms. More specifically, it is Carlo's version that what is being used is none other than his experience that he has accumulated in the security industry. Carlo admits that he announced his exodus from CSS to CPI on social media and invited the public to call for quotations.

[14] Regarding the sixteen (16) media platforms that form the fulcrum of CSS's interim relief Carlo avows that neither he nor CPI use any of the platforms to distribute information. Simply put, Carlo contends that CSS by simply haphazardly lumping several social media platforms which has not been used for the distribution of information, alternatively does not allow commercial activity, further alternatively are inactive, has led to the implosion of the CSS's version. The groups listed have many members. Notwithstanding this, no enticement occurred, and, in most cases, no commercial activity is permissible.

[15] Moreover, Carlo concedes to having administered CSS's participation on the Zello What's App group. On 11 May 2023 Carlo contends that when he left the employ of CSS, the cell phone that

was used by him was "wiped" and returned, as such no control over Zello was retained. Carlo and Mariska accept the existence of the letters of demand but retorted that collectively neither were in possession of any confidential information. Put simply, Carlo avers that he cannot act in an unlawful or uncompetitive manner, as he is a salesman and Mariska works for the construction company. Carlo contends that he cannot be interdicted from a vocation in which he has been operating for thirty (30) years.

[16] In respect of the initial contract concluded in 2005, Carlo avers that he cannot recall the precise terms that formed the body of same. He emphases that dates as contained in the restraint of trade agreement makes it improbable that he concluded same. Carlo contends that it is unlikely that he concluded this agreement in November 2016, but the same is dated February 2020.

[17] To fully encapsulate the contention of Carlo in respect of the agreements that CSS are placing much store on, Carlo states as follows in his answering papers:

" 1. **In any event, deny that I have signed any of the agreements.** Again, there are several question marks surrounding the documents, especially annexure " *FA11*"

48.1 The handwriting thereon, appears to be that of Tolmay Chatwind;

48.2. My name and the name of the applicant are written above the lines provided, therefore. I do not fill out forms like this.

48.3. There is a blank space on page 7 of the document;

48.4. No witness signed next to my purported signature, but indeed there is a witness on behalf of the applicant;

48.5 The date on which I purportedly signed was tampered with. It appears that 2022 was changed to 2020."

[18] Mariska confirms having signed the Restraint of Trade and the Confidentiality and Non-Disclosure Agreement and Restraint of Trade. Given her exit from the security sector, the relief sought has become moot.

[19] In *Webster vs Mitchell*, 1948 (1) SA 1186 (WLD) the court vocalized the test for an interim interdict. The test was, posited as follows:

"In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of applicant, he could not succeed. In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted. Subject, if possible, to conditions which will protect the respondent."

[20] In *Webster vs Mitchel* supra, reference was made with approval to the passage in *Setlogelo vs Setlogelo*, 1914, AD, 221 at page 227,

by Innes JA, dealing with the peremptory requirement to demonstrate irreparable harm:

"That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt. In such a case the test must be applied where the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party."

[21] In *National Treasury and others vs Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) at para [50], it was found that the *Setlogelo* requirements *supra* in respect of an interdict still found application within a constitutional democracy, wherein the following was stated:

"Under the Setlogelo test, the prima facie right that the claimant must establish is not merely the right to approach a Court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite."

[22] The appositeness of the rule *nisi* falls to be determined given the absence of same in part of the relief sought by CSS. In *National Director of Public Prosecutions v Mohamed, NO and Others* (CCT 44/02) 2003 ZACC 4, 2003 (1) SACR 561, 2003 (5) BCLR 476, 2003 (4) SA 1(CC) (3 April 2003), the apex court provides a valuable elucidation of the historical development of *ex parte* applications,

the granting of rules *nisi* and interim orders, pending the return day of a rule *nisi* where the following is encapsulated:

"The historical development of ex parte applications, the granting of rules nisi and the making of interim orders pending the return day of a rule nisi

[27] It is convenient to examine the common law practice relating to ex parte applications, the granting of rules nisi and the making of interim orders pending the return day of rules nisi as well as the importance of the audi rule for procedural fairness. For the purposes of this case "an ex parte application in our practice is simply an application of which notice was as a fact not given to the person against whom some relief is claimed in his absence. *Simross Vinters (Pty) Ltd v Vermeulen* 1978 (1) SA 779 (T) at 783.

[28] Our common law has recognised the great importance of the audi rule as well as the need for flexibility, in circumstances, where a rigid application of the rule would defeat the rights sought to be enforced or protected. In such circumstances the court issues a rule nisi calling on the interested parties to appear in court on a certain fixed date to advance reasons why the rule should not be made final and at the same time orders that the rule nisi should act immediately as a temporary order pending the return date. This practice has been recognised by the South African courts for over a century.

The term 'rule nisi' is derived from English law and practice and the rule may be defined as an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief claimed should not be granted. Our common law knew the temporary interdict and as Van Zyl points out, a 'curious mixture of our practice with the practice of England took place and the practice arose of asking the court for a rule returnable on a certain day but in the meantime to operate as a temporary interdict.

[29] The flexibility and utility of the rule nisi acting at the same time as an interim order has been recognised by our courts and is applied to modern problems in commercial suits. I would endorse the following passages from the judgment of Corbett JA, writing for the unanimous Appellate Division in the Safcor case:

"The Uniform Rules of Court do not provide substantively for the granting of a rule nisi by the Court. Nevertheless, the practice, in certain circumstances of doing so is firmly embedded in our procedural law. (see, generally, Van Zyl The Judicial Practice in South Africa 2nd ed at 355ff, 370-1 Herbstein and Van Winsen The Civil Practice of Superior Courts in South Africa 3rd ed at 89-90. This is recognised by implication in the Rules. (see, eg, Rule 6(8) and Rule 6(13). The procedure of a rule nisi is usually resorted to in matters of urgency and where the applicant seeks urgent relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged than disparaged in circumstances where the applicant can show prima facie that his rights have been infringed and he will suffer real loss or disadvantage if he called to rely solely on the normal procedures for bringing in disputes to Court by way of notice of motion or summons."

[23] Often a rule *nisi* and interim interdict are issued simultaneously and are legally intertwined, but that should not be mistakenly interpreted to mean that the rule *nisi* and interim interdict are the same. In *Nzwalo Investments (Pty) Ltd and Infoguardian (Pty) Ltd* Case 6950/ 2020 (23 July 2021), an unreported judgment of the Gauteng, the following was said regarding the difference of these two legal instruments:

"[13] The concept of the rule nisi is to be distinguished from a provisional order or interim order. A rule nisi is an order to show cause on a return day why a particular order should not be made. On its own, a rule nisi has no

legal effect other than to put those to whom it is addressed on notice that the specified relief will be sought on the return day.

[14] An interim or provisional order is different. The order has specified legal consequences beyond the mere notice of the prospect of final relief being granted.

[15] Often a rule nisi and an interim order are issued in the same order at the same time, but that does not mean they are the same thing. When a rule nisi is coupled with an interim interdict, the order sought to be confirmed on the return day will have the effect until the return day. If the return day passes, then both the rule and the interdict expire."

[24] An interim interdict is a court order preserving or restoring the *status quo* pending the determination of the rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination. (See *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002(2) SA 715 CC at para [49]. In this regard the Constitutional Court in *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002(2) SA 715 CC said the following:

"An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination. The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo." (See *Setlogelo v*

Setlogelo, 1914 AD 221 at p. 227, *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another* 1973(3) SA 685 (A) *Knox D Arcy Ltd v Jamison and Other* 1996(4) SA 348 (A) at 361).

[25] The interim relief as set out in prayers 2, 3, and 4 of the notice of motion focuses on the restraint of trade clauses. It is indisputable that this part of the relief is unaccompanied by the rule *nisi*.

[26] Given my finding in this regard the absence of the traditional rule *nisi* is of no consequence. I interpose to retell that the principle of our law is that the privity and sanctity of a contract should prevail. This has enjoyed attention of our courts in a plethora of judgments where the enforcement of such contracts was endorsed. Parties are to observe and perform in terms of their agreement. This is a trite principle in our jurisprudence. A deviation therefrom is justifiable if it can be demonstrated that the contract is tainted with fraud or a particular clause in the agreement is unreasonable and or so prejudicial to a party that it is against public policy.

[27] In *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17)* [2017] ZASCA 176 *(1 December 2017)* the Supreme Court of Appeal reaffirmed the principle of the privity and sanctity of the contract and stated the following:

"*paragraph 23 The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the requirements of a valid contract, freedom to contract*

denotes that parties are free to enter into contracts and decide on the terms of the contract."

[28] The Supreme Court continued and quoted with approval a paragraph in *Wells v South African Alumenite Company* 1927 AD 69 at 73 wherein the Court held as follows:

"If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice."

[29] In *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others CCT 109/19* [2020] ZACC 13 the Constitutional Court also an opportunity to emphasize the principle of *pacta sunt servanda* and stated the following:

"paragraph 84 Moreover, *contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed. Paragraph 85 The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of*

our society. Indeed, our constitutional project will be imperilled if courts denude the principle of pacta sunt servanda."

[30] I turn to focus on the final relief, which requires of this Court to interdict Carlo, Mariska and CPI from using confidential information of CSS comprising of inter *alia* contracts, technical, commercial, scientific information, know-how, trade secrets, processes, machinery designs, drawings, technical specifications and the like. It is trite that the three requirements for a final interdict are, a clear right; a threat to breach such right (in the case of a prohibitory interdict) or a refusal to act in fulfilment of such right (in the case of a mandatory interdict) and no other remedy.

[31] To determine whether an applicant has a clear right is a matter of substantive law. *Minister of Law & Order, Bophuthatswana v Committee of the Church Summit of Bophuthatswana* 1994 3 SA 89 (BG) at 97–98. This will necessitate a factual evidential finding. This will be underpinned by the applicant proving on a balance of probability, facts which in terms of substantive law establish the right relied on. See: LAWSA Vol. 11, 2nd Ed. 397.

[32] The granting of an interdict is discretionary and the remedy of the interdict itself has been described as unusual. *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T); *Burger v Rautenbach* 1980 (4) SA 650 (C) and *Grundling v Beyers* 1967 (2) SA 131 (W), Transvaal *Property Investment Co v SA Townships Mining and Finance Corp* 1938 TPD 521.

[33] The interim and final relief are intertwined. The parties contesting versions reveal a material dispute of fact, more so in respect of Carlo and CPI. This relates to the restraint of trade agreement and the possession and use of confidential information of CSS. The general rule is that final relief in motion proceedings may only be granted if those facts as stated by the respondent, together with those facts stated by the appellant that are admitted by the respondent, justify the granting of the application, unless it can be said that the denial by the respondent of the facts alleged by the appellant is not such as to raise a real, genuine or *bona fide* dispute of fact. See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1964 (3) SA 623 (A) at 634 E-I and 635 A-C.

[34] Rule 6(5)(g) of the Uniform Rules of court provides a mechanism where a material dispute of fact occurs:

> "*Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the a foregoing, it may direct that oral evidence he heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.*"

[35] An ordinary reading of Rule 6(5)(g) provides that where there is a material and *bona fide* dispute of fact that cannot be decided on the papers, a court is faced with three alternatives: it may dismiss the

application, or direct that oral evidence be heard on specified issues or refer the matter to trial. In application proceedings, where a dispute of fact has emerged and is genuine and far-reaching and the probabilities are sufficiently evenly balanced, referral to oral evidence or trial will generally be appropriate. See : *Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26 at paragraph 44. As I see it, referring the matter to oral evidence would ensure a just and expeditious decision. After hearing oral evidence, this Court will then be in a better position to determine the relief that is being sought by the CSS.

Order

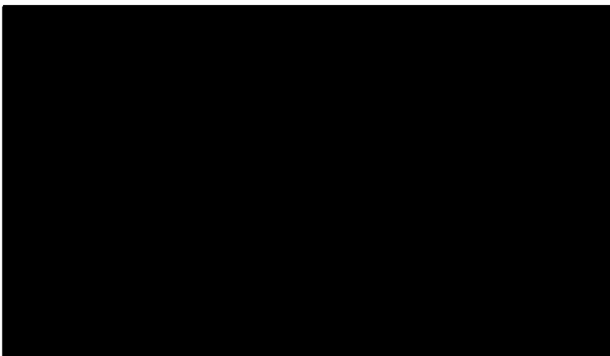
[36] For these reasons, I make the following order which is inclusive of costs.

(i) The application is referred for the hearing of oral evidence on a date to be determined by the Registrar before Reddy J on the issues of the whether the first and second respondents were in possession of:

(c) the confidential information and used same to the benefit of the third respondent.

(d) and whether the third respondent was complicit thereto. It must also be determined whether a restraint of trade agreement existed between second respondent and the applicant.

(ii) Costs are to be costs in the application.



A REDDY
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the Applicant	Advocate Sullivan
Instructed By	C/O Nienaber & Wissings 4204 Palmer Crescent Leopard Park 2575
For the First, Second & Third Respondents:	Advocate Kroeze
Instructed By	C/O Smit & Neethling 29 Warren Street Mahikeng
Date of hearing	15 March 2024
Date of judgement	12 August 2024