

**IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)**

CASE NO A5046/07

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED: YES/NO

.....
DATE

.....
SIGNATURE

In the matter between

NEIL VAN VUUREN

APPELLANT

and

GENEVA PRINTOTEK (PTY) LTD

RESPONDENT

J U D G M E N T

VAN OOSTEN J

[1] This appeal concerns interdictory relief granted by Kumalo AJ against an ex-employee in favour of the erstwhile employer arising out of their former employment relationship in the printer industry. The respondent conducts business in the printer industry throughout the Republic of South Africa, with its head office situated in Gauteng Province. The business involves the re-manufacturing of printers, repair of printers, refurbishment of print heads, refurbishment of fuser-units, the sale of factory re-manufactured printers, repairs to main printer boards, and on-site maintenance contracts.

[2] The appellant was a director and employee of the respondent with effect from 1 November 1999 until the date of his resignation as a director on 11 August 2006 and the termination of his employment by the respondent on 14

August 2006. He still holds 20% of the shareholding in the respondent. It is common cause that the appellant has since 1 September 2006 been operating his own business in competition with the respondent.

[3] The application which is the subject matter of this appeal was launched initially by way of urgency, on 16 August 2006. The matter proceeded in the normal course on the relief sought in part B of the notice of motion, which was for an interdict for a duration of two years broadly speaking aimed at preventing the appellant from competing unlawfully with the respondent “in any manner” and further protecting the respondent’s customers, existing employees and confidential information. The matter came up for hearing before Kumalo AJ. During argument the respondent abandoned the cause of action based on unlawful competition. The learned Judge granted an order as follows:

1. The Respondent is interdicted, prohibited and prevented with immediate effect and for a period of 2 years calculated from the date of granting of this order and within the Gauteng Province from:

1.1 Soliciting, interfering with, enticing or endeavouring to entice away from the applicant, the applicant's customers and/or prospective customers and/or persons who/which were accustomed to dealing with the applicant.

1.2 Soliciting, interfering with, enticing or endeavouring to entice away from the applicant, any existing employees of the applicant.

1.3 Utilising either directly or indirectly in any manner, divulging, disclosing or disposing to any person, any of the confidential information of the applicant and in particular the identity of any of the applicant's customers and/or the contact persons employed by those customers.

1.4 Disclosing details of the applicant's clients/customer lists or the contents thereof to anyone.

1.5 Holding himself out as being employed by, representative of or associated in any way with the applicant.

1.6 The respondent is to return forthwith to the applicant any written instructions, drawings, notes, lists, memorandum or records relating to the trade secrets and/or confidential information or (sic) the applicant made by the respondent or which came into the control and/or possession of the respondent during the period of the respondent's employment and/or association with the applicant, including any copies thereof, extracts therefrom and/or portions thereof and whether on computer, disk or otherwise and to the extent that any copies, extracts or portions of the foregoing are on hard disk, diaries and the like, the respondent is to delete, alternatively destroy all such copies, extracts or portions hereof, and

1.7 Costs of suit including the costs reserved in terms of Part A of the notice of motion.

The appeal before us is against the whole of the judgment and order of the Court *a quo* with leave of the Supreme Court of Appeal.

[4] Before dealing with the issues on appeal it is necessary to remark upfront that the order appealed against shows a conflation between an interdict on the one hand and a restraint of trade on the other. From the body of the order it appears that the learned Judge clearly intended to issue an interdict which had no relation to any restraint of trade. That being so, the time limit of two years imposed in the duration thereof is incompatible with the nature of an interdict granted in final form. The interdict, assuming the respondent to have been entitled thereto, clearly ought to have been granted for an indefinite duration. Counsel for the respondent conceded, in my view rightly, this to be so. The issues on appeal therefore will accordingly be dealt with on the basis of the Judge *a quo* having granted a final interdict of indefinite duration in the terms I have referred to. The issues relating to unlawful competition and restraint of trade are therefore no longer relevant and will not be dealt with any further.

[5] A convenient starting point is to consider the formation of the employment relationship between the parties; the nature thereof and the facts relied upon by the respondent in support of each separate part of Kumalo AJ's order. The appellant had been involved in the printer industry, both on the management and technical side thereof, since 1986. He was initially employed by Jensen Electronics (Pty) Ltd where he started as a technician and later was appointed the workshop manager. During 1991 he established his own business styled Laser Dot Matrix Services CC, which during 1999 merged with another close corporation, Printotek CC trading as Printotek and during 2000 Printotek merged with Geneva Technologies (Pty) Ltd to become the respondent. The appellant was appointed as the technical director of the respondent charged with the management of the workshop, which entailed supervision of the performance of staff and ensuring sufficient output, the purchase of second-hand printers for resale and supervision of stores. The employment

relationship between the parties eventually broke down for reasons that are in dispute and not relevant for present purposes. He was suspended from the respondent and resigned as a director. He thereafter set up his own business in the printer industry as a service provider, offering the same services and products as the two previous businesses in which he was involved as well as that of the respondent.

[6] The contract of employment between the respondent and the appellant was not written nor was there an express stipulation in restraint of trade. In the application the respondent relied on the obligations implied by law in terms of which the appellant was obliged to keep confidential the trade secrets and confidential information of the respondent. The appellant admitted that he became possessed of and gained knowledge of certain confidential information and trade secrets of the respondent. In his work environment the appellant was required to interface with the suppliers and customers of the respondent and accordingly became privy to documentation and information of a confidential nature in respect of the customers of the respondent. He had access to the identities of the suppliers and customers with whom he liaised in respect of their requirements, had contact with suppliers and customers and held meetings with them.

[7] I turn now to a consideration of each of the separate parts of the order granted.

SOLICITATION/ENTICEMENT OF RESPONDENT'S CUSTOMERS

[8] Two communications of the appellant with the respondents' customers are the subject matter of this part of the order. The learned Judge *a quo* found that the communications constituted "soliciting business from them". It is necessary to examine those communications which I should add, were made subsequent to the appellant's termination of his services at the respondent and are common cause between the parties. Firstly, the appellant sent a cellular short message (sms) to customers of the respondent, informing them:

"I have left and am no longer a director at GPTEK, my new number is ...[cellular phone number provided], please forward to all"

Secondly, the appellant by e-mail sent a power point presentation, outlining the company profile of his new business, to customers of the respondent. The power point presentation was only introduced by the respondent in the replying affidavit and an attempt was made to show that it was nothing more than a copy of the respondent's power point presentation, adapted where necessary to suit the appellant's purposes. In his rejoinder affidavit the respondent effectively showed that his power point presentation although showing similarities with that of the respondent, was markedly different and created from a Microsoft computer programme which is freely available as part of the Microsoft computer programme package. It is significant that no specific relief was sought by the respondent concerning the appellant's use of the power point presentation.

[9] In my view, and in the absence of unlawful competition, the communications referred to above without more show nothing more than what they intended to be which was to inform the addressees of the respondent's new business. These actions in my view were fully justified within the scope of the general rule that every person is entitled to carry on his business in the field for which he is qualified in competition with his rivals (*Schultz v Butt* 1986 (3) SA 667 (A) 678F; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 192; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) 505G; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)) and it therefore cannot be held that they constituted an unlawful interference with the rights of the respondent as to its customers. Nor has it been shown that the appellant in or by those communications solicited or enticed the respondent's customers away from it (See *Motion Transfer and precision Roll Grinding CC v Carsten and Another* [1998] 4 All SA 168 (N) 176). It follows that the interdict in respect of solicitation of the respondent's customers was wrongly granted and that it falls to be set aside.

SOLICITATION/ENTICEMENT/INTERFERENCE: THE RESPONDENT'S EMPLOYEES

[10] The Court *a quo* has not given reasons for granting this order. This Court therefore is obliged to consider the issue *de novo*. The only relevant evidence requiring consideration concerns a meeting hosted by the appellant shortly after the termination of his services with the respondent at his home which was attended by a number of the respondent's employees and former employees who apparently had resigned due to their dissatisfaction with the working conditions at the respondent. The appellant says the purpose of the meeting was to inform those present that he had the idea of starting his own business and that those who were interested, could join him.

[11] The respondent's managing director Clive Maher, who is also the deponent to the affidavits filed on the respondent's behalf, states that on becoming aware that the meeting had occurred, he convened an enquiry with members of the respondent's staff who he believed had been present at the meeting. He further states that he was informed that the appellant at the meeting had presented his plans of his future business venture and that he had further "requested of the applicant's staff members to consider rendering their services to him/his business operation rather than to the applicant". In confirmation hereof he annexed the affidavits of three employees of the respondent who were present at the appellant's meeting. On a perusal of their affidavits none of them makes any reference to the alleged request to render their services to the appellant in preference to the respondent, as Maher would have it. On the contrary one of them confirms the appellant's version that they were merely invited to join his new business while the other two (in affidavits containing identical allegations) mention nothing more than that the "possible employment" of the respondent's staff members was one of the items on the agenda for the meeting, but without stating whether it in fact was discussed and if so, what was said. The inference is inescapable: Maher's statement relying on evidence that did not exist was nothing more than an attempt to unjustifiably bolster the respondent's case. His version on this aspect falls to be rejected. There is nothing in the conduct of the appellant at

the meeting to show a solicitation or incitement or interference warranting the granting of an interdict. It follows that the interdict on this aspect was likewise wrongly granted and that it ought to be set aside.

RESPONDENT'S CONFIDENTIAL INFORMATION

[12] This brings me to what I consider to be the nub of the respondent's case, namely the protection of its confidential information and trade secrets. They are described as follows:

- 23.1.1 printer refurbishment and maintenance processes and techniques and distribution know how;*
- 23.1.2 the internal and operational structures and methods of the applicant;*
- 23.1.3 details of the financial structure and operating results of the applicant;*
- 23.1.4 the contractual arrangements between the applicant and its business associates;*
- 23.1.5 the details of the financial structure of the relationships between the applicant and its business associates;*
- 23.1.6 financial details (including credit and discount terms) relating to both the suppliers and customers of the applicant;*
- 23.1.7 names and contact details of both current and prospective customers and their requirements;*
- 23.1.8 knowledge of and influence over the customers, suppliers and business associates of the applicant;*
- 23.1.8 details of the remuneration paid by the respondent to its various employees, as well as their duties;*
- 23.1.10 information and details in respect of business opportunities available to the applicant; and*
- 23.1.11 other matters which relate to the operations and business of the applicant and in respect of which information is not readily available in the ordinary course of business to a third party or competitor of the applicant.*

The appellant does not dispute that he was privy to most of the information the respondent describes as confidential. The confidentiality of some of the items of the information however is in dispute. In the view I take of the matter it is not necessary to decide this issue and I will assume (without deciding) that the respondent in this regard has shown a protectable interest worthy of protection. The question to be answered is whether the appellant either used the confidential information in his new business or that a reasonable apprehension existed that he would do so. The requirements for succeeding

in respect of a final interdict are well-established (*Setlogelo v Setlogelo* 1914 AD 121; Joubert (ed) *The Law of South Africa* vol 11 in para [309]): the applicant for relief has to establish a clear right; an injury committed or reasonably apprehended; and that there is no satisfactory alternative remedy (*Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W) 586D). As for the second requirement no direct evidence exists to show that the appellant is either using or abusing the respondent's confidential information. The respondent relies on a reasonable apprehension that he is doing so. In this regard it is necessary to state that the mere assertion of a fear does not constitute a reasonable apprehension of harm. The facts grounding the apprehension must be contained in the founding affidavit to enable the court to establish whether the fear is reasonably grounded (See *AA Onderlinge Assuransie Bpk v De Beer* 1982 (2) SA 603 (A) 620E-G).

[13] It must of course be remembered that the appellant had acquired substantial knowledge, experience and skills in the printer trade prior to the merger I have referred to, and him joining the respondent. Those were obviously expanded during his employment with the respondent, both in the general sense and then of course also on those aspects which were unique to the business of the respondent. That brings to the fore the inevitable result that he must have had knowledge in his head when his employment with the respondent ended. Our Courts have held that the employee under such circumstances (in the absence of a covenant in restraint of trade, as is the case here) may freely use for his own benefit the knowledge so acquired in competition with his employer, unless the knowledge cannot lawfully be used for anyone's benefit but the employer's (See *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* supra 502-4; *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W) 429-432; *Arrow Altech Distribution (Pty) Ltd v Byrne and Another* [2008] All SA 356 (D) para [20]-[24]).

[14] Before dealing with the respondent's contentions there is however one further matter that I should mention and that relates to so-called *springboarding* (as to which see *Harvey Tiling Co (Pty) Ltd v Rodamac (Pty) Ltd* 1977 (1) SA 316 (T) 323H-324E) which the respondent has raised much

by way of argument in the papers. Counsel for the respondent submitted (correctly) that the respondent bears the *onus* to prove the nature of the springboard as well as its duration. There are as counsel for the appellant aptly referred to, no concrete facts, to establish that the appellant used his knowledge of the respondent's confidential information or that he used the respondent's confidential information as a *springboard* to establish his own business. It follows that that the principle cannot be invoked to assist the respondent to discharge the *onus* in any way.

[15] This brings me to the contentions advanced by counsel for the respondent. He identified certain what he referred to as building blocks, which he submitted are sufficient to establish the respondent's reasonable apprehension that the appellant may be using the respondent's confidential information. The first building block counsel argued is the fact that the appellant established a competing business which was fully functional within three weeks of him leaving the employ of the respondent. To do that from scratch on his own in a record time counsel further submitted, without using of the respondent's confidential information, must be regarded as inconceivable. I am unable to share counsel's reservations: the appellant as I have alluded to, firstly, was possessed of certain knowledge, experience and skills in the printer industry prior to joining the respondent and secondly, was entitled in the absence of a restraint of trade to carry with him the knowledge, experience and skills he had acquired whilst employed at the respondent. Again, these factors must be considered bearing in mind that the respondent has failed to prove any concrete facts to substantiate the respondent's fears. The second building block counsel referred to, is the fiduciary relationship that existed between the respondent and the appellant as shareholder and director of the respondent, which gave rise to certain obligations and duties owed by the appellant to the respondent. The second building block crumbles down for the same reason as the first one: whatever the obligations and duties the appellant may have had towards the respondent, it remains indisputable that there is simply no evidence that the appellant has breached any thereof. In conclusion the respondent's case lacks the building blocks required to lay the

foundation for an interdict which was evidence to show the appellant's use thereof. It follows that this part of the interdict also falls to be set aside.

DISCLOSURE OF RESPONDENT'S CUSTOMER LISTS

[16] No reasons were given by the learned Judge *a quo* for including this prohibition as part of the interdict. It is stated in the founding affidavit on behalf of the respondent that the appellant is in possession of "substantial" records in respect of the respondent's customers which the respondent fears the appellant will continue to make use of either for his own account or for that of his future business interests. The appellant's response (which must be accepted, these being motion proceedings) is a denial not only that he was in possession of the records but also that he was or would be using it. The respondent accordingly failed to prove an entitlement to an interdict on this aspect.

HOLDING OUT AS BEING EMPLOYED BY RESPONDENT

[17] Regrettably no reasons were given by the learned Judge *a quo* for granting this order. One attempts in vain to find evidence in support of this part of the order. In the search for evidence the only allegations that seem to be relevant are those made by the respondent in the most vague and general terms seemingly based on hearsay and without substantiation, that the appellant "has attempted" to abuse the name and reputation of the respondent to procure benefits for himself from the respondent's suppliers. Again, this was met by the appellant's denial. No case was made out and the order accordingly ought to suffer the same fate than the others.

RETURN OF DOCUMENTS

[18] The vagueness of the reference to the documents in this part of the order is such that it is, as counsel for the appellant correctly pointed out, impossible of performance. The respondent has failed to properly identify the documents referred to in the order. In regard to these documents the respondent states

that it was “reasonably assumed” that the reason for the appellant’s failure to return them was “to enable him to further his interests at the expense of” the respondent, and that there “can be little doubt” that the appellant in the interim period made copies thereof, to which is added “to the extent that he may not have done so, will do so prior to him handing the originals thereof back” to the respondent. The appellant denied being in possession of the documents. No entitlement to this part order was shown. It was wrongly granted and must be set aside.

[19] For all these reasons the appeal is upheld with costs. The order made by the Court *a quo* is set aside and substituted with the following:

“The application is dismissed with costs.”

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

M JAJBHAY
JUDGE OF THE HIGH COURT

I agree.

CD DE JAGER
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT
APPELLANT’S ATTORNEYS

ADV GM YOUNG
VAN GAALEN ATTORNEYS

COUNSEL FOR THE RESPONDENT
RESPONDENT’S ATTORNEYS

ADV M NOVITZ
SCHINDLERS ATTORNEYS

DATE OF HEARING
DATE OF JUDGMENT

10 NOVEMBER 2008
17 NOVEMBER 2008