IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable
Case no: 4243/2020P

In the matter between:

TRON LUBRICANTS PTY LTD	**FIRST APPLICANT**
HITECH CHEMICALS PTY LTD	**SECOND APPLICANT**
BLENDTECH PTY LTD	**THIRD APPLICANT**

and

KNT BUSINESS SOLUTIONS T/A KNT TRADING SOLUTIONS (K2015/299068/07)	**FIRST RESPONDENT**
THINESHEN TERRANCE MOODLEY	**SECOND RESPONDENT**
KARLENDRAN THAMBERON ALSO KNOWN AS COLIN THAMBERON AND KARL MANDRI	**THIRD RESPONDENT**
NERISHA NAIDOO	**FOURTH RESPONDENT**

KAVILAN NAIDOO ALSO KNOWN AS KEVIN NAIDOO **FIFTH RESPONDENT**

YOUGESHREE MANDRI **SIXTH RESPONDENT**

MULLER LUBRICATIONS PTY LTD **SEVENTH RESPONDENT**

This judgment will be handed down in open court and delivered electronically by circulation to the parties' legal representatives by email publication. The date and time for hand-down is deemed to be 09h30 on 11 March 2021.

ORDER

---

[1] The following order is granted:

1. <u>As regards the first respondent</u>:

   An order is granted in terms of paragraph 1.4 of the notice of motion, save that the restraint period shall be 14 months;

2. <u>As regards the second respondent</u>:

   An order is granted in terms of paragraphs 1.1 and 1.5 of the notice of motion, save that the period of restraint shall be for a period of 14 months, commencing on 18 March 2020.

3. As regards the fifth respondent:

   An order is granted in terms of paragraphs 1.3 and 1.5 of the notice of motion, save that the period of restraint shall be for a period of 14 months, commencing on 25 April 2020.

4. The first, second and fifth respondents are directed to pay the applicant's costs on the party and party scale, jointly and severally, the one paying the others to be absolved. There shall be no order of costs occasioned by the appearance on 5 February 2021.

5. As regards the fourth respondent:

   The claim against the fourth respondent is dismissed and there shall be no order as to costs.

JUDGMENT

Delivered on **11 March 2021**

Mossop AJ:

[1] In their notice of motion, the three applicants seek a rule nisi interdicting and restraining the second, third, and fifth respondents for a period of two years calculated from the date of their respective resignations from contravening restraint of trade agreements that the second and third respondents signed in favour of the first applicant and that the fifth respondent signed in favour of all three applicants. In addition, the applicants seek an order that the first and the seventh respondents be interdicted and restrained from employing the second, third and fifth respondents for a period of two years following upon their resignation. Finally, the applicants seek an order that all the

respondents be interdicted and restrained from competing unlawfully with the applicants through the use of the applicants' confidential information and trade secrets. While no rule was previously granted in the matter, it was fully argued and I intend to grant a final order.

[2] On 5 February 2021, when the matter first served before me, the applicants were given leave to withdraw the application against the sixth respondent and were directed to pay her costs on the party and party scale.

[3] When the matter came before me for final argument on 3 March 2021, there was no appearance in respect of the first respondent and all the relief sought against the third and seventh respondents was, by consent, adjourned for the hearing of oral evidence on a date to be arranged with the Registrar. The principal issue to be determined in those proceedings is whether the third respondent's signature appears on the restraint of trade that he is alleged to have signed, the third respondent contending that the signature purported to be his on that document is a forgery. The order dealing with the third and seventh respondents was handed down separately from the order to be granted in this matter. Accordingly, whilst reference may be made in this judgment to the third respondent from time to time as his conduct forms an integral part of the overall narrative, no findings will be made in respect of him. The matter thus proceeds as against the second, fourth, and fifth respondents only.

[4] When the matter was called, I had the pleasure of hearing argument from Ms. Dheoduth, who appears for the applicants, and Ms. Jacobs who appears for the second, fourth and fifth respondents. They are thanked for their helpful argument.

The applicants

[5] The three applicants in this application, all of which are incorporated entities, form part of a group of companies known collectively as the Chemgroup group of companies

(Chemgroup). The applicants claim that they carry on business throughout the Republic of South Africa and that Chemgroup has an international footprint elsewhere in Africa and in the United Arab Emirates through its international arm, KLT International Pty Ltd. The first applicant manufactures and markets lubricants and other specialist chemicals, including petroleum, the second applicant blends and packages solvents, adhesives, detergents and other specialist chemicals, including petroleum and the third applicant is, generally, the manufacturing arm of both the first and second applicants. Apparently the three applicants are dependent on each other and work together in order to advance the interests of Chemgroup.

The basis of the applicants' claims

[6] The applicants allege that the fourth respondent, together with the second, third and fifth respondents, adapted the first respondent, an incorporated entity, to unlawfully compete with them whilst the second, third and fifth respondents were still employed by the applicants. They created a company profile for the first respondent (the first respondent's profile) to facilitate the marketing of its services utilising company profiles already prepared for the applicants and approached customers of the first and second applicants with a view to securing their business. In addition, they allege that the third respondent set up the seventh respondent for a similar purpose. All of this was done, according to the applicants, in defiance of restraint of trade agreements that the second, third and fifth respondents had concluded in favour of the applicants.

Common cause

[7] The papers are voluminous, extending over 1 000 pages, and everything appears at first blush to be in dispute. However, a careful reading of the papers establishes that much of what is disputed is irrelevant to the issues to be determined and much is, in fact, common cause. The conclusion of the respective restraint of trade agreements by the second and fifth respondents is not in dispute nor is the fact that the fourth respondent is

not a signatory to a restraint of trade agreement. The same holds true of the confidentiality agreements signed by the second and fifth respondents. It is also not in dispute that the first respondent was initially incorporated by the fourth respondent nor is it in dispute that the second respondent became a director of the first respondent at a time when he was still employed by the first applicant thereby being in breach of the restraint agreement that he admits signing.

The employment of the respondents

[8] The second respondent commenced his employment with the first applicant as a sales representative on 1 December 2017. The fourth respondent previously worked for the second applicant in its finance department and she incorporated the first respondent in 2015 after terminating her employment with the second applicant in 2014. The fifth respondent commenced working for the first applicant during 1999 as a general worker.

The relationship between the parties

[9] Chemgroup is proudly and unashamedly a family business. So much so is conceded by its founder, Gopaul Naidoo (the founder), who deposed to the applicants' founding affidavit. The fifth respondent is his nephew. The fourth respondent is married to the fifth respondent. Other family members are employed throughout Chemgroup. The second, third, and erstwhile sixth respondents are not family members of the founder but the third and erstwhile sixth respondents are, however, linked as they are engaged to be married to each other.

[10] The second and third respondents reported to the fifth respondent. Notwithstanding such formality, they were personal friends, were inseparable and socialized with each other after working hours.

The restraints of trade

[11] The restraints of trade signed by the second and fifth respondents are identical in content, as is the restraint of trade disputed by the third respondent. The notice of motion follows the wording of the restraints of trade which read as follows:

'1.1 Employee, or his agent, shall not at any time during his employment with "The Company" and within two years after he shall cease to be employed by "The Company":

1.1.1 directly or indirectly use know-how, products, which belong to "The Company", its associates or its clients, or have been developed by "The Company", its associates or its clients for any purpose whatsoever other than normal company business.

1.2 Employee shall not, without the express written consent of the directors of "The Company", at any time during his employment with the company, nor within three years after he shall cease to be employed by the company:

1.2.1 member of a syndicate or otherwise howsoever, and whether directly or indirectly in any business, firm or undertaking which conducts the similar or same business of the company within the Republic of South Africa; and

1.2.2 be employed by a firm or Company who was a customer of "The Company" during the terms of his employment and with whom he was directly involved, whether in the course and scope of his employment with "The Company" or otherwise; and

1.2.3 solicit or seek to obtain orders in respect of products or services similar to those marketed by "The Company" from any person, firm or company who was a customer of "The Company" during the terms of his employment; and

1.2.4 employ, offer to employ or offer employment to any person employed by "The Company" during the currency of the Agreement; and

1.2.5 induce or attempt to induce any person employed by “The Company” during the currency of this Agreement to leave the service of “The Company”; and

1.2.6 cause or assist any other person to employ or offer to employ or offer employment to any person employed by “The Company” during the currency of this Agreement; and

1.2.7 cause or assist any other person to induce or attempt to induce any person employed by “The Company” during the currency of this agreement to leave the services of “The Company”;

1.2.8 Employee acknowledges and agrees that the terms of the Restraint of Trade are reasonable in all respects and in particular as to extent, duration and area.’

The suspicions of the founder

[12] During the course of 2018 and 2019, the founder discerned that the applicants were experiencing a significant decrease in turnover and profitability. He initially suspected that products were being stolen alternatively that the sales department, which was headed by the fifth respondent, and which had some latitude in determining sales prices, had decreased product margins by too great a margin. In order to be certain, the founder brought in an external person to conduct certain investigations on his behalf. The outcome of this investigation was never revealed in the papers, nor was the identity of the person that carried it out.

The resignations

[13] The third respondent resigned his employment with the first applicant on 28 February 2020 and the second respondent resigned on 17 March 2020. On 24 April 2020, the fifth respondent also resigned from all the entities with which he was associated in Chemgroup.

The investigations by the founder

[14] On 14 March 2020, shortly before the resignation of the second respondent, a search of the Companies and Intellectual Property Commission (CIPC) database by the founder revealed the existence to him of the first respondent. It also revealed that the second respondent and a person named 'Karl Mandri' were both appointed as directors of the first respondent on 8 October 2019. That search also revealed that on 13 February 2020, the first respondent registered itself for Value Added Tax purposes.

[15] After his resignation, an investigation of the fifth respondent's computer by the applicants' information technology department revealed the existence thereon of the first respondent's company profile. This document confirmed the link between the first respondent and the second respondent, whose name and cellular telephone number appeared on its cover. The document also revealed that a person by the name of 'Karl Mandri' was employed by the first respondent. This is the same name that was discovered during the CIPC search. The third respondent's full names are 'Karlendran Thamberon'. As noted previously, he is engaged to the erstwhile sixth respondent, whose surname is 'Mandri'. The suspicion of the founder was that the name 'Karl Mandri' was a fabricated composite name, used in an attempt to escape the reach of the restraint of trade now disputed by the third respondent. Further information in the first respondent's company profile hardened the founder's suspicion as to the true identity of 'Karl Mandri': also included was a cellular telephone number for 'Karl Mandri', which it is now common cause, is the third respondent's cellular telephone number. The second and fifth respondents admit that the name 'Karl Mandri' is, indeed, a reference to the third respondent but that the fabricated name was used in the document as a 'joke' as the third respondent was allegedly controlled by the erstwhile sixth respondent and ought to, in the view of the second and fifth respondents, take her name when he married her.

The applicable law

[16] It is settled law that restraints of trade are valid and binding and, as a matter of principle, enforceable unless, and to the extent that, they are contrary to public policy because they impose an unreasonable restriction on the former employee's freedom to trade or to work.[1] It is also settled that the onus of establishing that the restraint of trade is unreasonable falls on the former employee.[2]

[17] In considering the reasonableness of a restraint of trade, the well-known factors enumerated by Nienaber JA in *Basson v Chilwan and Others*,[3] are relevant and must be considered.[4] One of those factors identified by the Learned Judge in that judgment is the issue of a proprietary or protectable interest. In this regard, in *Experian South Africa (Pty\) Ltd v Haynes & Another* [5] the Court held that:

'It is well-established that the proprietary interests that can be protected by a restraint agreement are essentially of two kinds, namely:

1. The first kind consists of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the trade connection of the business being an important aspect of its incorporeal property known as goodwill.

2. The second kind consists of all confidential matter which is useful for the carrying on of the business and which could, therefore, be used by a competitor if disclosed to him to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as trade secrets.'

---

[1] Magna Alloys and Research (SA)(Pty) Limited v Ellis 1984 (4) SA 874 (A) at 891B-C.
[2] Den Braven (Pty) Ltd v Pillay and Another 2008 (6) SA 229 (D) para 3.
[3] 1993 (3) SA 742 (A) at 767G-H.
[4] *(a)* Does the one party have an interest that deserves protection after termination of the agreement? *(b)* If so, is that interest threatened by the other party? *(c)* In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? *(d)* Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?
[5] 2013(1) SA 135 (GSJ).

[18] In *Rawlins and another v Caravantruck (Pty) Limited,*[6] the court stated that the need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to his new, competitive place of business.[7] This is a factual issue, with much depending on:

' . . . the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left..." [8]

[19] As was stated by Wallis AJ in *Den Braven (Pty) Ltd v Pillay and Another*,[9] in considering the facts of a particular case it must always be borne in mind that a protectable interest in the form of customer connections does not come into being simply because the former employee had contact with the employer's customers in the course of their work. The connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business.[10]

[20] In *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others,*[11] the court noted that skills acquired by an employee belong to himself, even if he was trained up in this regard by the employer.[12] The fact that such an employee may commence work for a

---

[6] 1993 (1) SA 537 (A).
[7] At 542.
[8] At 542.
[9] 2008 (6) SA 229 (D).
[10] para 6.
[11] 2007 (2) SA 271 (SCA) para 8.
[12] Aranda Textile Mills (Pty) Ltd v L D Hurn [2000] 4 All SA 183 (E).

competitor does not in itself entitle the employer to restrain the ex-employee if all the ex-employee will be doing is applying his skills and knowledge acquired whilst in the employ of the employer. It is only if the restriction on the employee's activities serves to protect a proprietary interest relied on by the employer that the ex-employee would be in breach of his contractual obligations.

[21] Finally, in *Reddy v Siemens Telecommunications (Pty) Ltd* [13] the Court held that in deciding whether or not to enforce a restraint of trade, the competing public interests of members of society being held to the agreements that they conclude (*pacta servanda sunt*) and the right to freely engage in trade and commerce must be weighed up. A restraint would be unenforceable if it prevents a party after termination of his or her employment from being involved in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint would not be in the public interest.

The issues

[22] The issues arising out of the papers can fairly be summarised as being:

(a) whether the applicants have a proprietary interest worthy of protection; and

(b) whether the restraint of trade agreements that the second and fifth respondents have admitted signing are unreasonable and contrary to public policy in regard to the area that they cover and their duration.

The first issue

[23] The applicants state that the duties of the second and fifth respondents:

[13] 2007 (2) SA 486 (SCA) para 15 – 16.

‘ . . . [i]ncluded, inter alia, communication with representatives and customers surrounding pricing, quoting, invoicing and costing, direct communication with customers regarding ongoing orders and obtaining further orders, directly handling customers with their complaints and/or requests.’

[24] The applicants contend that as a consequence, the second and fifth respondents allegedly formed substantial relationships with the directors of the applicants’ customers, particularly with regard to the applicants’ top ten customers. The second and fifth respondents respond to this allegation in a tight lipped fashion and simply deny this to be the case. There is evidence, however, that relationships between the second and fifth respondents and their customers reached such a state of familiarity that the customers no longer communicated with the applicants but instead preferred to communicate directly with the second and fifth respondents on their cellular telephones.

[25] The applicants state that they have a genuine fear that because of the strong relationships that the second and fifth respondents built up with their customers that they would easily be able to persuade those customers to follow them to their new business enterprise. In advancing this submission, they indicate that their fears have already been recognised as they have lost the business of customers such as Blackbox Investments, the applicants’ biggest customer, and Gans Auto Spares. It is alleged that the first respondent has taken over these customers by undercutting the applicants’ prices. In investigating the loss of these customers, the founder discovered that Blackbox Investments had been advised by the fifth respondent that the first applicant would not be operating its business in the future due to a lack of product and due to mismanagement. It was also discovered that the fifth respondent had advised the proprietor of Gans Auto Spares that the first applicant was closing down and would be unable to supply it with products in the future. In answer, the fifth respondent put up an email authored by the owner of Blackbox Investments that extolls the fifth respondent for his efforts in creating and maintaining the business relationship with it. The email is not confirmed by way of an affidavit from the author. Whilst the letter does complain of the manner in which the applicants conducted their business with Blackbox Investments, it also reveals the extent

of the personal relationship that existed between the owner and the fifth respondent and that such relationship continued to exist after the fifth respondent had resigned, the email being dated 16 July 2020. The relationship between Blackbox Investments and the applicants was intact at the date of the fifth respondent's resignation but ended after the fifth respondent left Chemgroup.

[26] The applicants contend further that the second and fifth respondents had access to their confidential information, which included:

'(i) Pricing information;
(ii) Profit margin information;
(iii) Contact sheet [sic] of customers and clients;
(iv) Discounting information;
(v) Contact details of directors of customers and clients;
(vi) Delivery costs and associated information; and
(vii) Projected income information based on future sales and profit margins.'

[27] The second respondent simply denies this to be the case, as does the fifth respondent. In my view, that information would appear to be information that a salesman would be expected to have. A salesman would need to know who the customers were that he was to call upon and which person he should contact at those customers. He would need to know the price structure of the products that he was required to sell especially where he was, as in this case, granted a discretion as to the price to be agreed to by him. If a salesman was not aware of the applicable discounting structure to be applied to a particular customer he could potentially occasion his employer financial harm by agreeing to an unwarranted discount. The denial by the fifth respondent, who was in overall charge of the applicants' sales force, of such knowledge is meritless: he would need to have that information to properly instruct his salesforce.

[28] In addition, the applicants state that:

‘. . . the Second, Third and Fifth Respondents worked closely on sales, margins, new customers, emerging brands and other such products on behalf of the First Applicant and the Fifth Respondent worked closely with the sales team and I in respect of the Second Applicant.’

[29] The fifth respondent admits this whereas the second respondent denies this, save for admitting that he worked closely with the fifth respondent.

[30] Further, the applicants state that the second, third and fifth respondents during the course of their employment:

‘ . . . attained specialised skills and were privy to highly sensitive information and material information which dictated the essential elements of the Applicant’s day to day running. This entailed the gross profit associated with the manufacture of the solvents etc. produced by the Applicants, versus the cost price and the profitability achieved from each customer based on order and delivery. They also, as a result of knowing the cost price to manufacture, are well aware of the ingredients and measurements that make up the product in terms of the manufacturing.’

[31] The second and fifth respondents, again, address these very specific allegations by both simply denying them to be true. Indeed, the use of a blanket denial is their standard approach when dealing with many of the specific and detailed allegations made by the applicants. The second and fifth respondents instead consistently raise irrelevancies insofar as the issues are concerned relating, for example, to alleged difficulties in receiving payment of their salaries whilst employed by the first applicant.

[32] I am satisfied that the applicants have established that they have trade connections and that they have confidential information. I accordingly find that the applicants have proprietary interests worthy of protection.

[33] Reference was previously made to the first respondent’s company profile. Portions of that document appear to have been taken directly from the applicants’ pre-existing company profiles. As stated previously, the second respondent is directly linked to this

document: with his name and cellular telephone number appearing on the cover of the document. The second and other respondents contend that the first respondent's company profile put up by the applicants was simply a draft document. It was not stated what the purpose of that draft was. It is a professionally designed document that is clearly intended to impress. In my view it is simply too detailed to be viewed solely as a draft: it appears to be a serious attempt to market the business of the first respondent.

[34] A further document was located by the founder in the course of his investigations. This document appears also to have been professionally designed in the style of the first respondent's company profile. It is its contents, however, and not its style that is significant. This document could not have been intended for distribution amongst the first respondent's customers, but instead appears to have been designed for internal use (the internal document). The internal document disclosed that the first respondent's sales representatives were 'Kevin, Collin and Terence'. This is contrary to the what the fifth applicant has stated, who has consistently denied any association with the first respondent. The founder contends that the reference to the names constitutes a reference to the fifth, third and second respondents respectively. The fifth respondent is also known as 'Kevin' and has been so cited in this application, the third respondent is also known as 'Colin Thamberon' and has also been so cited and the second respondent's middle name is 'Terrance'. None of them has denied this and I accordingly accept that names 'Terence' and 'Kevin' refer to the second and fifth respondents respectively.

[35] The internal document contained a page dealing with the first respondent's monthly sales forecast. This document identified, inter alia:

(a) the customers of the first respondent: the customers whose names appear within the internal document are, according to the founder, the top ten customers of the applicants. Included therein is Blackbox Investments and Gan's Motor Spares;

(b) the sales agent allocated to each customer: the fifth respondent has four customers allocated to himself, one of which is Blackbox Investments, the third respondent has five allocated to himself and the second respondent has one allocated to himself;

(c) the sales region in which the customer is located. This reveals that the areas and places covered are Zimbabwe, East London, KwaZulu-Natal, Bloemfontein, and Gauteng;

(d) the sales category: all the prospective sales were to be in the field of lubricants;

(e) the forecast of sales to each customer over the period January 2021 to November 202. It appears, as will become evident shortly, that the figures are not annual figures, but monthly figures. The total projected monthly sales figure was forecast to be R3 714 047,33, with sales to Blackbox Investments alone predicted to be R942 321,78;

(f) the mark up: this comprised a uniform across the board mark-up of 15 per cent; and

(g) the monthly profit forecast for that period: the profit totalled R557 107,10 which is, indeed, 15 per cent of the total of the monthly forecast.

[36] In my view, the internal document clearly establishes the links of the second, third and fifth respondents to that document and to the first respondent. It is also important to note that the period covered by the document is a period subsequent to the resignation of the second, third and fifth respondents and it is in keeping with a further discovery of the founder, namely that the first respondent had been registered for the purposes of Value Added Tax on 13 February 2020. It is mandatory for any business to register for Value Added Tax if income earned in any consecutive twelve month period exceeds, or is likely to, exceed R1 million, as stated by the founder. The registration of the first

respondent for Value Added Tax purposes appears to be denied by the fourth respondent, but such denial is contained in a paragraph that contains a blanket denial that covers three paragraphs of the founding affidavit. Such registration dovetails with the projected sales figures of the first respondent as revealed in the internal document.

[37] Any doubts regarding the conduct of the second, third and fifth respondents, their links to the first respondent and their conduct prior to their respective resignations are dissolved by an email of one Candice Myerson Shear (Shear). She is the person that was requested to prepare the first respondent's company profile. She appears to have gone beyond the remit of her mandate and appears to have harboured designs of being involved in the business of the first respondent. On 13 November 2019, whilst the second, third and fifth respondents were still employed by the applicants, she directed an email to a person called Madi Ramsamy. The contents of the email makes for interesting reading and I intend to quote extensively therefrom. In the email, Shear states:

'As per our recent discussion there is a very lucrative opportunity available for us on the Lubricants front.

Confidential information is that the owners of a company called Tron Lubricants have been living on the profits of the business and have basically run their company into the ground. They are currently not able to deliver to clients and are retrenching staff.

3 of the guys have been with tron for between 6 – 10 year on the sales side and they have fantastic relationships with the clients most of whom are aware things are not right at Tron and are happy to move with sales guys (Tron is not aware of this yet as obviously there are concerns they will try interfere but clients are currently cancelling orders with them due to non delivery). I have worked with these guys for years and I know their customer service, product knowledge and integrity is all top class. They are really driven to succeed and build this business. They have secured the agency for LAAPSA lubricants and greases but those are very specific focused products that will be bought in asap but not for their current client base.

At this stage they have spoken to 5 of the top 10 customers are all happy to move over, they are more concerned with consistency of supply than anything else. All these clients have excellent track records for repeat ordering and paying on time.'

[38] Shear goes on further to state:

'In a nut shell we could start immediately with the customers below (mainly KZN based):

Customer average sales (12 months) Gp% 13 to 18%
**potential

Engineparts – R350k monthly (**1 million) @15%
Black box – R1.5 million monthly (**5 million)@13%
Gans – R400k monthly #13%
Super auto – R350k monthly @15%
Shiptech – R2 million (**4 million) @15%
Other – R500k @ 18%'

[39] Everything stated in Shear's email could only have originated from the second, third and fifth respondents. The email reveals that plans were afoot well before the second, third and fifth respondents resigned to poach the business of the first respondent. The customers named in the email constituted five of the applicants' top ten list of clients and Shear confirmed that all of them had been approached to transfer their business allegiances to the first respondent. This email is devastating to the defences of the second and fifth respondents.

[40] The second respondent concedes that the applicants are involved in a competitive industry. This is an important concession. It is precisely the existence of such competition that heightens the applicants' fears regarding the dissemination of their proprietary information. If such information was made available to a competitor, it is the applicants' belief that it would afford such competitor an unfair advantage. I cannot find that this belief

is exaggerated or misplaced given the orchestrated conduct of the second, fourth and fifth respondents and the general level of deception that they have employed.

[41] That the first respondent was a direct competitor of the applicants brooks of no dispute. On the fourth respondent's own version, it involved itself in the sale of 'oils' and, inter alia, secured for itself a distribution contract from LAAPSA, a lubricant manufacturer, a fact confirmed by Shear in her email. The first applicant is a distributor of that manufacturer's products as well. The fourth respondent concedes, further, that the first respondent actually involved itself in sales and that three transactions were concluded in 2019 and a further three in 2020. The identity of the customers with whom the first respondent did business was never revealed by her. Ms. Dheoduth rather acerbically submitted in argument that the respondents are unable to identify with whom business was conducted as that would reveal that it was done with the applicants' customers. There may well be some force in that argument. That those sales benefitted the second and fifth respondents is also undeniable. During December 2019, the second, third and fifth respondents each received a payment in the amount of R18 000 from the first respondent. The payment to the fifth respondent came from the second respondent but the source of the payment to the second respondent was the first respondent. To explain these payments, the fourth respondent stated that she had given each of the second, third and fifth respondents the money as a personal loan and that the loans had been repaid. The applicants, on the other hand, claimed this was the fruits of the first respondents unlawful competitive behaviour. I can safely reject the fourth respondent's version: the money came from the first respondent's bank account and not her personal bank account and she would surely not expect her husband to accept a loan from her or to repay it – she would surely simply have given him the money if he needed it. If it was indeed a loan from her to her husband, it is most curious that it was not paid directly to him by her but was paid to him using the second respondent as the conduit. No proof of the repayment of the alleged loans was put up. That the loans have been repaid can also be rejected: the loans were apparently required due to financial hardship and shortly after they were granted, the COVID-19 pandemic struck, bringing with it further financial hardship and reducing

the likelihood of repayment. The fact of the matter is that the fourth respondent was not the source of the money, the first respondent was and the explanation advanced by the respondents is strained and contrived and is not accepted.

[42] There was an allegation in the papers that the first respondent no longer exists. There was no appearance for it when the matter was called. The suggestion of its non-existence was advanced by the fourth respondent who stated that she had taken the decision to deregister it. She made reference in this regard to a document attached to her answering affidavit. This, so it was stated by her, constituted proof of its deregistration. This document, written on the letterhead of 'CN Business Consultants', is addressed to 'To whom It May Concern' and states:

'We herby [sic] confirm the above company will be de-registered from SARS and CIPC. SARS have been notified; the Fairbury 2021 ITR 12 is submitted.

The company cannot trade, if they do so SARS will issue an audit findings letter.'

[43] In my view, this document is not proof of the de-registration of the first respondent. In fact, there is no evidence that the first respondent no longer exists as a legal entity other than what the fourth respondent states. All that is expressed in the document referred to is an intention to de-register it. Had it actually been finally deregistered it would have been a matter of some simplicity to put up documentary proof of its formal deregistration, but this was not done. I am accordingly not able to find that the first respondent no longer exists as a legal entity.

[44] There was a further allegation that following a dispute with the fourth respondent, the second and third respondents resigned as directors of the first respondent. The fourth respondent states that she:

‘ . . . had a disagreement pertaining to how business should operate and I then advised them that I was no longer willing to do business with them and requested that both the Second and the Third Respondent be removed as directors of the First Respondent.’

[45] Whether this actually happened, again, is open to doubt. What the differing points of view were that led to the alleged disagreement was never disclosed. No proof of the resignations of the second and third respondents were put up by either the second or fourth respondents. The search of the CIPC database by the founder records them as still being directors. There has been ample time for documentation recording the resignation to be put up, yet this has not been done.

[46] Both the second and fifth respondents were presented as persons who could pose no threat to the applicants. The second respondent was portrayed in argument by Ms. Jacobs as being nothing more than a humble salesman. As was stated by Wallis AJ in *Den Braven*, in any business dependent for its profits on the sale of its products, the sales function is of fundamental importance and the salesperson’s ability to damage the business of the employer may be very considerable or even fatal, notwithstanding the fact that he may seem to stand fairly low in the staff hierarchy.[14] An attempt was made to present the fifth respondent in the same light. That attempt, perhaps, went a bit further. It was argued by Ms. Jacobs that the fifth respondent, like the second respondent, possessed no particular skills but that he was also an incompetent businessman who clearly displayed no insight into the running of a business. He could, so the argument went, not compete with the applicants and would never pose a threat to the wellbeing of the applicants. I remain unpersuaded that either of these two portrayals are accurate representations of either gentleman’s abilities or value.

[47] Such competition has, in fact, occurred and the first respondent has earned income from those competitive business activities. In my view, the applicants have established that the first respondent is an entity that has been adapted to compete with it and that it

[14] Den Braven (Pty) Ltd v Pillay and Another, supra, para 11.

is designed to trade in a range of similar products to those that they trade in. I am fortified in that view by the following admission contained in the second respondent's answering affidavit where he states:

'I admit that in preparation of my resignation from the First Applicant, that the Third Respondent and myself engaged the Fourth Respondent to possibly enter the lubricant field, which would be carried out through the First Respondent.'

[48] I conclude therefore that there is a risk of harm to the applicants if the second and fifth respondents are able to continue to compete with them through the first respondent.

[49] As regards the fourth respondent, the only relief sought against her was that she be interdicted from unlawfully competing with the applicants by utilising information proprietary to the applicants. No evidence was adduced of her having such information and in my view no relief can be granted against her. She is not restrained in any manner. That being said, it is undeniable that she aided and abetted the other respondents in the furtherance of their plans. This will be reflected in the costs order that I intend making.

The second issue

[50] In my view, as was stated in *Den Braven*, the period of the restraint should not be any longer than is necessary to enable the applicants to place new people in the positions previously occupied by the second and fifth respondents to enable them to become acquainted with its products and its customers and to make it plain to the latter that they are now the persons with whom to deal on behalf of the applicants.

[51] That having been said, I am aware that our society is living in strange times. The COVID-19 pandemic has played havoc with, inter alia, our economy. Businesses have been prevented from operating and the ability of the applicants to appoint and train new sales persons will undoubtedly have been blunted by the state of the economy. This is of

some relevance when considering the length of the period of restraint. In *Den Braven*, Wallis AJ noted that a period of restraint of two years was the 'outer limit' in respect of the case that he was dealing with. He, too, was faced with a salesperson who was sought to be restrained. I am of the view that the period of two years is excessively long in the circumstances of this case.

[52] I acknowledge that the second and third respondents terminated their working relationship with the first applicant on 17 March 2020 and 24 April 2020 respectively. Whilst I am of the view that a restraint period of two years is too long, I take into account that during the period within which the respective restraints commenced running, the country was in lockdown and thereafter various other restrictions existed and continue to exist for a number of months. During this period movement and the conducting of business was severely hampered. The application was launched on 2 July 2020, approximately two months after the last resignation took effect. The application was ultimately argued on 3 March 2021, almost a year after the termination of the second respondent's working relationship with the first applicant. That the matter has taken this long to be argued is through no fault of the applicants but is a further manifestation of the consequences of the COVID-19 pandemic as the courts' capacity to hear cases has also been restricted.

[53] In my view, the period of the restraint could profitably be reduced by a period of ten months and that accordingly a restraint period of 14 months will meet the need. I have arrived at this figure by using as a base a period of 12 months, which I consider to constitute a reasonable restraint period in the circumstances of this matter, and by adding two months thereto to compensate for the lockdown period. The period of each restraint is to be regarded as having commenced running on the day following the resignation date of the second and fifth respondents respectively. It follows that the time period mentioned in paragraph 1.4 of the notice motion must be reduced to a period of 14 months as well.

[54] The content of the internal document adds support to the applicants' contention that they operate throughout South Africa and service customers throughout the Republic. Whilst I am disposed to reduce the period of the restraints, I am not disposed to reduce the area of the restraint.

The order

[55] I accordingly grant the following order:

1. <u>As regards the first respondent</u>:

   An order is granted in terms of paragraph 1.4 of the notice of motion, save that the restraint period shall be 14 months;

2. <u>As regards the second respondent</u>:

   An order is granted in terms of paragraphs 1.1 and 1.5 of the notice of motion, save that the period of restraint shall be for a period of 14 months, commencing on 18 March 2020.

3. <u>As regards the fifth respondent</u>:

   An order is granted in terms of paragraphs 1.3 and 1.5 of the notice of motion, save that the period of restraint shall be for a period of 14 months, commencing on 25 April 2020.

4. The first, second and fifth respondents are directed to pay the applicant's costs on the party and party scale, jointly and severally, the one paying the others to be absolved. There shall be no order of costs occasioned by the appearance on 5 February 2021.

5. As regards the fourth respondent:

The claim against the fourth respondent is dismissed and there shall be no order as to costs.

_____

MOSSOP AJ

APPEARANCES

Date of Hearing	:	03 March 2021
Date of Judgment:	:	11 March 2021
Counsel for applicants	:	Advocate D. Dheoduth
Instructed by	:	T. Giyapersad Inc. c/o Schoerie and Sewgoolam
Counsel for 1st Respondent	:	No appearance
Counsel for 2nd, 4th and 5th Respondents	:	Advocate Jacobs
Instructed by	:	Manoj Haripersad
Counsel for 3rd and 7th Respondents	:	Advocate U. Lennard
Instructed by	:	Law Offices of Karen Oliver c/o Austen Smith Attorneys