REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

CASE NO: 3210/2018
A98/19

In the matter between:

TRANSERVE KIMBERLEY t/a TRANSERVE

FILTRATION MIDDLEBURG (PTY) LTD **First Appellant**

JOHAN GROENEWALD **Second Appellant**

and

F.T. FILTRATION TECHNOLOGY (PTY) LTD **Respondent**

J U D G M E N T

MASHILE J

INTRODUCTION

[1] To avoid confusion, I will refer to the parties herein in their actual names instead of Appellant/s or Respondent. On 20 November 2018, the Court a quo per De Vos J sitting as a court of first instance heard this matter as an urgent application. The application succeeded and on 26 November 2018, the court directed that for a period of 8 months from the date of its order the Appellants, Transerve Kimberley ("Transerve") and Johan Groenewald ("Groenewald") are:

"1.1 Interdicted and restrained from using directly or indirectly or disclosing to any person, firm or company any confidential information, trade secrets in their possession and in particular: the respondents are interdicted and restrained from using for their own benefit or for the benefit of any other person/s or divulging or communicating to any person any of the applicant's secret or any other information which they might have received or obtained in relation to the applicant's affairs or its clients including its clients lists, or to any marketing technique (including pricing and markups on products) which is carried on or used by the applicant in any matter, either directly or indirectly, for purpose of soliciting business of the applicant's clients;

1.2 Interdicted from soliciting or assisting in the solicitation of the custom or business of any of applicant's clients or soliciting or assisting in the solicitation of orders from the applicant's clients or any competing services either for his/its own account or as a representative or agent for any third party or in conjunction with any person, company, business, entity or other organisation whatsoever, directly or indirectly;

1.3 Interdicted from using for his/its own benefit or that of any other person, firm or a company, any confidential information relating to the affairs of the applicant which may have come into his/its possession or of which the respondents had become aware of, whilst the first respondent was in the employ of the applicant.

2 Ordered to forthwith return all documentation and other property of the applicant that may be in his/ its possession, including lists of customers, clients or written information regarding the business of the applicant.

3. Ordered to pay the cost of this application on an attorney and client scale jointly and severally, the one paying the other to be absolved."

[2] Perturbed by the judgment and order of the Court a quo as described above, Transerve and Groenewald launched an application for leave to appeal. De Vos J dismissed it on 13 June 2019, Transerve and Groenewald petitioned the Supreme Court of Appeal ("SCA"). The SCA granted the petition and remitted the appeal back to be heard by a full court of this Division. On 20 March 2020, this Court duly presided over the appeal and this is therefore its judgment.

[3] A perusal of the notice of appeal reveals that Transerve and Groenewald are challenging the judgment and order on a number of grounds whose quintessence amounts to the following:

3.1 The Court a quo inadvertently omitted to deal with and pronounce on the application of Transerve and Groenewald to file a further affidavit addressing allegations in the replying affidavit of Filtration Technology, which they failed to do on the assumption that Filtration Technology would not place them in contest. Transerve and Groenewald contend that this is a misdirection.

3.2 The Court a quo granted interdict against Transerve and Groenewald prohibiting them from unlawfully competing with Filtration Technology. Given that context, can it be contended that Groenewald had laid his hands on confidential customer information whilst in the employ of Filtration Technology and that he was utilising it in his employment with Transerve to advance the latter's business interests?

3.3 Groenewald had unlawfully logged into the data base of Filtration Technology gaining access to confidential information. He subsequently supplied it to Transerve thereby enabling it to unlawfully compete with Filtration Technology.

3.4 The testimony before court only established that although Groenewald had illicitly accessed the data base of Filtration Technology, he only secured contact details, such as email addresses of persons with whom it had done business previously. To the extent that Filtration Technology failed to

demonstrate any proprietary interest in such information, Transerve and Groenewald assert that it cannot be argued that such e-mail details constituted confidential information. Filtration Technology has therefore failed to show that Transerve and Groenewald were unlawfully competing with it.

3.5 The admission by Filtration Technology that by the time it launched the application the alleged confidential information was already in the public province is unprecedented because interdictory reliefs are designed to avert imminent harmful happenings and not past ones. In the circumstances, concludes Transerve and Groenewald, an interim relief remedy is improper and the Court a quo should accordingly have refused it.

FACTUAL MATRIX

[4] The facts that led to the launching of this application against Transerve and Groenewald are largely common cause. Filtration Technologies conducts business as a specialist merchandiser of domestic and industrial filters and related products. These include but are not limited to the supply of all filtration needs like air, fuel, hydraulic, coolant filters, bag filters, supply of full range of domestic and industrial water filters in the Republic of South Africa. Filtration Technology has been in business for the past 26 years and has established a niche market within the Nelspruit Region, especially within the forestry industry.

[5] Filtration Technology is also an authorised supplier of Indy Oils, Sabat batteries, and Ground Engaging Tools for all earth moving equipment. It also supplies Baldwin and Fleetguard filters and filtration products. In carrying out its business, Filtration Technology supplies a range of products on a retail basis that are both locally manufactured and imported from various international suppliers and manufacturers. Filtration systems enhance working environments to improve conditions and also extend the operating life of vehicles, heavy duty machinery and equipment.

[6] The principal business of Filtration Technology relates to marketing and sales of both domestic and industrial filters to large commercial entities. Interwoven with the services rendered by Filtration Technology is the provision of service technicians to its clients for the fitment and testing of products.

[7] Transerve is a direct competitor of Filtration Technologies. Like Filtration Technology, Transerve supplies on a national scale, with several branch offices situated in Bloemfontein, Kimberley, Kathu and Middelburg. The main factors that influence placement of business by customers in the market are price, quality of service and ability of product suppliers to make products available to customers. Fundamental in this industry is the customer information and contact details in relation to each specific contractual arrangement between Filtration Technology and its clients. This will include each client's individual and specific requirements by them and the additional services which they are offered by Filtration Technology.

[8] Clients of Filtration Technology comprise, large fleet companies with different vehicles, which require different types and volumes of filters at a specific and individual discount margin, large commercial forestry entities with a fleet of different heavy machinery whose business with it is determined by the number of machinery. Filtration Technology has individual and specific contracts with each of these customers according to their particular needs and requirements. It sells its filters to the large commercial entities on the basis of a customised 'All-inclusive Kit', specific to the individual client's precise requirements and needs.

[9] Filtration Technology maintains that this information is not readily available in the ordinary course of business to its competitors. The sales, client information and individual discount margins within the industry is what gives it its competitive edge in the open market. It alleges further that over the period of its existence, it has identified clients which present with a continuous dependence on its products. These particulars are contained in a detailed database, sourced and engaged by it with their respective identities and individual contact details.

[10] On 25 June 2018, Filtration Technology and Groenewald entered into a written contract of employment in terms of which Groenewald was employed as an Internal Sales/Stores Coordinator. In terms of the employment contract, Groenewald assumed the following duties:

10.1 Counter Sales;

10.2 Stock Ordering;

10.3 Supervising of stock and telesales.

[11] The agreement provided that Groenewald would first be placed on a 90-day probation period. In addition, Clause 16 thereof incorporated a confidentiality clause that stipulated as follows:

> *"Company clients names, addresses or any other information on Company products are Company Property, and under all circumstances be treated "strictly confidential" and private at all times."*

[12] Having commenced his 90-day probationary period with Filtration Technology on 26 June 2018, Groenewald without warning tendered his resignation with immediate effect on 26 September 2018. It is common cause that at the time when Groenewald applied for the position at Filtration Technology on 13 May 2018, he was in the employ of Transerve.

[13] As part of discharging his daily duties with Filtration Technology as an internal sales/stores coordinator Groenewald:

13.1 was responsible for the growth of profits of Filtration Technology by selling to its existing clients;

13.2 marketed and offered any one or more of the range of the services of Filtration Technology to its clients;

13.3 employing the database of Filtration Technology that comprises all its existing clients, he was involved in establishing, maintaining and promoting relationship with clients of Filtration Technology.

13.4 became aware of and accustomed to the clients of Filtration Technology;

13.5 established relationships with the clients;

13.6 shared in and had access to documentation of Filtration technology and confidential information, which was essential for the proper execution of his duties. Such information was part of the data base of Filtration Technology and it consisted of, but not limited to:

13.6.1 pricing;

13.6.2 client information, unique and individual requirements and contact details;

13.6.3 potential client information requirements and contact information;

13.6.4 profit margins;

13.6.5 service agreements with various clients;

13.6.6 client transaction histories;

13.6.7 mark-ups on products;

13.6.8 supplier details;

13.6.9 gross profit of each item and gross profit of each quote or invoice or delivery;

13.6.10 each customers applicable discount rate;

13.6.11 the clients' moving average and sales;

13.6.12 access and insight to each customer sales price and cost of items.

[14] Filtration Technology gave login credentials to Groenewald to enable him to access the database. It is common cause that it was through the knowledge of the login credentials that Groenewald gained access to the confidential information. He was further required to make daily contact with the clients of Filtration Technology. In this manner he was placed in a position in which he could gain inimitable knowledge of the requirements of the clients and potential clients of Filtration Technology including business conducted by it.

[15] Filtration Technology alleges that this information is extremely useful as clients and potential clients are guided by recommendations made by the sales representative who they know and trust. It avers further that by having access to this information, Groenewald was placed in a position to influence or induce the clients of Filtration Technologies and potential clients to follow him to a competitor such as Transerve.

Given Groenewald's exposure to the confidential information of Filtration Technologies and his knowledge of its business, he was in a favourable position to undercut it.

[16] Filtration Technology further alleged that during the course of his employment with it, Groenewald has been sharing in its confidential information, which it maintains, is its proprietary interest deserving of protection both by contract and at common law. Besides, Groenewald became aware of the confidential information of Filtration Technology during discussions and debates regarding sales. Additionally, during his employment Groenewald was frequently exposed to the confidential information of Filtration Technology through engagements with different directors and senior managers.

[17] During mid October 2018, Filtration Technology caught wind that Groenewald was once again in the employ of Transerve. Transerve is in direct competition with Filtration Technology particularly around the latter's Middelburg branch. Transerve operates in the same market and commercial space as Filtration Technology and offers the same services to its customers. It merchandises predominantly the same products as Filtration Technology especially in the mining industry. Filtration Technology and Transerve continue to compete on various clients.

[18] That said, Filtration Technology alleges that the main difference lies in the service it provides and how it renders it to the client. This concerns the specific pricing structure, mark-ups and discount margins in relation to each client. In doing so, claims Filtration Technology, it considers the exact and unique requirements of each customer. Filtration Technology sells and provides individual Filtration Service Kits to its diverse customers according to their individual needs. It is not disputed that Transerve did not provide these services.

[19] A further difference, alleges Filtration Technology, between it and Transerve is that it functions and supplies to a niche market within the forestry industry. Filtration Technology does not advertise the supply of Bell Logger Service Kits and it is not known to the public except for its customers to whom these Service Kits are supplied. Before Groenewald's employment at Filtration Technology, Transerve did not supply the forestry industry especially in the regions of Nelspruit, Sabie, Graskop, Barberton,

Witrivier and Swaziland. With the introduction of Groenewald among its staff, Transerve is now in hot pursuit of these regions.

[20] On 17 October 2018 and following a tip-off from one of its customers, Filtration Technology acquired knowledge that Groenewald had commenced soliciting its customers. In the investigation that ensued, Filtration Technology confirmed that indeed Groenewald had been contacting some of its customers. On conducting a search on the Facebook page of Transerve, the following was established:

20.1 On 19 March 2018, Groenewald stated on his Facebook page that Transerve had opened a branch in Middelburg and the product that he was promoting related to the mining industry;

20.2 On 6 July 2018, Groenewald advertised the business of Transerve;

20.3 On 27 September 2018. Groenewald stated that he started a new job at self-employed;

20.4 On 8 October 2018, Transerve shared a post on his Facebook page advertising the same Bell Logger Service Kits on the Nelspruit/Witrivier Junk Mail Facebook page:

> *"Bell Logger Service kit that includes Fuel F/W, Oil, Inner, Outer Air and hydraulic Filters.*
>
> *Fleetguard Belll Logger Service Kit at a Great Price of R 720.53 excl VAT."*

20.5 On 12 October 2018, Gronewald advertised 'Fleetguard Hilux D4D kit', on behalf of Transerve and his signature appears on the signature with his e-mail address. The landline telephone number advertised is one used by Transerve;

20.6 Upon calling the number asking to speak to Groenewald, Dirkie Maria Skinner, the secretary of Filtration Technology, was told that he was in Nelspruit on assignment to recruit customers;

20.7 On 22 October 2018, Groenewald continued to advertise on his Facebook page on various platforms in Nelspruit.

[21] On 25 October 2018, Filtration Technology caused its attorneys to write a letter to Groenewald primarily demanding that he furnished a written undertaking to desist making any form of contact with its customers and to return any material, written or electronic, in his possession that belonged to it. On the same day, Groenewald responded stating that he did not sign a restraint of trade with Filtration Technologies but nonetheless acknowledged that his employment contract with Filtration Technology contains a confidentiality provision, which he had promised not to contravene.

[22] Although he agreed that he had in his possession prices, customer lists and information belonging to Filtration Technology, he denied having utilised it in his endeavour to obtain customers for Transerve. Groenewald further undertakes in his letter that he would expunge all the confidential information from his electronic devices. On 31 October 2018, Filtration Technology became aware that Groenewald, without its permission, logged and signed into its Google Account on 30 October 2018. Groenewald does not deny this. Filtration Technology suspects that Groenewald logged and signed into its Google Account to copy its customer list and contact information.

[23] On 31 October 2018, Transerve sent an e-mail comprising approximately 112 various contacts, among which were about 20 customers of Filtration Technology, advertising its services. The e-mail also thanks the recipients of their support in the past 27 years notwithstanding that some of them have never been Transerve's customers. Filtration Technology concludes that Groenewald must have used the e-mail addresses that he copied from its Google Account to forward the advertisement.

[24] Again, on 2 November 2018, Filtration Technology addressed a letter to Transerve demanding that it desist using the confidential information. In reply, Transerve denied that Groenewald was in its employ and that he was one of its customers. Transerve in essence refused to undertake not to continue using the information dubbed 'confidential' by Filtration Technology. It is as a result of that refusal to make an undertaking not to use the information that Filtration Technology approached this Court for a final interdictory relief against Groenewald and Transerve.

ISSUES

[25] Before traversing the main issues there are three preliminary issues that require the attention of this Court. These issues are important for either one of them may, depending on the decision, dispose of the matter in its entirety. The first issue is whether or not the matter has become moot as contemplated in Section 16(2)(a)(i) of the Superior Court Act[1]. The Second relates to whether or not an interdict was an appropriate remedy given the facts of this matter and the third concerns whether the Court a quo should have made a pronouncement on the application for the admission of further evidence.

[26] Depending on this Court's decision on the first two issues above, there may be a need to explore:

26.1 The existence of confidential information worthy of protection;

26.2 Whether or not injury has actually been committed by either Groenewald or Transerve;

26.3 Whether or not the Applicant has objectively demonstrated grounds for a reasonable apprehension of future injury;

26.4 Whether or not Groenewald breached the agreement.

WHETHER THE MATTER IS MOOT OR NOT

[27] Filtration Technology raised the issue whether the matter was moot or not and that if so, it ought to be dismissed as envisaged in Section 16(2) of the Superior Courts Act[2]. That issue found pertinence in the fact that the Court a quo granted the interdict on 26 November 2018. As such, the 8-month period mentioned in the order would have culminated around July/August 2019. If that is correct, the matter was indeed moot as contemplated in Section 16 of the Superior Courts Act. Conversely, pointing to the provisions of Paragraph 2 of the order, Groenewald and Transerve strenuously asserted to the contrary.

[28] Paragraph 2 of the order directs Groenewald and Transerve to return all documentation and other property of Filtration Technology that may be in their

[1] No. 10 of 2013
[2] Note 1 *supra*

possession, including lists of customers, clients or written information regarding the business of Filtration Technology. Groenewald and Transerve argued that this part of the order is extant the elapse of the 8-month restraint period notwithstanding. They contended that for as long as it exists, they are expected to comply with it. The court considered the matter and resolved that indeed Groenwald and Transerve were in terms of the order still expected to return the information to Filtration Technology. As such, the court proceeded to hear argument on the appeal.

INTERDICT: AN APPROPRIATE REMEDY IN THESE CIRCUMSTANCES?

[29] The issue regarding the appropriateness of the remedy of interdict arises here because Filtration Technology states at Paragraphs 101, 102 and 103 of its founding affidavit that:

> *"101 This harm manifests in the erosion of the goodwill that vest in the applicant's enterprise and further the fact that the applicant's confidential information and proprietary interests are at risk of being rendered in the public domain due to the impermissible and unlawful conduct of the respondent.*
>
> *102. In fact, the confidential information relating to the applicant's client contact information is already within the public domain due to the impermissible and unlawful conduct of the respondents.*
>
> *103. The relief sought if granted, will to some extent limit the harm to be occasioned by the applicant as a result of the respondent's conduct."*

[30] At Paragraph 101, Filtration Technology refers to a risk that it seeks to avert but then proceeds at Paragraph 102 that in fact the risk that it is attempting to prevent (the confidential information) is already in the public province. Paragraph 103 of the affidavit states that if the remedy is granted it will to some degree limit the extent of the harm to be suffered by it.

[31] Groenewald and Transerve have pointed out that paragraph 102 constitutes a confession that the horse has bolted. To the extent that interdicts are not remedies whose objective is to punish past infractions, the Court a quo erred in granting it. In

my view, paragraphs 101, 102 and 103 are contradictory and cannot reside together in the same document. The Court a quo seems to have disregarded it completely while Filtration Technology was very glib about it. From what I could gather from the heads of Filtration Technology, its response is simply that the issue is not central to the appeal.

[32] It is indeed trite that interdicts are not remedies designed to punish past invasions of a party's rights[3]. There is no other context of interpreting the provisions of Paragraph 102 of the founding affidavit. The confidential information that Filtration is trying to protect from spilling into the public sphere is already there making an interdict as a remedy improper.

[33] Once the information is out in the public domain, there is no manner in which harm can be avoided. Accordingly, Paragraph 103 of the founding affidavit is preposterous because it comes in the aftermath of the alleged infliction of harm. I agree that the Court a quo misdirected itself. The correct outcome would have been to refuse the remedy because Filtration Technology had an adequate alternative remedy – damages.

FAILURE OF THE COURT A QUO TO PRONOUNCE ON THE APPLICATION FOR THE ADMISSION OF A FURTHER AFFIDAIVIT

[34] It is settled that without leave of the court, a respondent cannot of right deliver further affidavits after an applicant has served and filed a replying affidavit. Generally, where an applicant has raised a new matter in his replying affidavit and depending on its materiality, a court would exercise its discretion whether to allow further affidavits in favour of a respondent. I therefore need to consider whether there were new matters raised in the replying affidavit of the Applicant which the First Respondent needed to counter. Groenewald and Transerve believe that they needed to respond to two issues raised by Filtration Technology in its replying affidavit.

[35] The issues raised were firstly, that Groenewald and Transerve did not anticipate that Filtration Technology would deny that it purchased filters from Transerve. Secondly, by the time Filtration Technology launched this application, Groenewald had already terminated his employment with Transerve and was in the employ of an entity known

[3] Philip Morris Inc and Another v Marlboro Shirt co sa ltd and Another 1991 (2) SA 720 (A)

as Benchmark Handling. Accordingly, attached to their further affidavit was a general ledger showing transactions pertaining to orders of filters made by Filtration Technology. The significance of the production of the general ledger was to demonstrate to the Court a quo that Filtration Technologies was not candid with the court.

[36] The court a quo probably inadvertently made no pronouncement at all. I agree that in view of their relevance and the fact that Filtration Technologies denied them, which was unexpected, the Court a quo should have attended to them and made a decision one way or the other. An issue that relates to the integrity of a party is material to the outcome of a decision such as this. Even if the Court a quo regarded the further evidence as immaterial to decide the case, it still needed to make a finding and declare why it held that view as opposed to simply ignoring the application as if it never crossed its table. In the premises, this too is a misdirection.

LEGAL FRAMEWORK

[37] To establish whether or not information is confidential one must embark on a factual enquiry. For it to be confidential it must be:

37.1 Capable of application in trade or industry, that is, it must be useful and not be public knowledge and property;

37.2 Known only to a restricted number of people or a closed circle; and

37.3 Of economic value to the person seeking to protect it[4].

[38] In **Meter Systems Holdings Ltd v Venter and Another**[5] after listing various information that would enjoy protection Stegman J stated the following:

"10. The type of information alone does not necessarily establish its confidentiality. All of the relevant circumstances must be considered. Where information is protected as confidential by law, the confidentiality is not always absolute, nor is the protection always permanently available. Amongst the limitations are:

[4] Townsend Productions (Pty) Ltd v Leech & Others 2001 (4) SA 33 (C) at 53J-54B
[5] 1993 (1) SA 409 (W)

10.1 the limit to the protection of the information in a customer list, which I have already mentioned in 1 above;

10.2 the knowledge gained by an employee of a trader relating to the method of conducting the business, and relating to the identity of the suppliers to such business, need not necessarily be confidential at all: such information may become the employee's own knowledge and skill which he is afterwards entitled to use in competition with his former employer: Marks v Luntz and Another 1915 CPD 712; Atlas Organic Fertilizers (supra at 192G-194B);

10.3 the information in question may be useful and relevant, and therefore confidential, for no more than a limited time (ie the time which any independent enquirer would take to gather it for himself). It is then only protectable for a very limited period, if at all. This is the basis of the 'springboard' doctrine: Compare Atlas Organic Fertilizers (supra at 191C-192G)".

[39] Stegman J in the Meter System case supra also referred to the following passage of the English case of Faccenda Chickens Ltd where Goulding J held that:

> *"Let me now deal with the alleged abuse of confidential information. I must make it clear that anything I say about the law is intended to apply only to cases of master and servant. In my view information acquired by an employee in the course of his service, and not the subject of any relevant express agreement may fall as regards confidence into any of three classes. First there is information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to impart it during his service or afterwards to anyone he pleases, even his master's competitor. Second, there is information which the servant must treat as confidential, either because he is expressly told it is confidential, or because by character it obviously is so, but which once learned necessarily remains the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without*

infidelity and therefore breach of contract. But when is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his formal master."

[40] With regard to customer connection, 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 a customer[6].

[41] A respondent must establish that he had no access to confidential information and that he never acquired any significant personal knowledge of or influence over the applicant's customers whilst in the applicant's employ. It suffices if it is shown that trade connections through the customer contact exist and that they can be exploited if the former employee were employed by a competitor. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant if its former employee were to take up employment becomes real.

[42] In order to establish that confidential information is an interest deserving protection by the restraint, the employer should demonstrate in reasonably clear terms that the information, know-how, technology or method, as the case may be, is something which is unique and peculiar to the employer and which is not public property or public knowledge, and is more than just trivial[7].

[43] It is incumbent upon an employer to identify what the specific information was, the reason why it was regarded as confidential and a trade secret, how and when it was developed and who developed it and the period of its expected existence[8].

APPLICATION

EXISTENCE OF CONFIDENTIAL INFORMATION WORTHY OF PROTECTION

[44] It was in the context of considering this question when Stegman J in the Meter Systems Holding case supra referred to the Faccenda Chickens case. The approach should therefore be firstly, to determine whether Groenewald was still in the employ

[6] Rawlins & Another v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) at 541C/D-I.
[7] Hirt & Carter (Pty) Ltd v Mansfield and Another 2008 (3) SA 512 (D) at paragraph 57.
[8] Note 7 *supra at paragraph 58*

of Filtration Technology when he utilised the information. Secondly, the determination of the first question would inexorably lead to the resolution of the matter – whether or not Groenewald should be interdicted.

[45] It follows that a determination of the confidential nature of the information is unnecessary once it is decisively demonstrated that Groenewald was not in the employ of Filtration Technology at the time when he accessed the alleged confidential information of Filtration Technology. Accepting for a moment that the information was confidential because there was a specific provision to that effect, its confidential status would persist for as long as Groenewald remained in the employ of Filtration Technology.

[46] Once he left, Filtration Technology could not have continued to enforce the confidentiality stipulation in the absence of a restraint of trade clause in the agreement with Groenewald. This is the position stated in the Faccenda Chickens case mentioned in the Meter Systems case. Groenewald was obliged to observe the clause for as long as he was in the employ of Filtration Technology but upon departure, the latter could not interdict him from doing as he like with the information.

[47] Filtration Technology is not entitled to prevent Groenewald or any other person from marketing, selling and distributing products and services that are freely available to the public. The fact that Groenewald might have acquired his knowledge of how to market or sell the filters during his employment with Filtration Technology cannot be used against him not to engage in similar business especially in circumstances where Filtration Technology did not specifically prohibit this by a restraint of trade clause in the employment contract.

[48] In any event, Groenewald knows no other skill other than the current, which he had acquired partly from Transerve and partly from Filtration Technology. Depriving him of the liberty of using his skills in the open will be tantamount to cutting his means of making a legitimate living. In the result, the confidential information that Filtration Technology seeks to protect, as confessed by itself at Paragraph 102 of its founding affidavit, is firstly, not worthy of protection as it is in the public domain[9], and secondly, such information has become Groenewald's own knowledge and skill

[9] Note 4 *supra,* also see Alum - Phos (Pty) Ltd v Spatz and Another 1997 (1) All SA 616 (W)

which he is afterwards entitled to use in competition with Filtration Technology. See, the Meter Systems Holdings case supra.

[49] It should therefore follow as a matter of course that Transerve cannot be found to have been in unlawful competition with Filtration Technology if Groenewald's acquisition of the information was legitimate. In reaching the conclusion above, this Court should not be understood to be tolerating Groenewald's actions of secretly accessing the Google Account of Filtration Technology. They remain reprehensible and should be condemned in the strongest terms possible but this Court is not the correct forum to determine the issue.

[50] Groenewald's employment with Filtration Technology would have exposed him to suppliers in the industry. He would undoubtedly have continued to be in a position to identify them when he joined a competitor such as Transerve for the second time. Besides, one must bear in mind that these suppliers supply all the various competitors in the industry including Transerve for which Groenewald had worked previously. Restraining the Second Respondent from contacting them is akin to cutting a lifeline to him. To countenance or entertain such orders as required by Filtration Technology would be to encourage parties to engage in unhealthy competition conduct.

[51] Of course, Groenewald as an employee of Filtration Technology would have been in the know of customer information. Knowledge of the customers' contact particulars, the key contact persons within those customers, the order data base of the customers reflecting the products purchased by the customers on a regular basis as well as prices charged to each customer and discounting structures would have been a natural corollary.

[52] This information cannot be taken away from Groenewald especially on a permanent basis because it represents indispensable tools in his sphere of business. I need to reiterate that the information from which Groenewald is sought to be interdicted is in any event susceptible to interval price fluctuations such that granting the order now may be moot having in mind the time that has intervened since the alleged transgression.

[53] In the circumstances:

53.1 Groenewald did not breach his contract of employment with Filtration Technology and the latter has therefore failed todemonstrate a clear right;

53.2 Accordingly, it is gratuitous to decide whether the information that he accessed was confidential or not;

53.3 However, the manner in which he gained entry into the Google Account of Filtration Technology was legally unacceptable and may well be punishable but this Court is not seized of that matter;

53.4 Transerve cannot be found to have been conducting business in unlawful competition with Filtration Technology for as long as the conduct of Groenewald is legally sound. As such, no harm had been inflicted nor was one imminent.

ORDER

[54] In the premises, I propose the following order:

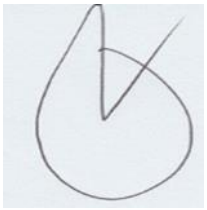
1. The appeal is upheld with costs, the order of the Court a quo is set aside and is substituted for:

"The case of Filtration Technology is dismissed with costs, such costs to include those consequent upon the employment of two counsel".

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA



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ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT:	**Adv S GROBLER SC**
INSTRUCTED BY:	**PHATSHOANE HENNEY INC**
COUNSEL FOR THE RESPONDENT:	**Adv COOPER**
INSTRUCTED BY:	**WOLHUTER ATTORNEY**
DATE OF HEARING:	**20 MARCH 2020**
DATE OF JUDGMENT:	**07 JULY 2020**