THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 19555 / 2010

In the matter between:

KUYANDA COMMODITIES 19 CC
t/a SYNERGY INTERIORS

SELECT SOLID SURFACE CC 1st Applicant

2nd Applicant

and

JEROME LYNDON ABELS

ABSOLUTE SOLID SURFACING 1st Respondent

2nd Respondent

JUDGMENT : 16 NOVEMBER 2010

BOZALEK J:

[1] The applicants sought, in urgent application proceedings, final interdicts against the respondents on two distinct although related grounds. In the first place the applicants sought to restrain the respondents from unlawfully competing with them, by way of the appropriation and abuse of certain confidential

information. In this regard applicants initially sought an interdict with unlimited duration and related ancillary relief. Secondly, the applicants sought to enforce a restraint of trade agreement.

[2] The respondents opposed the relief sought. The matter was first called on the 20 September 2010 and, after effect was given to a timetable, argued fully before me on the 27 October 2010.

BACKGROUND

[3] Many of the basic facts in this matter are undisputed. First applicant conducts the business of designing and installing interiors, commonly known as "*shopfitting*". It employed the first respondent in about January 2007 as a contract manager/trainee and he remained in its employment until the 6 July 2010. His duties were in part described as "*supervision of staff*" and "*client service*". By the time the first respondent's employment ended, he had assumed control of the day to day operation of the second applicant in selling and installing certain imported solid surfacing products manufactured by Messrs. Dupont, Corian and Montelli. First applicant had been accredited to sell and install these products in February 2009 by Max on Top, the sole South African importer and distributor thereof.

[4] Clause 26.1of the first respondent contract of employment provided as follows:

> **"26.1 The employee undertakes not to be engaged in any business be it direct or indirect in competition or as a shareholder, partner, and member of a Close Corporation, director of a company or in any other capacity within one year of termination of this agreement in the area known as Western Cape.**
>
> **26.2 The employee acknowledges and agrees that the aforesaid restraint is fair, reasonable and necessary for the protection of his employer, his employer's trade name and the goodwill attached thereto."**

[5] Within a few days of the termination of his employment, the first respondent, in his capacity as the sole member of the second respondent, was conducting the business of installing solid surfaces although not dealing in Dupont, Corian and Montelli products.

[6] The respondents raised three principal grounds for opposing the relief sought against them. Firstly, they denied unlawfully competing with either first or second applicants in that they were neither engaged in shopfitting nor dealing in the specialised products mentioned. The respondents denied furthermore appropriating any confidential information or goodwill in the form of "*client connections*" from the applicants. In relation to the restraint of trade the respondents contended that the

interest sought to be protected by the applicants in fact vested in the second applicant but that there was no restraint of trade between that party and the first respondent. Finally, the respondents contended that as a result of the manner in which the applicants had conducted their business ie. by concealing the close relationship between these entities from their customers, they had come to court with "*unclean hands*" and should thus be denied any relief.

[7] The precise circumstances of the termination of the first respondent's employment, those in which he commenced trading for his own account and how he came to furnish certain quotations to a customer of the applicants', was the subject of disputing versions. These being application proceeding in which final relief was sought, such disputes must, in the ordinary course, be resolved on the basis of the facts as put up by the respondents together with those put forward by the applicants which respondents do not dispute. This is in accordance of course with the test articulated in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (AD) at 634 E.

[8] It is trite, however, that a court must examine alleged disputes of facts to see whether these are real and genuine or whether one party's allegations are so far-fetched or so clearly untenable or

palpably implausible as to warrant their rejection on the papers. In this regard see **Wightman t/a J W Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 at page 375 D – 376 C.

[9] According to Van Rensburg, the majority member of both applicants, the first respondent informed him on the 28 June 2010 that he would be starting his own business selling and installing solid surfacing products. In the circumstances it was agreed that the first respondent's employment would terminate on the 2 July 2010. Thereafter, Van Rensburg discovered that the first respondent had approached employees of the first applicant to resign and take up employment with his proposed new business. He discovered, furthermore, that the first respondent had approached existing clients of the second applicant in an attempt to deflect them as customers to his own proposed new business. The clients in question were Nova Kitchens, Shelco Shelving and GPS Interiors. Van Rensburg's response was to suspend the first respondent and arrange for a disciplinary hearing to be held on the 6 July. At that hearing the first respondent pleaded guilty to the following disciplinary infractions:

> "1. **Starting a business which is in direct competition with (first applicant);**
>
> 2. **Using (first applicant's) Clients and Suppliers for personal gain;**

3. **Pouching (sic) staff from (first applicant) for (his) own business;**
4. **Changing company password and using e-mail for personal gain."**

Pursuant to the enquiry the first respondent was summarily dismissed and immediately started trading from business premises in Parow Industria. On the day of his dismissal, 6 July 2010, the three co-employees approached by first respondent all resigned from the first applicant and immediately took up employment with the second respondent. When, at the disciplinary hearing, the first respondent furnished Van Rensburg with the password to his computer, which he had changed thus temporarily disabling the first applicant from gaining access to the e-mail address used by him whilst he was employed, it was discovered that on 2 July the first applicant had sent out quotations to an existing client of the applicants, Nova Kitchens. These quotations purported to be made on behalf of the first applicant but contained the first respondent's banking details. They related to solid surfacing products, and amounted to more than R100 000.00 worth of work. It was common course that the customer accepted the quotations but that the work was done and the monies received by the first respondent and second respondent.

[10] The first respondent denied, however, stealing any client or work from the applicants stating that in furnishing the quotations he had erroneously used the second applicant's logo. He also claimed that he had made no prior plan to start his own business and had merely mentioned, on 28 June, in a casual conversation with Van Rensburg, that he would "*one day*" like to start his own business. It was only following his dismissal that he "*had no other option but to seriously consider starting my own business*". He denied having approached workers employed by the first applicant to resign their employment or to take up employment with him. According to the first respondent after he had been dismissed by first applicant he informed these workers thereof and their response was to enquire from him about his future plans and then to ask him to employ them. In regard to dealings with the applicant's clients he stated:

> **"Similarly I informed various clients with whom I had built a relationship that I will be leaving. I do believe that informing the clients was the professional ethical act that they may know to not contact me. Certain clients told me that they would like to use my services should I start a business of [the] same kind. I respectfully submit that I have not approached any client with the intention to lure them to follow me. I do believe that any client will follow quality, professional results-orientated business."**

The first respondent stated that it was only on the 30 June when Van Rensburg told him to leave that he immediately began to search for premises, machinery and clients and that he had prior to that date made no plans to set up any business. He admitted that he was able to set up the business in a remarkably short period of time but credited this to his "*personal skills, knowledge of the industry that gave (him) the confidence to act expeditiously.*"

[11] In my view, the disputes of fact outlined above are instances where the one party's allegations are so far-fetched or so clearly untenable or so probably implausible as to warrant their rejection merely on the papers. It is utterly improbable that the applicants would terminate the services of a valued employee performing important work simply on the basis of a casual conversation in which the first respondent indicated that he would "*one day*" like to start his own business. Similarly, the first respondent's explanation for furnishing quotations under the name and logo of the applicant/s but substituting his banking details, thereby procuring the work for his account, as merely an innocent error is also quite implausible; so too is his bland explanation as to how he was able to set himself up in business with proper premises, literally within a few days of the termination of his employment, at the same time taking three of the applicant's employees with

him. Adopting "*a robust, common sense approach*" to these disputes, it is in my view, quite apparent that the applicant carefully planned to set up his own business so that, when he finally revealed his intention to do so to Van Rensburg, following which it was agreed that his services would terminate with effect from early July, he was able to hit the ground running. In the process he appropriated three of the applicants' staff members and walked away with work procured from one of the applicants' existing clients during the course of his employment.

[12] On the basis *inter alia* of these facts I turn to consider the relief sought by the applicants. Unlawful competition may exist in the form of a competitor gaining an advantage by misappropriating the efforts of another or filching confidential information belonging a rival. Whatever form the competition takes, the question whether it amounts to unlawful competition is a policy decision. The relevant policy factors are summed up by Van der Walt and Midgley, Delict (at 97) as follows:

> **"The fairness of conduct and honesty of the defendant are important criteria, as are the interest of the competing parties, the business ethics of the section of the community (the morals of the market place), the value placed upon a free market economy, and the public interest generally. Other factors, inappropriate circumstances, are: whether protection is already afforded by statute or other common law remedies; whether the**

dispute relates to a work of craftsmanship or one of a technical nature; issues of confidentiality; the defendant's motive; whether the defendant is profiting from his or her own endeavours, as opposed to those of the plaintiff; whether the parties are engaged in the same field of activity, and the likelihood of confusion; and conventions with other countries."

[13] The applicants have been able to show that its former employee, the first respondent, conceived the idea of starting a rival business for the installation of solid surfacing products. Whilst still so employed he set up his business so that he was able to commence trading immediately after his services terminated with the first applicant, in the process taking three of the first applicant's employees with him. More significantly, using his position with first applicant and whilst still employed by it, he clandestinely and dishonestly solicited and obtained orders for his own business from an existing client of second applicant.

[14] It is so that the respondents do not trade in the solid surfacing products in which the second applicant now specialises i.e. Dupont, Corian and Montelli. However, this difference alone does not mean the respondents are not competitors of the applicants. It was common cause that, either as a shopfitter or as a specialised solid surface installer, the latter activity is an important component of the applicants' business/es, and the

very market in which the respondents are trading and competing. As the quotations which the first respondent furnished to Nova Kitchens illustrate, he was able to persuade that customer not to take the specialised products but a different solid surfacing product. Nor, in my view, does the fact that the first applicant was engaged in the broader field of shopfitting whilst the respondents specialised only in solid surface installation, render it any less of a competitor to the applicants. It is clear that solid surface fitting forms an important component of the shopfitting business as a whole. That disposes of the first ground of opposition raised by the respondents.

[15] In seeking to establish that the respondents were unlawfully competing, the applicants pinned their colours to the mast of his acquisition and use of their trade secrets or confidential information, more particularly the detail of the second applicant's client base and its costing structure i.e. the basis upon which it priced products in order to remain competitive in the solid surfacing market. Although limited detail was given of these interests, the first respondent in effect admitted their existence as appears from the following passages from his affidavit:

"I admit that I was intimately acquainted with the details of the second applicant as I was given the responsibility of the day to

day operation of the business. I acquired the client-base through by personal skills of negotiating and knowledge of the products... It was my responsibility to deal with clients; since neither (applicants) supervised or trained me I was responsible to handle client and costing structure. Since the owners of the first and second applicants were not involved with the day to day operation of the business, the client base only knew me thus contacting me."

[16] The relationship between the parties turned sour when the applicants became aware that the first respondent had approached existing clients of the second applicant even whilst still employed in what applicants perceived was an attempt to deflect their custom to his own proposed new business. In response to these allegations, the first respondent at least partly admitted the conduct, although not the intention, when he stated as follows:

> **"... I informed various clients (of the second applicant) with whom I have built a relationship that I will be leaving. I do believe that informing the clients was the professional and ethical act that they may know to not contact me. Certain clients told me that they would like to use my services should I start a business of (the) same kind. I respectfully submit that I have not approached any client with the intention to lure them to follow me. I do believe that any client will follow quality, professional result-oriented business."**

[17] Having regard to the manner in which the first respondent solicited a substantial business order from Nova Kitchens whilst still

in first applicant's employment, the first respondent's statements are disingenuous. In my view, it can reasonably and safely be inferred that when he advised the second applicant's clients "*to not contact him*" at its business premises, he was in fact intending and attempting to induce them to transfer their custom to his newly established business. When the first respondent joined first applicant he had no prior experience in the shopfitting or solid surfacing business. All the skills that he acquired were a result of the exposure which he gained to the business and to the applicants' clients whilst employed by first applicant. The manner in which the first respondent set about establishing his new business whilst in the employ of the first applicant strongly indicate that he used the knowledge which he had acquired of the client customer base, (their trade connections) and its costing structure as a springboard to establish his own competing business. The first respondent did not suggest that this information was not confidential.

[18] In my view, taking all the relevant facts and policy factors into account, the applicants have succeed in establishing that the first respondent is unlawfully competing with them by deliberately misappropriating and filching the products of the applicants' skill and labour. An interdict does not require the establishment of fault or damage, the unlawfulness of the

conduct being sufficient. See **Townsend Production (Pty) Ltd v Leech and Others** 2001 (4) SA 33 (C).

[19] This is an instance, however, where the value of the advantage sought to be utilised by the respondents will diminish with time and ultimately vanish entirely. Sooner or later anyone competing in the shopfitting or solid surface installation markets will become aware of the main customers and be able to establish contacts with them. Similarly, within a relatively short period of time the applicants' costing structure will change and the value of the first respondent's knowledge thereof will diminish as the months pass. In the circumstances any interdict granted cannot be indefinite and to the Court must determine its reasonable duration. The applicant sought a period commensurate with that of the restraint of trade, namely, one year but, in my view, a period of six months would be appropriate, such to commence from the date on which the relief is granted.

[20] Of the remaining grounds of opposition raised by the respondents only one potentially applies to the unlawful competition relief. That is the claim that the applicants were precluded from any relief by reason of having to come to court with unclean hands. This claim arose in the context of the first respondent's averment that the first applicant's members

required him to refrain from disclosing to customers or potential customers that the second applicant, the vehicle through which the specialised solid surfacing products were marketed and installed, had any formal relationship with the first applicant. I am quite prepared to accept that these were indeed the instructions which were given to the first respondent by the applicants' members, the reason being that they did not want their shopfitting customers or rival shopfitters to know that when the second applicant quoted for solid surfacing sub-contracts its interests were wholly aligned with those of the first applicant and that it was not an independent firm. To have done otherwise would have been to render it much less likely that any other shopfitting business would accept such quotes knowing that, in doing so, it was indirectly assisting a rival shopfitter namely, first respondent.

[21] The only supporting cases cited by Mr. Hack on behalf of the respondents were those where a plaintiff in a passing off case was refused protection where he himself had made a fraudulent misrepresentation in relation to the get-up of the goods in question. It is unclear to me exactly how this doctrine is said to apply to the delict of unlawful competition save perhaps the contention that if the first applicant was itself unlawfully

competing with its rivals, it could not restrain any other party from unlawfully competing with it.

[22] Mr. Hack sought to buttress his argument by reference to the strictures of the Competition Act No 89 of 1998 on prohibited practices and in particular Section 4 thereof which prohibits restrictive horizontal practices including "collusive tendering". However, no evidence was put forward by the first respondent suggesting that the applicants engaged in tendering, let alone collusive tendering, which I take to refer to a secret agreement with an apparently rival tenderer in order to undermine the process of competitive tendering. At worst for the applicants they failed to disclose to customers or potential customers that there was a relationship between the first and second applicants. It does not follow that the quotations or prices furnished by the second applicant were not competitive. This ground of opposition does not therefore assist the respondents at all.

[23] I turn now to the relief sought by the applicant arising out of the restraint agreement. The applicants initially sought a rectification of this agreement on the grounds that its terms were unclear and did not reflect the agreement between the parties. On re-consideration the applicants did not persist with such prayer with,

in my view, good reason. The terms of restraint, although not elegantly expressed, are quite clear.

[24] The question for determination is whether, all other things being equal, the enforcement of the restraint would be adverse to public policy as being contrary to the public interest. In most instances this boils down to the question of whether the restraint was unreasonable and, in determining this, the interests of the contracting parties must weigh within the broader context of the often contradictory public policies of contractual sanctity and person liberty. In **Reddy v Siemens Telecommunication (Pty) Ltd** 2007 (2) SA 486 (SCA) para 16, applying the principles first outlined in **Basson v Chilwan and Others,** the following four questions were identified as requiring an answer when considering the reasonableness of a restraint:

"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 require the restraint he maintained or rejected?

Where the interest of the parties sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry

which is undertaken at the time of the enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests."

[25] However, the first question to be addressed is the third substantive defence raised by the respondents, namely, that the interest sought to be protected by the applicants belongs solely to the second applicant, with whom the first respondent had no contractual relation and, by definition, no restraint agreement. The undisputed evidence of the applicants was that the second applicant was acquired by the first applicant as a corporate vehicle for the business of selling and installing Dupont, Corian and Montelli solid surfacing products after first applicant was accredited to sell them in South Africa. The membership of the applicants was the same in each case. The evidence was, furthermore, that the members regarded the second applicant as a specialised division within the broader shopfitting business of the first applicant. It is similarly undisputed that the first respondent, although employed throughout by the first applicant, was appointed by it to take charge of the day to day operations of the second applicant in selling and installing the specialised solid surfacing products. In support of a case that the second applicant's business was, to all intents and purposes, a division of the first applicant, the applicants' majority member

points out that during the first year of its existence the second applicant was heavily subsidised by the first applicant. To my mind, Mr Tyler, who appeared on behalf of the applicants, was correct in arguing that the real issue was not whether a restraint agreement existed between the first respondent and the second applicant but rather whether the first applicant's legitimate or protectable interests extended to or incorporated the business of the second applicant. In my view, given the identical member interest in, and thus control of the second applicant, the fact that it was effectively set up and operated as a division of the first applicant, and, most importantly, that the first respondent remained employed throughout by the first applicant, although running the day to day business of the second applicant, the latter's business clearly forms part of the first applicant's protectable interest.

[26] Mr. Hack sought to rely on **Townsend Productions** for the proposition that no contractual nexus had been established by the applicants. In **Townsend**, however, the restraint relied upon was in favour of legal entity other than the applicant. In casu the applicant relies on a restraint in its favour and therefore the correct party is before court, the question being only whether the restraint covers the interest sought to be protected. Even if one were to disregard the existence and business of the second

applicant, I consider that the installation of solid surfaces, being an important component of the business of shopfitting as a whole, falls within the terms of the restraint at the instance of the first applicant alone.

[27] It must be borne in mind that the *onus* rests upon the convenantor, the first respondent, to prove that the restraint sought to be enforced against him is unreasonable. The interest which the applicants seek to protect in the present matter is confidential information in the form of its pricing structure and its trade connections. There can, in my view, be no serious argument that these do not constitute a protectable interest at the instance of the applicants. That interest is, furthermore, clearly threatened by the first respondent through his continuing to trade within the Cape Town area in the field of the installation of solid surfaces. I have already found that it does not avail the first respondent that this field is a component of the larger shopfitting trade – he is clearly in indirect if not direct competition with the first applicant.

[28] First respondent occupied a position of some influence and authority within the first applicant and acquired all his training and expertise whilst in its employ. He left it at short notice with the express intention of setting up a rival business. He does not seek

to make the case that, economically speaking, he will not survive if he is held to the terms of the restraint. There is no aspect of public policy having anything to do with the relationship between the parties that requires the restraint to be rejected.

[29] Having regard to all the relevant factors I consider that the first applicant's interest in protecting itself against the first respondent using the information and expertise which he acquired during the course of his employment weighs more than the interest of first applicant, for a limited period of time, to have complete freedom to compete with applicants in the field of solid surfacing installation.

[30] The geographical extent of the restraint was narrowed by the applicants in argument from the Western Cape to the Cape metropole, an area which is quite justifiable. As regards the restraint's duration, I take into account the applicants' stance that they do not seek to indefinitely preclude the first respondent from profiting from the skills which he acquired during the course of his employment and, furthermore, that the interest which they seek primarily to protect are their trade connections and pricing structure. As mentioned earlier, these interests have a diminishing value and in these circumstances I consider that it would

appropriate and reasonable to limit the operation of the restraint to a period of six months from the date of this order.

[31] For these reasons the following order is made:

1. For a period of six months from date of this order the first and second respondents are interdicted and restrained:

1.1 from utilising the client information of the applicants' in the conduct of any business which competes with the applicants in selling and installing solid surfaces;

1.2 from utilising the first respondent's knowledge of the costing structure of the applicants' business in the conduct of any business which competes with the applicants in selling and installing solid surfaces;

1.3 from utilising the first respondent's connection with the applicants' clients in the conduct of any business which competes with the applicants in selling and installing solid surfaces;

1.4 from selling solid surfacing components to or installing solid surfaces for or on behalf or at the instance of, or from otherwise engaging in the business of selling and installing solid surfaces with any person or entity which was on, or had within one year prior to 6 July 2010, been a client of the applicants; and

2. The first and second respondents are directed to forthwith deliver to the applicants' attorney any and all documents and copies of documents in their possession which embody the costing structure and client information of the applicants, including names, contact persons, telephone numbers, e-mail addresses, and the like.

3. Clause 26.1 of the contract of employment attached to the applicants' founding affidavit, marked "A", is enforced against the first respondent, wherefore the first respondent is interdicted and restrained, for a period of 6 months reckoned from date hereof, and within the Western Cape metropole, from being engaged in the business of the second respondent in any capacity, or from being engaged in any capacity in any business which directly or indirectly competes with the applicants' business.

4. The respondents, jointly and severally, shall pay the costs of this application.

L. J. BOZALEK, J
JUDGE OF THE HIGH COURT