IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 27972/2010

In the matter between:

DYNACHEM (PROPRIETARY) LIMITED	Applicant
and	
VINCENT BRANCO	First Respondent
CARL TALJAARD	Second Respondent

JUDGMENT: 31 MAY 2011

WEINKOVE A.J.

1. In this matter Applicant sought an urgent interdict against First Respondent to enforce an alleged restraint of trade agreement which was to be subject to a rule nisi and operate as a temporary interdict.

2. The application was brought on 30 December 2010 on 24 hours notice to First Respondent and the matter came before Mr. Justice Fourie on 31 December 2010.

3. The parties agreed to a timetable to regulate the further conduct of the matter and to file affidavits. First Respondent gave certain undertakings *pendente lite*.

4. Applicant carries on a chemical business which distributes detergent chemical products. It claims to manufacture these chemical products but it would appear that the word "manufacture" may be an exaggeration in the sense that raw chemicals are purchased and mixed with other chemicals to make up the final detergent product.

5. First Respondent was an employee of Applicant and worked for it from 1995 until he resigned in September 2010. At the time of his resignation he had been promoted to the position of "factory manager" but the salary he was earning could not be regarded as commensurate with the salary of a senior employee.

6. Applicant made First Respondent's position redundant and offered him a lesser position. Applicant also sought to secure First Respondent's agreement to a written employment contract which involved a restraint of trade agreement. There is a dispute between the parties as to whether First Respondent was pressured into signing this agreement or whether that agreement was freely and voluntarily signed. The probabilities are that he was pressured into signing this agreement and if regard is had to subsequent conduct on the part of Applicant, there seems to be a strong indication that First Respondent was the victim of unfair labour practices.

7. In January nearly 6 years later, First Respondent was required to train a production supervisor who would appear to be prepared to be his successor.

8. In August 2010, First Respondent resigned when he felt that Applicant's director, Mr. Malamoglou, did not fulfil his promise to give him a new service contract which involved a share of profits and an equity share in Applicant after 2 years.

9. After leaving Applicant's employment, First Respondent worked for a while in the building industry. In October 2010 he purchased a damaged aerosol machine at an auction for what would appear to be one-tenth of its new price. He apparently intended to repair this machine to resell it at a profit or perhaps even use it to manufacture products for sale.

10. He arranged with Second Respondent to store the aerosol machine at his premises because he knew Second Respondent who had also had dealings with Applicant in the past.

11. Second Respondent had worked in the chemical industry for 20 years and for the past 10 years had been a member of Chemitex CC, a close corporation in which Malamoglou held a 45% interest, Second Respondent held a 50% interest and a third party held a 5% share.

12. The aerosol machine was stored in the premises of Chemitex, although First Respondent had no interest in Chemitex, was not employed by that

business and only used a part of the premises to store that particular machine.

13. These premises, Second Respondent and the company Chemitex feature in Applicant's founding affidavit where Applicant alleges First and Second Respondents were carrying on business in competition with Applicant and where it alleges chemical stocks were found which could only have come from Applicant by some unlawful means. This was one of the bases of Applicant's claim for urgency namely that the restraint agreement was being breached and that First and Second Respondents were engaged in the unlawful acquisition of the chemicals belonging to Applicant.

14. Malamoglou, on behalf of Applicant, did not disclose that he held a 45% interest in Chemitex, nor did he disclose that there was a business relationship between Applicant and Chemitex pursuant whereto chemicals were sold by Applicant to Chemitex, nor did he disclose that there was pending litigation between Applicant and Chemitex in regard to disputed claims for payments by Applicant from Chemitex. In truth, Second Respondent, Chemitex and Malamoglou are well known to each other and have been in business for at least 10 years.

15. It appears that all these facts were withheld from the Court in the original application by Applicant.

16. Applicant contended that First Respondent was guilty of breaching the confidentiality restraint provisions of the service contract. Furthermore, that there was a risk that First and Second Respondents might use Applicant's trade secrets to unlawfully compete against it.

17. Applicant relies heavily on two e-mails sent from an unknown person who signs himself Mr. Robert Brown and who operates from a "Yahoo" e-mail address. There is no confirmatory affidavit by Mr. Brown and the information placed before the Court by Applicant emanating from Mr. Brown is in the first place incorrect and in the second place not properly substantiated.

18. Applicant also relies on hearsay information given by one Paul Dempers and one Raymond Cohen regarding schemes that were made by First and Second Respondents to compete unlawfully against Applicant. No confirmatory affidavits were placed before the Court by Dempers or Cohen. On the contrary, First Respondent produced affidavits from these people where they deny making the statements alleged by Applicant's witnesses.

19. The first e-mail that was sent by Brown arrived some 6 weeks prior to the launching of the application and advised Applicant that First Respondent was making and selling chemicals in accordance with its secret formulae and selling them at lower prices. Strangely enough, this allegation was not investigated by Applicant at that point. No evidence is placed before the court as to who the particular Mr. Brown may be and the allegations

made by him are denied by Respondents. There is also no explanation why, on receipt of this particular e-mail, Applicant did not immediately take steps to investigate this complaint.

20. First and Second Respondents are well known to Applicant and its representatives and this allegation could easily have been investigated at that time. The second e-mail emanating from Brown comes from a different "Yahoo" e-mail address and that e-mail purports to advise Applicant of Second Respondent's business address. As counsel for Respondents points out, this e-mail triggered the searches which were made at the premises of Second Respondent and gave rise to the allegations that chemicals had been stolen from Applicant and were now being housed in Second Respondent's premises.

21. The affidavits filed on behalf of First and Second Respondents clearly indicate that these chemicals were not stolen, but were purchased by Second Respondent from Applicant in terms of the agreement concluded between them so many years ago.

22. The statements made by Applicant are, to say the least, defamatory and false and the defamation is compounded by the fact that Applicant then reported this matter to the South African Police and caused a docket to be opened and an investigation to be initiated against First and Second Respondents.

23. No effort was made by Applicant prior to launching this application to determine how Second Respondent came to be in possession of chemicals which emanated from Applicant and which Applicant therefore considered to have been stolen. The affidavits filed on behalf of Respondents show that these chemicals were purchased and that Applicant knew, or must have known, that they were not stolen.

24. In my opinion the allegation by First Respondent that Applicant deliberately concealed material facts from the Court in order to engineer a basis for urgency has considerable merit and justifies this court voicing its displeasure at what is nothing less than an abuse of the process of this court.

25. The allegations made by Applicant concerning information given by Dempers and Cohen are refuted by these people in affidavits filed by Respondents. Applicant claims that the information from Dempers and Cohen emanated from a Mr. Hunter and it seems strange that both Dempers and Cohen would depose to affidavits contradicting what Hunter is alleged to have said. Counsel for Respondents has relied upon this course of conduct on Applicant's part in support of a contention that this application ought to be dismissed on the grounds that urgency has not been established.

26. I do not propose to decide this matter on the question of urgency and counsel for both parties agreed that this matter ought to be decided on its

merits and not on the technical ground of a lack of urgency. What these factors do, however, demonstrate is that the credibility of Applicant and Malamoglou is seriously reduced. Very little reliance can be placed upon Applicant's evidence because so much was concealed from the court and so much hearsay evidence was tendered some of which was subsequently repudiated by the persons concerned or which, as in the case of Brown, seem to emanate from a fictitious person.

27. Counsel for Applicant correctly conceded that having regard to the evidence before the Court there was no evidence that First Respondent had divulged to any person any of Applicant's trade secrets, confidentiality dealings, or the contents of its manufacturing plan and production batch sheets. Furthermore, there was no evidence that First Respondent (whether the restraint was valid or not) operated either for his own account or any other person, directly or indirectly in opposition to Applicant.

28. There was also no evidence that he had canvassed or solicited business from any person, firm, or corporation with whom he had done business in the preceding 24 months of his employment with Applicant, nor was there evidence that he carried on business, or was in any way employed, or had any interest, or associated with, or engaged in the business of the manufacture or distribution of speciality chemicals of the type manufactured by Applicant in competition with it.

29. The only basis upon which counsel for Applicant could rely upon was that there was a reasonable apprehension that he may have breached the

restraint in these terms or that he was likely to breach the restraint in these terms in the future.

30. Having regard to the evidence presented in this matter, it seems to me that Applicant's fears in this regard are far fetched and unrealistic. Furthermore, Applicant has been guilty of placing selective information before the court and has deliberately concealed from the court relevant information which should have been disclosed. I speak in particular about the relationship between Malamoglou and Chemserve.

31. Applicant also needs to amend the text of the restraint agreement by importing certain tacit terms in order to qualify for some of the prayers sought.

32. It is unnecessary for me to decide whether the restraint itself is reasonable or not or whether public policy requires that the restraint itself should be amended or rejected. As far as the present application is concerned, Applicant has failed to demonstrate an actual or a reasonable apprehension that the restraint agreement has been or will be breached. On this basis, Applicant is not entitled to an order interdicting First Respondent either in the manner claimed or at all.

33. Whether or not this restraint, having regard to the manner in which it was concluded and the allegations made by First Respondent in these papers, is a restraint which ought to be enforced need not be decided at this

stage. Different allegations would have to be placed before the court both by Applicant and by First Respondent.

34. In the result, I consider Applicant has failed to make out a case for any of the relief claimed and the application for a rule nisi and interim relief is dismissed.

35. As far as the question of costs is concerned, this is clearly a case where a punitive order for costs should be made against Applicant, who has abused the process of this Court in that he has:

22.1 brought an application at the last minute on very short notice when his suspicions could have been investigated a long time ago and there would be no justification to bring the application literally on the last day of the year, 31 December 2010, thereby rendering it virtually impossible for Respondents to get legal assistance and file affidavits timeously;

22.2 withheld relevant material in his founding affidavit with particular reference to Malamoglou's association with Chemserve and Second Respondent;

22.3 falsely created an impression that there was a reasonable belief that First and Second Respondents were in possession of chemical goods belonging to Applicant which must have been stolen from it

or, as is put in the papers, could not have been acquired by lawful means;

22.4 introduced hearsay evidence concerning statements made by witnesses who subsequently filed affidavits stating that they had not made these statements and who improperly tried to introduce the evidence of Brown, whose statements were highly prejudicial to Respondents and were designed to reinforce a suspicion that Respondents had acted unlawfully and were breaching the terms of the restraint agreement concluded by First Respondent.

36. Applicant, not content with its efforts to wrongly persuade this Court to grant an interdict against First Respondent, made matters worse by filing criminal charges against First and Second Respondents.

37. Applicant's conduct aforesaid deserves the strongest censure from this court and in the result Applicant is ordered to pay the costs of both Respondents as between attorney and client.

WEINKOVE, A.J.