

**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case No.: **9817/2015**

In the matter between:

LONRHO LOGISTICS (PTY) LTD

Applicant

and

TOLL GLOBAL FORWARDING (SA) (PTY) LTD

First Respondent

GEOFFREY MILLS PARTRIDGE

Second Respondent

BRUCE JAMES CHAPLIN

Third Respondent

IAN COLLIN MCALLISTER

Fourth Respondent

ANDREW MCGRATH

Fifth Respondent

MARTIN PAUL BROWN

Sixth Respondent

JUDGMENT: 5 JUNE 2015

MEER J.

[1] The applicant seeks an order that, pending the return day of a rule nisi, the first respondent is interdicted and restrained from providing freight forwarding services in respect of perishable products, being exported from Cape Town to the applicant's customers that are identified on the list headed

“Customer Listing,” which forms part of Annexure “DS10” to the founding affidavit of Mr Swart.

[2] The applicant conducts a freight forwarding business. Annexure “DS10” is a business plan compiled and sent by the sixth respondent to the first respondent In November 2014. At the time the sixth respondent was employed by the applicant as the branch manager and air freight manager of its Air Freight Division in Cape Town, but he was planning to take up employment with the first respondent who was setting up an air freight business, also in Cape Town in competition with the applicant. The sixth respondent concluded a contract of employment with the first respondent on 28 January 2015. He informed the applicant some three months later of his intention to resign. Thereafter he gave the applicant notice on 30 April 2015. A number of other erstwhile employees of the applicant have also taken up employment with the first respondent.

[3] Annexure “DS 10” and the customer listing contained therein was sent by the sixth respondent for the benefit of the first respondent and the business it was setting up in competition with the applicant. It is common cause that the information contained therein was used as a basis for the first respondent’s business plan. It is also common cause that “Annexure D S 10” and the customer listing was sent to the first respondent by the sixth respondent without the permission or knowledge of the applicant. The first respondent has agreed that to the extent that the business plan (annexure “DS10”) contains any

information that is proprietary to the applicant, the respondent will not use this business plan in any manner or form. The sixth respondent in his answering affidavit has acknowledged that he ought not to have disclosed the applicant's confidential information and has apologised therefor. With regard to the contested customer listing however, the stance of the respondents is that there was nothing to prevent the sixth respondent from providing information concerning the applicant's customers to the first respondent.

[4] The applicant's founding affidavit states, and it is undisputed, that the "customer listing" reveals the identities of the first respondent's anticipated customers, the nature of the product to be handled for each of them and the anticipated profit margin each one is anticipated to generate. Save for the last one on the list, the identified clients are the applicant's main clients and it handles the commodities listed alongside their names. This information, it is stated, would have been known to Brown, the sixth respondent, who furnished the list to the respondents, at a time when he was still employed by the applicant.

[5] The customer listing in question appears on page 227 of the record. There are 3 columns. The first column under the heading "Customer Listing," contains the names of the customers. The second column under the heading "Commodity", lists a commodity in relation to the customer. The commodities

mentioned are “lobster and abalone, flowers, fruit and various”. The third column, headed ‘Margin’, indicates a percentage in respect of each customer.

[6] Mr Woodland for the applicant submitted that the surreptitiously sent customer list containing confidential information, revealed more than just the identity of the customers. Once such information is synthesised and stolen by an employee for a competitor, like the first respondent, he said, the competitor would know how to target the clients and structure his business. The sixth respondent, he submitted, was helping the first respondent to steal customers to set up its business. In this regard he referred to an email of 2 October 2014 from Mc Allister, the fourth respondent who is the first respondent’s national operations director to Brown, the sixth respondent. In that email the fourth respondent asks the sixth respondent to advise on *inter alia* . .

“certainty of client relationship and migration”.

[7] Mr Woodland submitted that the client list and other information passed on by the sixth respondent to the first respondent was used as a spring-board by the first respondent to start up its business. In this regard, the interim interdict the applicant seeks is designed to take account of the so-called “spring-board” doctrine which recognises that where a competitor acts unlawfully, the appropriate way to nullify the advantage so obtained is to interdict it from competing with the rival until the benefits of that advantage have passed. See

Waste Products Utilization (Pty) Ltd v Wilkes and Another 2003 (2) SA 515 (WLD) at 582 E – 583 I.

[8] Mr Strathern for the first to fourth respondents relying on *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W) submitted that there was nothing to prevent Mr Brown from providing information concerning the applicants' customers to the first respondent. He emphasised also that the applicant did not have a restraint of trade agreement with the sixth respondent.

Finding

[9] In *Waste Products Utilisation (Pty) Ltd v Wilkes and Anther* 2003 (2) SA 515 (WLD) at 570 G – 571 C and 571 G – H, it was acknowledged that in determining whether competition is unlawful one must have regard to criteria such as fairness and honesty. Also recognised was the unfair use of a competitor's fruits and labour, and the misuse of confidential information in order to advance one's own business interests and activities at the expenses of a competitor.) At 577 B – E Lewis J as she then was, went on to state that for information to be considered confidential it must meet the following criteria:

- “it must be useful, in the sense that it must be capable of use or application in trade and industry;
- it must, objectively, not be public knowledge or public property, but known only to a restricted number of persons; and
- it must be of economic value to the plaintiff.

[10] Judged against these criteria the “customer listing” contained in Annexure “DS10” is confidential. The sixth respondent’s imparting of this confidential information to the first respondent whilst he was employed by the applicant, can, in the circumstances of this case be construed as misuse of confidential information in order to advance the first respondent’s business interests at the expense of the applicant, and was accordingly unlawful.

[11] In the case of *Telefund Raisers CC v Isaacs and Others* 1998 (1) SA 521 (CPD), information recorded on the applicant’s customer lists which the first to third respondents had taken after leaving the employ of the applicant, to the fourth respondent, was similarly considered confidential and deserving of legal protection. The use thereof was held to be unlawful and the applicant was entitled to approach the Court to put a stop to such use. See 534 G – H. The Court granted an order restraining and interdicting the respondents for 12 months from soliciting or canvassing any of the applicant’s customers listed.

[12] Likewise in the unreported case of *Mullane and Another v Smith and Others* Case No. 2014/28264 [2015] ZAGPJHC 66 (20 April 2015), South Gauteng Division, an interdict similar to the one sought by the applicant before me was granted against an erstwhile employee and his new employer. In that case an erstwhile employee imparted to his new employer customer lists which he claimed he compiled from memory and found on his email. Spilg J at paragraph 32 stated that the information was acquired whilst the respondent

concerned was employed by the applicant and is confidential to it and protectable. He went on at paragraph 36 to describe the conduct of the respondents, as a clear attempt to take unfair and wrongful advantage of inside knowledge that is otherwise protectable against filching or economic espionage.

[13] Mr Strathern for the respondents submitted that the above cases pertain to the theft of customer lists and are therefore distinguishable from the case at hand. I do not agree. As in the aforementioned cases the sixth respondent in the instant case, too, imparted to the first respondent the applicant's client list and relevant information. Whilst in the applicant's employ he surreptitiously and intentionally gave the first respondent the applicant's property, its client list, without the applicant's knowledge or permission and with the knowledge that he should not have done so. As much is evident from his admissions in this regard in his answering affidavit. The information was passed on for the purpose of assisting the first respondent to start up business. This being so, I am of the view that the applicant has a *prima facie* right to the interim relief it seeks.

[14] The irreparable economic harm to the applicant if the first respondent is allowed to appropriate the applicant's major clients, in the interim, is evident and was not contested. I am satisfied that the applicant had no adequate remedy other than to seek an interim interdict to prevent the first respondent from providing services to the listed customers. I am of the view that the balance of

convenience favours the applicants more so given Mr Woodland's unrefuted submission that the first respondent has not yet commenced trading.

[15] I accordingly find that the applicant is entitled to an order that, pending the return day of the *rule nisi* it seeks, the first respondent is interdicted and restrained from providing freight forwarding services in respect of perishable products being exported from Cape Town to the applicant's customers that are identified on the list headed "Customer Listing" which forms part of Annexure "DS10" to the affidavit of Mr Swart.

[16] Paragraphs 2.1 and 2.2.1 of the *Rule Nisi* which the applicant seeks to have issued ask that the first respondent be interdicted and restrained from providing services to any of the applicant's customers including those identified on the aforementioned customer listing being part of annexure "DS10". I am of the view that an interdict against any of the applicant's customers would be too wide and may indeed not be enforceable. I am mindful of the fact also that a listing in respect of all applicant's customers was not furnished by the sixth respondent. The *rule nisi* which I intend granting shall accordingly be in respect of only those customers identified on the list headed "Customer Listing" which forms part of annexure "DS10".

[17] I accordingly grant the following order which at paragraph 2 incorporates the interim interdict in respect of which I have made a finding.

1. A rule *nisi* is issued, calling on the respondents to show cause, on Tuesday, 18 August 2015, in the Fourth Division of this Court, as to why orders should not be made in the following terms:

- 1.1 That the first respondent be interdicted and restrained, for a period of 12 calendar months, from providing freight forwarding services in respect of perishable products being exported from Cape Town to the applicant's customers identified on the list headed "Customer Listing" and which forms part of annexure "DS10" to the founding affidavit of Mr Swart;

- 1.2 That the respondents:

- 1.2.1 be interdicted and restrained, for a period of 12 calendar months, from approaching, directly or indirectly, or assisting any other person in approaching directly or indirectly, the applicant's customers identified on the list headed "Customer Listing" and which forms part of annexure "DS10" to the founding affidavit of Mr Swart and/or the representatives and/or employees of those customers, with a view to soliciting or canvassing freight forwarding business

from them in respect of perishable products being exported from Cape Town;

1.2.2 be directed, within 5 days, to deliver up all and any of the applicant's confidential information in their possession (whether in electronic format, hard copy or otherwise), including but not limited to:

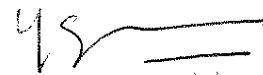
1.2.2.1 the computer file (and any printed copies thereof) named "*Copy of Lonrho Logistics Revenue Breakdown 2014 (Budget).xlsx*" and referred to in paragraph 76 of the founding affidavit of Mr Swart;

1.2.2.2 the computer file (and any printed copies thereof) named "*turnover breakdown.xlsx*" and referred to in paragraph 77 of the founding affidavit of Mr Swart; and

1.2.2.3 the computer file (and any printed copies thereof) named "*Income Statement Cpt Oct 14.pdf*" and referred to in paragraph 79 of the founding affidavit of Mr Swart;

- 1.2.3 be interdicted and restrained, for a period of 12 calendar months, from utilising, communicating or publicising any of the Applicant's confidential information to any third parties, including the information contained in the computer files referred to in paragraphs 1.2.2.1 – 1.2.2.3;
- 1.2.4 be interdicted and restrained, for a period of 12 calendar months from accessing or using:
 - 1.2.4.1 the computer file (and any printed copies thereof) named "*Cape Town – Business Plan ver 5.xlsm*" and referred to in paragraph 81 of the founding affidavit of Mr Swart; and
 - 1.2.4.2 all and any previous or subsequent iterations of the business plan referred to in paragraph 83 of the founding affidavit of Mr Swart (whether electronic or otherwise);
- 1.2.5 be interdicted and restrained from communicating with any of the applicant's employees, directly or indirectly, for the ultimate purpose of soliciting them to terminate their employment with the applicant; and

- 1.3 That the respondents pay the costs of this application, such costs to be payable jointly and severally, the one party paying the other to be absolved.
2. The orders in paragraphs 1.1, 1.2.1, 1.2.2, 1.2.3 and 1.2.4.1 are to operate as interim interdicts pending the return day.
3. The respondents will file their supplementary answering papers by Friday, 26 June 2015; and the applicant will file its replying papers by Friday, 10 July 2015.
4. Heads of argument will be filed in accordance with the rules and practice notes of this Court.
5. All questions of costs will stand over for later determination.



Y S MEER

Judge of the High Court