

REPUBLIC OF SOUTH AFRICA



GAUTENG HIGH COURT
JOHANNESBURG LOCAL DIVISION

CASE NO: 2014/05400

(4) REPORTABLE: No
(5) OF INTEREST TO OTHER JUDGES: No
(6) REVISED.

07 March 2014

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SIGNATURE

In the matter between:

Urban Genesis Management (Pty) Ltd

First Applicant

Urban Genesis Operations (Pty) Ltd

Second Applicant

And

Johannes Jacobs Jooste

First Respondent

**Specialised Area and Improvement
Districts (Pty) Ltd**

Second Respondent

Judgment

Vally J

Introduction

1. The applicants approach this court on an urgent basis asking that their non-compliance with the Uniform Rules of Court (the rules) be condoned and that the application be entertained in terms of rule 6(12)(a) of the

rules. It bears mentioning that in this matter only the Respondents submitted heads of argument. The applicants seek to interdict and restrain the respondents:

- 1.1. for a period of 18 months from utilising in any way the confidential information regarding the first applicant's unique business model (including its database), its pricing structures and the full details of the first applicant's contracts with all of its customers, including the pricing in such contracts, the functions to be performed by the first applicant and how long the contracts have still to run (prayer 2);
 - 1.2. from soliciting business or attempting to solicit business, whether directly or indirectly, from the applicants' customers (prayer 3).
2. They further seek an order from this court directing the respondents to deliver to them all copies of the following documentation:
- 2.1. the database consisting of confidential property related information about each of the areas in which the applicants business is involved which includes financial and planning information specific to each of the applicants' customers (prayer 4.1.1);
 - 2.2. all fonts, letterheads, computer programmes and like documentation and/or information utilized by the respondents to generate tenders and/or quotations to customers substantially similar to those generated by the first applicant (prayer 4.1.2);

- 2.3. all financial and database information and documentation in their possession relating to the first applicant's business dealings with the Main Marshall Improvement District, the Fashion Improvement District and the South of Johannesburg Improvement District (prayer 4.1.3) as well as all documentation and other information relating to the first applicant's 2013 tender for work in respect of the Orlando Ekhaya project (prayer 4.2)

Urgency

3. The respondents contend that the matter is not urgent. They rely on the fact that by the applicants' own version they were aware of the conduct they complain of in December 2013, that the incidents they complain of occurred between November and December 2013, but took no steps to enforce their alleged rights until February 2013. As a result they lost the benefit of relying on the provisions of rule 6(12). For this reason the respondents ask that the application be struck from the roll for lack of urgency.

4. It is trite that while rule 6(12) allows for the court to entertain a matter on an urgent basis. It is not open to an applicant who so seeks the assistance of the court to choose when s/he wishes to approach a court. The applicant must justify a departure from the rules regarding normal time periods as such allows for a respondent to appropriately address the case s/he is asked to answer to. It also allows the court to give careful consideration to the issues raised by the parties before

pronouncing on them. This principle was first laid down in *Luna Meubels Vervaardigers (Edms) Bpk v Makin*¹ and has since been incorporated into the Practice Directives of this court.² It is captured in the following terms in *Luna Meubels*:

“Undoubtedly the most abused Rule in this Division is Rule 6(12) which reads as follows:

“12(a) *In urgent applications the court or judge may dispense with the forms and service provided for in these rules and may dispense of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.*

(b) in every affidavit or petition filed in support of the application under para (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.”

Far too many attorneys and advocates treat the phrase ‘*which shall as far as practicable be in terms of these rules*’, in sub-rule (a) as simply *pro non scripto*. That this phrase deserves emphasis is apparent also from the judgment of Rumpff, JA (as he then was) in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (AD) at p 782B. Once an application is believed to contain some element of urgency, they seem to ignore (1) the general scheme for presentation of applications as provided for in Rule 6; (2) the fact that Motion Court sits on Tuesdays through to Fridays; (3) that, for matters to be on this roll on any particular Tuesday, the papers must be filed with the Registrar by 12:00 noon on the preceding Thursday; (4) that the time of day at which the Court commences its daily sittings is 10:00am. These practitioners then feel at large to select any day of the week and any time of the day (or night) to demand a hearing. This is quite intolerable and is calculated to reduce the good order which is necessary for the dignified functioning of the Court.”³

5. The applicants agree that they were aware of the conduct which “was *tainted with a degree of unlawfulness*” as long ago as December 2013 and that they only instituted proceedings on 18 February 2013. They

¹ 1977 (4) SA 135 (W).

² Gauteng Local Division Urgent Applications Practice Directive 9.22

³ *Luna Meubels (op cit)* at 136

claim that the reason they did not do so earlier is because the managing director (who deposed to the affidavits on behalf of the applicants) believed that the respondents (first respondent in particular), would desist with their alleged unlawful conduct, and was concerned that the institution of legal proceedings would impact negatively on the business of the applicants. However, the respondents failed to desist with their alleged unlawful conduct but instead became more brazen and reached an intolerable state when on 4 February 2014 the applicants became aware that the respondents were successful in soliciting business away from the applicants towards the respondents. This conduct resulted in the applicants fearing for the future of their business which propelled them to institute proceedings some 14 days later on 18 February 2014. The respondents furnish a bare denial in response to these allegations and for that reason cannot be taken as seriously raising an irresolvable dispute of fact.

6. The respondents are correct to suggest that the applicants should have instituted proceedings soon after learning of the alleged unlawful conduct in December 2013. The applicants however have to furnish a reasonable and perfectly acceptable explanation for not doing so. In a word, they wanted to avoid engaging in litigation with the respondents. Thus, the question that is raised by these facts is this: does the respondents delay in bringing this application mean that they should be punished by having the portal of court closed in their faces? I think not. Their hope to avoid litigation, which is costly and can be bruising, is

commendable. Unfortunately the respondents persisted in the alleged unlawful conduct and the applicants cannot be faulted for approaching court after realising that if they left matters as they stood the alleged unlawful conduct would not cease. For this reason I believe it is appropriate to condone their failure to comply with the rules of court and to grant them an urgent hearing in terms of rule 6(12)(a). Thus, the respondents' invitation to have this matter struck from the roll for lack of urgency is declined.

7. The relief sought by the applicants is far reaching. They seek a final interdict in various forms. To succeed they have to make out an explicit case in their founding affidavit⁴ and have to show that they have a clear right, that they have been injured or that they reasonably apprehend being injured and, finally, that they have no other satisfactory remedy.⁵ Moreover, the interdict they seek can only be granted on the basis of the facts averred by them which have been admitted by the respondents together with other facts averred by the respondents.⁶
8. In prayer 2 the applicants seek to prevent the respondents for a period of 18 months from utilising in any way the confidential information which consists of: the first applicant's unique business model (including its database), its pricing structures and the full details of the first applicant's

⁴ *Lipschitz & Swartz NNO v Markowitz* 1976 (3) SA 772 (W) at 775H-776A; *Triomf Kunsmis (EDMS) v AE&CI BPK EN ANDER* 1984 (2) SA 261 at 267G-269H; *Titty's Bar & Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & Others* 1974 (4) SA 362 (T) at 369A-B; *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 327E-H.

⁵ *Setlogelo v Setlogelo* 1914 AD 221.

⁶ *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635I.

contracts with all of its customers, the pricing in such contracts, the functions to be performed by the first applicant and how long the contracts have still to run (the confidential information).

9. Their case is that the first respondent was in the employ of the first applicant since 1 February 2010 in a very senior position and that he was employed by the first respondent's predecessor since 2006 in the same position. As a result of his employment he came to acquire knowledge of the first applicant's confidential information and is now in the process of exploiting it for his and the second respondent, benefit to their detriment.

10. The first respondent's employment contract contained the following clause:

"I undertake that except in the proper course of my duties I shall keep secret and shall not at any time (whether during my employment with the Company (the first respondent) or after the termination of my employment with the Company for whatever reason) use for my own or another's advantage, or reveal to any person, firm or company, any trade secrets, business methods or information, which I know, or ought reasonably to know, to be confidential, concerning the business or finances of any member of the Kagiso Group (the "Group") or any of the Group's dealings or affairs, including information concerning the Group's clients, as far as they shall have come to my knowledge during my employment."⁷

11. That this clause obliges the first respondent to respect and protect the confidential information of the first applicant is beyond question. There is, however, no time limit to the obligation imposed upon him. The

⁷ Application Bundle p 50 (Annexure "SS2")

applicants show that during the course of his employment with the first applicant the first respondent was privy to the confidential information it seeks to protect. The first respondent does not deny this.

12. The first respondent resigned from the employ of the first applicant on 4 November 2013. Immediately thereafter he commenced working for the second respondent in direct competition with the first applicant. He is the brains behind the second respondent. In fact, he established the second respondent solely for the purpose of competing with the first applicant. Within a month of leaving the employ of the first applicant and commencing work as a competitor to it, he succeeded in luring some very important employees of the first applicant to resign from their positions and to take up employment with the second applicant.
13. It is submitted on behalf of the respondents that the applicants do not allege that any of the respondents actually possess this information. Nor do they advance any facts to show that the respondents have this information. Further, the respondents claim, they do not show that the information is of any economic value.
14. There is, in my view, no substance to the respondents' claim. This is so for the following reasons:
 - 14.1. The applicants claim that during his employment with the first applicant the first respondent was one of the most important employees in the first applicant's business and that there were only two other employees that were as involved in its business as

he was. The first respondent merely denies that he was the main employee. He claims that the other two employees more senior than himself that were also in the first applicant's business and that they were more crucial than himself to the business. This however, does not raise a serious dispute of fact on the issue before court. The first respondent does not deny that he was crucial to the first applicant's business and that his involvement was central to the its business and as such was he in possession of confidential information such as it pricing structure, its tendering processes, its contracts, its inner workings and all the contracts its had concluded during his tenure.

14.2. Furthermore, the first respondent admits that upon his resignation he submitted a "*close-out report*". This, essentially, is a report about all the projects he was involved in at the time of his resignation. The projects remain pending. The report show without more, that the first respondent was privy to the contracts of the first applicant and was centrally involved in its operations,

14.3. The information referred to above is something that is private to the first applicant. It is part of its business. It is not something that is known to the general public. Nor can it be obtained by anyone not involved in the first applicant's business.

14.4. It certainly has value to the first applicant who, after all, is a commercial entity engaged on a daily basis in commercial activity.

In my view the information certainly has value to its competitors and even to its contracting parties engaged, and continue to engage, in commercial negotiations with the first applicant

15. There can, therefore, be no doubt that the first respondent was privy to the confidential information of the first applicant. As he established the second respondent (whose sole purpose is to engage in the same commercial enterprise as the first applicant) and is central to its operations it cannot be doubted that the second respondent, too, has access to this confidential information.

16. The respondents' counsel submitted that the first respondent cannot be held to account for his breaching of this clause because to hold him accountable would be to prevent him from taking advantage of his skill and knowledge which has been acquired over time. In support of this contention the respondents rely on the principle that an employee cannot be restrained from utilising knowledge he acquired through the course of time as a result of his own skill and by the exercise of his own mental faculties.⁸ This, however, does not assist the respondents. The confidential information that the applicants seek to protect is not general knowledge that can be acquired through the use of individual skill and by the exercise of individual mental faculties by anyone not privy to the

⁸ See *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 193F-194A

information. It is knowledge about the intimate business dealings and operations of the first applicant. It is unique to the business of the first applicant. It is, therefore, protectable knowledge or information.

17. Finally, it bears emphasising that the respondents did not raise the customary defences of the clause being *contra bonos mores*, unfair, unlawful or unenforceable as it violates the first respondent's constitutional right to engage in economic activity in order to ensure his own and his family's survival.
18. In the result, the applicants have shown that they have a protectable interest deserving of this court's protection in the form of an interdict enforcing the obligations on the first respondent in terms of his employment contract with them. In a word, the applicants have made out a case for the relief sought in prayer 2 and are entitled to an appropriate order in that regard.
19. As far as prayer 3 is concerned the applicants furnish no facts establishing that they have a right to prevent the respondents from soliciting or attempting to solicit any business from any of their customers. Their case is that the first respondent was employed by them for a lengthy period and as such had access to the information. But this does not show that he has kept copies in soft or hard form of the said confidential information. As they cannot show that he has such copies they cannot ask for their return.

20. The question though is that do they have a right to prevent the respondents from competing with them. Whether or not they have such a right is a matter of substantive law.⁹ The first respondent is not subject to any restraint preventing him from competing with the applicants for business. Nor is he breaking any law from competing with the applicants for the custom of their clients. The second respondent, which according to the applicants is the vehicle created by the first respondent to solicit business from their customers, is not breaking any law or assisting the first respondent from breaching any restraint of trade agreement he is bound to. Thus the applicants fail to show that they have a right to the interdict they seek in prayer 3 of their notice of motion. They merely wish to eliminate the competition offered by the respondents to the market they operate in. The law allows the respondents to offer such competition. In fact, it encourages it.¹⁰ As the applicants fail to make out a case for the relief sought in prayer 3 their application in this regard stands to be dismissed.

21. With regard to prayer 4 too, it has to be said that the applicants do not present any real facts to show that the respondents are in possession of their confidential information in the form of having it stored on a database or in the form of a hard copy. There is not a single averment in the founding affidavit stating that the respondents actually have such copies. There are many averments about the central role played by the

⁹ *Schultz v Butt* 1986 (3) SA 667 (A) at 687H. See also CB Prest: *Interlocutory Interdicts* at 47.

¹⁰ See: The Competition Act 89 of 1998

first respondent in the first applicant's business during his tenure there but none of them show that he kept copies of any of the confidential information they want returned. At best for the applicant's they are able to show that he had access to confidential information, but as they cannot show that he or anyone else linked to the second respondent actually possess copies (whether in soft or hard form) of the confidential information they do not make out a case for the relief sought in this prayer. Further, the respondents deny possessing such copies and there is nothing before the court to say that this denial is disingenuous or misleading.

22. For this reason the relief sought in prayer 3 has to be refused.

Conclusion

23. In conclusion then, the applicants are only entitled to the relief sought in prayer 2. As they have been successful in this regard there is no reason to deny them the costs they have incurred by having to vindicate their rights. They may not have succeeded in the other prayers they sought, but their success in securing prayer 2 is substantial enough to warrant them being granted their costs.

Order

24. Accordingly, the following orders are made

- 1 The applicants non-compliance with the Rules of Court relating to service and the time periods is condoned and the matter is treated as urgent in terms of Rule 6(12)(a).
- 2 The first and second respondents are interdicted and restrained for a period of 18 months from utilising for their or for any other person's advantage or revealing to any person, firm or company, any trade secrets, business methods or information concerning the business or finances of the applicants' or any of the applicants' dealings or affairs, including information concerning the applicants' clients.
- 3 The respondents are to pay the costs of this application.

Vally J
Gauteng High Court, Johannesburg Local Division

Appearances:

For the applicants	: Adv S. Bunn
Instructed by	: Garrat Hugo and de Souza
For the first respondents	: Adv L M Spiller
Instructed by	: Keith Sutcliffe & Associates Inc

Date of hearing	: 28 February 2014
Date of judgment	: 7 March 2014