IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH) **CASE NO.: 2891/2010**

In the matter between:

PRESTIGE CLEANING SERVICES (PTY) LTD **Applicant**

And

LAMBERTUS IZAK VOLSCHENK **Respondent**

JUDGMENT

BESHE J:

[1] Applicant brought an application by way of semi-urgency in terms of the provisions of Rule 6 (12) on the 19th of October 2010 for an order in the following terms:

> 2. That a *rule nisi* do hereby issue calling upon the Respondent to show cause, if any, on **TUESDAY** the **23rd** of **NOVEMBER 2010** why an order should not be granted in the following terms:-
>
>> 2.1 That the Respondent be interdicted and restrained from being employed by and/or in any way interested in any company, close corporation, firm, undertaking or concern operating anywhere in the Gauteng, KwaZulu Natal, North West Provinces and Northern Provinces ("the prescribed areas"), which renders cleaning and/or other services connected therewith and ancillary thereto and/or which

renders pest control services ("the prescribed services"), within a period of 12 (twelve) months after the 24th of March 2010;

2.2 That the Respondent be interdicted and restrained from directly or indirectly soliciting business from any past, present and/or prospective customer of the Applicant with whom the Respondent has dealt with whilst he was employed by the Applicant ("the prescribed customers") for the prescribed services, canvassing business in respect of the prescribed services, rendering any prescribed services to any prescribed customer or soliciting appointment as agent or representative of any company, close corporation, firm, undertaking or concern in respect of the prescribed services, within a period of 12 (twelve) months from the 24th of March 2010;

2.3 That the Respondent be interdicted and restrained from using any confidential information in his possession relating to the Applicant, including:

> 2.3.1 the Applicant's entire customer lists, including present customers, past customers and prospective customers;
>
> 2.3.2 the terms, conditions, value and/or period of all contracts of the Applicant with its customers;
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> 2.3.3 the location at which the contracts are carried out;
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> 2.3.4 the number of employees of the Applicant engaged in the carrying out of any contract for any customer of the Applicant;
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> 2.3.5 details of terms and conditions of employment of employees of the Applicant, including but not limited to salaries

and other benefits payable to such employees;

2.3.6 the costings and profitability calculations of contracts of the Applicant with its customers;

2.3.7 details of training methods and programs used by the Applicant;

2.3.8 know-how in the Applicant's techniques relating to the rendering of cleaning services and any other services connected therewith;

2.3.9 details of any control systems, which are used by the applicant;

2.3.10 all of the Applicant's trade secrets, business connections and other confidential information pertaining to the Applicant's business;

2.4 That the Respondent forthwith return all documents, notes and any copies thereof obtaining during the course of his employment by the Applicant to the Applicant together with any other items in his possession that are the property of the Applicant;

2.5 That the Respondent be directed to delete all copies of confidential information of the Applicant contained in the electronic format from whatever memory source such information may be retained;

2.6 That the Respondent be ordered to pay the costs of this application;

3. That the orders in paragraphs 2.1 to 2.5 hereof shall operate as an interim order pending the final determination of this application; and

4. That further and/or alternative relief be granted to the Applicant.

[2] On the 7th of October 2010 respondent filed a notice of intention to oppose applicant's application and proceeded to file an answering affidavit. At paragraph 6 of his answering affidavit respondent states *inter alia* that "However I am not opposing the application and as a display of my *bona fides vis-a-vis* the applicant with whom I had a successful working relationship for twelve years, I have instructed my attorney of record and my counsel to agree to the terms of the notice of motion ... ..." I do this purely in an attempt to display my *bona fides* as I am not in breach of any of the terms of my restraint of trade agreement. I am not operating any business in the Republic of South Africa but I am trading only in Mozambique. Accordingly the terms of the restraint of trade do not affect my business at all.

[3] At paragraph 7 respondent continues: "For this reason I have instructed my attorney of record and my counsel to agree to the terms of the Notice of Motion, but as will become evident infra, I do not agree to paying the costs of the applicant. The application is ill-advised and is a direct function of incorrect information divulged by Mrs Engelbrecht to the applicant".

[4] On the 19th of October 2010 a *rule nisi* in terms of the Notice of Motion was issued with the return date being the 2nd of December 2010.

[5] On the return date, respondent still maintained his stance that he was conceding the relief sought by the applicant, but that he was not agreeable to paying the costs of the applicant.

[6] It is necessary to briefly sketch the background to this application. Applicant is a company, as its name suggests, that provides specialized cleaning services to *inter alia* health care, hospitality, commercial, retail, industrial, education, property and food production industries, and operates throughout the Republic of South Africa.

[7] Applicant has over the years developed specific systems, procedures and methods of conducting business, which it believes gives it an advantage over its competitors. According to the applicant, these systems, procedures and methods of doing business are highly confidential.

[8] Respondent took employment with the applicant as a sales consultant, specialized services, in June of 1998 whereupon respondent was required to read and sign a confidentiality undertaking and restraint of trade.

[9] As respondent progressed through the ranks he would be required to sign a confidentiality undertaking as well as a restraint of trade upon reaching each level or rank in his employment.

[10] 22.4 The operative part of the restraint of trade reads thus:

> "I, the undersigned, BERTUS VOLSCHENK undertake in favour of PRESSTIGE CLEANING SERVICES (PROPRIETARY) LIMITED ("the company"), and its successors in title, (being the person, company, close corporation, firm, undertaking or concern) that acquires the goodwill of the business through its shareholding in the Company, and / or has acquired by cession the right to enforce the restraints embodies herein as follows:
>
> 1. I shall not, either alone or jointly for the period during which I am employed by the company and for a period of 12 months after the termination of any employment with the company, for whatsoever reason ("the restraint period"):-
>
>   1.1 whether the *(sic)* employee, proprietor, partner, director, shareholder, member, consultant, contractor agent, representative, assistant or otherwise, and whether for reward or not, directly or indirectly;
>
>   1.2 anywhere in the GAUTENG, KWA-ZULU NATAL, WESTERN CAPE, NORTHERN CAPE, EASTERN CAPE, MPUMALANGA *(sic)*, FREE STATE, NORTH WEST PROVINCES & NORTHERN PROVINCES ("the prescribed areas");
>
>   be employed by and/or engaged and/or in any way interested in any company, close corporation, firm undertaking or concern operating in any part of the prescribed areas, which renders cleaning and or other services connected therewith and ancillary thereto and/or which renders pest control services ("the prescribed services").

2. I further undertake that neither I nor any company, close corporation, firm, undertaking or concern in or by which I am directly or indirectly interested and/or employed, shall during the restraint period and whether for reward or not, directly or indirectly –

   2.1 encourage or incite or persuade or induce any employee of the Company, who was employed whilst I was employed by the Company and who is engaged or participates in the prescribed services, to terminate his employment by the Company and/or become employed by or, directly or indirectly, in any way interested in or associated with any other company, close corporation, firm undertaking or concern;

   2.2 furnish any information or advice (whether oral or written) to any past, present and / or prospective customer of the Company with whom I have dealt or whom I have approached to do business (a "prescribed customer") that I intend to or will (whether as proprietor, partner, director, shareholder, member, employee, consultant, financier, agent, representative or otherwise, and whether for reward or not, directly or indirectly), be interested or engaged in or concerned with or employed by any company, close corporation, firm, undertaking or concern carried in the prescribed areas which renders the prescribed services or any services similar thereto during the restraint period;

   2.3 furnish any information or advice (whether oral or written) to any prescribed customer or use any other means or take any other action which is directly or indirectly designed, or in the ordinary course of events calculated, to result in any such prescribed customer terminating its association with the Company and / or transferring its business to or accepting the rendering of any prescribed services from any person other than the Company, or attempt to do so.

3. Without derogating from the obligations imposed by this undertaking, I undertake that neither I nor any company, firm, undertaking or concern in or by which I am directly or indirectly interested, engaged, concerned or employed will during the restraint period directly or indirectly, whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise in any part of the prescribed areas and whether for reward or not:-

    3.1 Solicit business from prescribed customers for the prescribed services.

    3.2 Canvass business in respect of the prescribed services.

    3.3 Render any prescribed services to any prescribed customer.

    3.4 Solicit appointment as agent or representative of any company, close corporation, firm, undertaking or concern in respect of the prescribed areas."

22.5 The Respondent furthermore undertook and agreed in clause 4 of the restraint order that:

"I shall surrender to the employer on demand, any *(sic)* in any event upon termination of my employment with the Company any documents or records (including written instructions, notes or memoranda) and any copies thereof which relate to the business of the Company, irrespective of who the author was of such document or record."

[11] In respect of confidentiality respondent signed the following undertaking:

"I, the undersigned BERTUS VOLSCHENK, undertake in favour of PRESTIGE CLEANING SERVICES (PTY) LTD ("the company"), by whom I am employed as SUPERVISOR-EASTERN CAPE.

1. During the course of my employment and upon termination of my employment with the Company I shall not disclose to any third party any confidential information of any nature whatsoever which I may obtain from or relating to the Company, its holding company or subsidiaries, howsoever such information may be disclosed to myself including, without limiting the aforegoing, whether orally or visually;

2. Without derogating from the obligations in terms of Clause 1, I further undertake not to disclose to any third party, for any reason whatsoever (and without limitation), the following information:-

    2.1 The Company's entire customer lists, including present customers, past customers and prospective customers ("the customers").

    2.2 The terms, conditions, value and / or period of all contracts of the Company with the customers.

    2.3 The location at which contracts are carried out.

    2.4 The number of the employees of the Company engaged in the carrying out of any contract for any customer of the Company.

2.5 Details of terms and conditions of employment of employees of the Company, including but not limited to salaries and other benefits payable to such employees.

2.6 The costings and profitability calculations of contracts of the Company with customers.

2.7 Details of training methods and programmes used by the Company.

2.8 Know-how in the Company's techniques relating to the rendering of cleaning services and any other services connected therewith.

2.9 Details of any control system, which are used by the Company, including control systems for the implementation and administration of which the employee is responsible.

2.10 All the Company's trade secrets, business connections and other confidential information pertaining to the Company's business, all of which constitutes confidential information of the Company.

3. I further acknowledge that the information referred to in Clause 2 and any other confidential information is being made available to me solely for the purpose of fulfilling my duties in terms of my contract of employment with the Company and for no other purpose whatsoever, and that such information would not have been made available to me but for this undertaking.

3.1 I shall not directly or indirectly use for my own benefit or for the benefit of any other, such information other than for purposes contemplated in Clause 3, unless any part of such information is or becomes public knowledge and in the public domain by reason of becoming property other than through an act or omission on my part.

4. Upon termination of my employment the Company, I shall return all documents, notes and any copies thereof obtained during the course of my employment by the Company.

5. I acknowledge that I have discussed the contents of this document with my employer and all questions raised by me regarding this clause have been explained to me to my satisfaction."

[12] Respondent tendered his resignation from the applicant in February of 2010 his last working day being 24 March 2010.

[13] In his founding affidavit, Alistair Fulton, applicant's General Manager contends that on the 9th of August 2010 he received a telephone call from Mrs Engelbrecht of S E Industries a company that is also in the cleaning industry and is a competitor of the applicant in Port Elizabeth, that respondent had divulged applicant's confidential information to her.

[14] According to Mr Fulton, during discussions with Mrs Engelbrecht he learnt that the latter had entered into discussions to form a partnership with the respondent, that would conduct business in the cleaning industry which partnership then started operating from the beginning of January 2010.

[15] Mrs Engelbrecht also handed Mr Fulton a memory stick that she alleged was given to her by the respondent which upon being downloaded was found by Mr Fulton to contain extremely confidential information pertaining to applicant's business. I do not propose to detail the information allegedly contained in the memory stick aforementioned, as well as other allegations made by Mrs Engelbrecht about information divulged to her by the respondent.

[16] Applicant believing that the respondent was in breach of the restraint of a trade agreement between him and the applicant, and that by so doing was causing serious prejudice to the applicant's viability as well as financial loss, instituted these proceedings.

[17] Respondent contends that the application is ill-advised and is a result of incorrect information divulged by Mrs Engelbrecht to the applicant. This is contained in his answering affidavit under the heading:

THE BACKGROUND TO MY RELATIONSHIP WITH MRS ENGELBRECHT:

> "8. In or about September 2009 I identified a business opportunity in the Republic of Mozambique to provide cleaning and related services in that country. I was on holiday in Maputo with my family when I identified the lack of cleaning services in that country. However, I needed a financier as it is capital intensive to commence cleaning operations. For this reason I

approached Mrs Engelbrecht, who was also employed in the cleaning industry. She is a direct competitor of my erstwhile employer, Prestige Services. I clearly explained to her that I am under a restraint of trade and do not have any intention to act in breach of my contractual obligations in South Africa. It was agreed between the two of us to register a company in the Republic of Mozambique. This was duly done and both of us acquired 50% shareholding in the company. Both myself and Mrs Engelbrecht have substantial experience in the cleaning industry and accordingly I envisaged that the company will achieve success in Mozambique.

9. It had always been the agreement that the Engelbrechts would provide the startup capital for the company (Into Africa Cleaning Solutions). However, after approximately three months it became apparent that the Engelbrechts are not in a financial position to provide the startup capital and accordingly we mutually agreed that our business relationship be terminated. However, Mrs Engelbrecht fraudulently deregistered my 50% shareholding in Mozambique without my knowledge. This activity was identified by the Mozambique Police and she is currently under investigation for fraud. I believe that a warrant for her arrest had been issued in Mozambique, however, I cannot verify this fact.

10. Subsequent to the termination of our business relationship I registered a new company in Mozambique which is currently trading successfully. I emphasize that the business model of my company in Mozambique is wholly removed from any of the trade secrets and confidential information I obtained during my employment with Prestige Cleaning. I do not intend to elaborate save to say that the Mozambican Republic has a separate body of law and

business practices, a different language and that the knowledge which I acquired during my term with Prestige is of no benefit to me at all. The business model is simply too remote.

11. I have no idea why Mrs Engelbrecht has acted in this malicious manner to divulge false information to the Applicant. The true facts how the information on my memory stick came into the possession of Mrs Engelbrecht are as follows:

12. In about 7 June I visited the residence of the Engelbrechts in the evening. I needed to make use of their printer in order to print certain quotations for our company in Mozambique. I provided a memory stick with personal information to Mrs Engelbrecht's husband. He downloaded the information from the memory stick onto their computer. I confronted him about it and requested him to delete the same as it was personal information. Apparently he did not do so. Under no circumstances did I divulge any of the information willingly to the Engelbrechts at all. During my employment with the Applicant I often worked after hours at home. As a result I had quotes on my memory stick to refine such in the evenings after work. This was a function of my work ethic. I forgot the Prestige data is on the stick. I did under no circumstances permit the data to be downloaded by Engelbrecht. I have since deleted all Prestige data in my possession as it is of no use to me."

[18] From the aforegoing there appears to be a dispute of fact as to whether or not respondent is in breach of the terms of the restraint of trade agreement

and confidentiality undertaking. It is however trite that the existence of a dispute of fact does not necessary preclude the court from granting relief on Notice of Motion. If the real issue is capable of resolution on an acceptance of facts which are common cause or indisputable, relief may be ordered without reference to the facts in dispute. In my view the denial by the respondent of what is alleged by the applicant does not raise a real or *bona fide* dispute of fact. (See ***Plascon-Evans Paints Limited v Van Riebeeck Paints (Proprietary) Limited 1984 (3) SA 623 AD 634E – 635C.***)

[19] It appears to be common cause that applicant's highly confidential information that was in the possession of the respondent found its way to the hands of applicant's direct competitor. That in itself in my view was sufficient reason for applicant to apprehend that its rights had been infringed. I am satisfied that the applicant was justified in instituting these proceedings.

[20] In addition, as indicated earlier, the relief sought by the applicant is not resisted by the respondent. The only issue that is resisted is the prayer that the respondent be ordered to pay the costs of this application.

[21] *Messrs Scott* for the applicant, and *Welgemoed* for the respondent pointed out that the general rule as regards costs is that they should follow the result.

[22] It is however trite that a court can, for a good reason, deprive a successful party of costs in whole or in part.

[23] *Mr Welgemoed* submitted that this was one such case where the court should deprive the successful party of costs. He argued that the entire application was unnecessary and could have been avoided by a single letter. He argued further that even after the interdict has been conceded, the applicant proceeded to file no less than 9 affidavits in reply.

[24] *Mr Scott* submitted that the applicant was, on the information available to it, entitled to bring the present application and argues that respondent should be ordered to pay the costs of the application.

[25] I have already made a finding in this regard – namely that the applicant was justified in bringing this application.

[26] The question however is whether, respondent having conceded the granting of the interdict, was it necessary for the applicant to file further affidavits.

[27] *Mr Scott* argued that it was necessary to do so because the respondent

did not tender costs upon conceding the granting of the relief sought by the applicant, but proceeded to place before court a factual version of events which is patently false.

[28] I am not persuaded that after respondent had conceded the granting of the interdict it was necessary for the applicant to file at least eight replying affidavits as well as some seventeen annexures. In my view it was of no moment that respondent though conceding the granting of the interdict sought to deny Mrs Engelbrecht's allegations about him.

[29] In my view the applicant is entitled to the costs of the application only up to date of the issue of *rule nisi* on the 19th of October 2010.

[30] Accordingly, the *rule nisi* that was issued on the 19th of October 2010 is confirmed.

Respondent is ordered to pay applicant's costs up to and including the issue of the *rule nisi* on the 19th of October 2010.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

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Date Reserved	2 December 2010
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