IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 2533/2016

Date Heard: 18 August 2016

Date Delivered: 25 August 2016

In the matter between:

HAFA SECURITY CC t/a SPECIAL EYE HOLDINGS	Applicant
and	
TERENCE ERNST GIBBON	First Respondent
SMHART FAMILY TRUST t/a SMHART SECURITY	Second Respondent

JUDGMENT

EKSTEEN J:

[1] The first respondent was previously employed by the applicant and has recently taken up employment with the second respondent. The applicant seeks an urgent final interdict restraining the first respondent from being employed by the second respondent together with certain further interdictory relief. The applicant's cause of action is founded on an alleged covenant restraint in of trade, alternatively, on unlawful competition in that it is contended that, irrespective of the alleged covenant, the first respondent has in his possession and is abusing confidential information of the applicant to benefit the business of the second respondent.

[2] At the hearing of the application, Mr **Pretorius**, who appeared on behalf of the applicant, modified the relief sought by the applicant to some extent. The interdict which Mr **Pretorius** sought was:

"1. That the First Respondent be interdicted from disclosing to any person and/or business entity (company) including the Second Respondent any confidential information concerning the business of the Applicant;

2. That the First Respondent be interdicted from approaching any of the clients of the Applicant and from attempting to persuade them to terminate their agreements with the Applicant and enter into agreements with the Second Respondent;

3. That the First Respondent be interdicted for a period of twelve months from persuading and/or canvassing any of the clients of the Applicant within a radius of 75km of Jeffreys Bay to enter into agreements with the Second Respondent;

4. That the First Respondent be ordered to terminate his employment with the Second Respondent with immediate effect; and

5. That the First Respondent pay the costs of this application and that the Second Respondent only pay costs of this application in the event that the Second Respondent opposes the application."

Factual background

[3] The relief which the applicant seeks is final. Where in proceedings on notice of motion disputes of fact arise on the affidavits a final order may be granted if those facts averred by the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. (See **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) 623 (A) at 634H-I.) Most of the material facts relevant to the determination of the

issue in this matter are not in dispute, however, where disputes of fact do arise neither party contends that such disputes of fact do not raise a real, genuine or *bona fide* dispute so as to justify a different approach to the evidence. On an application of the said approach set out in **Plascon-Evans** *(supra)* the material facts which emerge from the papers are set out below.

[4] The applicant conducts a business delivering security services to homes and businesses in Jeffreys Bay and Humansdorp. Prior to July 2015 the first respondent was employed at the gymnasium in Jeffreys Bay. On 20 July 2015 first respondent took up employment with the applicant in Jeffreys Bay as a “sales officer”. A written contract of employment (the employment contract) was concluded between them. The employment contract contained an express term prohibiting the first respondent from disclosing to any person, firm or company any information concerning the business of the applicant, whether during the tenure of his employment or thereafter, without the written consent of the applicant. The employment contract also contained an express covenant in restraint of trade (the restraint of trade) restraining the first respondent for a period of twelve months after the termination of his contract of employment with the applicant from participating directly or indirectly as shareholder, employee, director, agent, officer, consultant, advisor or otherwise in any concern rendering risk management and security services within a radius of 75km from each and every project area where the first respondent worked during his employment with the applicant.

[5] The first respondent’s employment with the applicant, however, did not endure for any extended period and, on 26 May 2016, just 11 months after taking up

his employment, the employment contract was cancelled by mutual consent. The first respondent at the time expressed to the applicant a desire to relocate to East London on a permanent basis.

[6] In his answering affidavit the first respondent explains that he had terminated his services with the applicant as the applicant appeared to be falling into financial difficulties. He contends that the applicant's sales had dropped significantly, that the applicant had fallen in arrears with the payment of its Value Added Taxes (VAT) and that it did not have sufficient funds to make all of its response vehicles serviceable. In view of these circumstances he noted a negative feeling amongst the company's employees towards the company.

[7] The first respondent did indeed set off for East London with the intention to relocate to East London. Very soon, it appears, he realised that the grass was no greener in East London than it had been in Jeffreys Bay. A mere three weeks later, on 14 June 2016, the first respondent was back on the applicant's doorstep in Jeffreys Bay, cap in hand, seeking employment. The applicant did not re-employ the first respondent, however, it engaged the services of the first respondent as an independent contractor and the parties concluded a written agreement (the second agreement).

[8] In terms of the second agreement the first respondent was engaged to perform essentially the same services which he had previously performed as an employee. The second agreement contained no covenant in restraint of trade. It did however contain a similar clause to that in the employment contract providing that

the first respondent may not disclose private and confidential information concerning the business of the applicant to other entities conducting business in competition with the applicant. Confidential information was circumscribed in the second agreement as follows:

> "12.1 The Contractor acknowledges that it may, in the course of the performance of the Services, gain access to and become acquainted with the techniques, methods and processes, trade secrets, data, information technology, software, business associates, clients, and other private, sensitive and confidential information ("Confidential Information") of HAFA SECURITY.
>
> 12.2 The Contractor accordingly undertakes, for the duration of this agreement as well as after the termination thereof, not to directly or indirectly, utilize, disclose or make public to any third party any Confidential information of HAFA SECURITY and to keep any Confidential Information secret and confidential at all times …"

[9] The clause proceeds to enumerate a number of exclusions which would not be regarded as confidential information. There was some debate at the Bar relating to these exclusions, however, by virtue of the decision to which I have come it is not necessary to consider these further.

[10] What is of greater significance is that the second agreement contained a further clause as follows:

> "13.5 This agreement supersedes all prior agreements, representations, communications, negotiations and understandings between the parties concerning the subject matter of this agreement."

[11] The second agreement too did not endure for any appreciable time and the first respondent secured employment with the second respondent approximately a week after the conclusion of the second agreement. He declares that the reasons for him not pursuing the second agreement were essentially the same as the reasons for his original resignation, same being the financial deterioration of the applicant.

[12] On 21June 2016 the first respondent approached the second respondent seeking an employment opportunity. First respondent advised the second respondent that he had been engaged on behalf of the applicant on contract selling their products and services. He expressed concern about the future of the applicant as its sales were down and it was experiencing internal problems. He disclosed all the applicant's financial woes which had led him to resign, as set out earlier, to second respondent. On specific enquiry from Mr Trahms of the second respondent in respect of the existence of a covenant in restraint of trade the first respondent advised that he had initially been bound by the restraint of trade, however, that he had entered into a subsequent contract which had superseded the employment contract and that he was accordingly no longer bound. In these circumstances the first respondent was engaged by the second respondent, again on contract, to do sales for the second respondent. This contract was concluded on 23 June 2016.

[13] At approximately the same time, Mr Heystek, who deposed to the founding affidavit on behalf of the applicant, met with Trahms and advised Trahms that the applicant was struggling financially and that he personally intended to leave the security industry. The purpose of the meeting according to Heystek was to investigate whether applicant and second respondent could join forces. Trahms

proposed that the second respondent and the applicant enter into a partnership. In the course of these discussions Heystek revealed the applicant's monthly turnover, the approximate number of clients of the applicant and the average monitoring fee per client, the number of employees engaged by the applicant and the fact that the applicant had a substantial number of client cancellations during June 2016 to Trahms. Heystek also advised Trahms that the applicant had fallen in arrears with its taxes and was in dispute with the statutory regulating body for the security industry (PSIRA) with regard to its contributions. In view of these revelations the partnership proposed by Trahms did not come to fruition. The inescapable conclusion to be drawn from these averments is that Heystek approached Trahms in his capacity as a member of applicant, on behalf of the applicant, in order to negotiate for a possible partnership, merger or other form of consolidation between applicant and second respondent.

Applicant's case

[14] In its founding papers the case made on behalf of the applicant was twofold. First, it was contended that the relationship which now exists between the first and second respondents was in breach of the restraint of trade. Second, it was contended that during his employment with the applicant the first respondent had obtained confidential information relating to the identity of the clients of the applicant and the applicant's tariffs. It contended that the first respondent was utilising this confidential information in enticing the applicant's clients away to the second respondent.

[15] Much of the answering papers were devoted to the manner in which the security services industry operates. With particular reference to the two categories of confidential information relied upon in the founding papers the respondents contend that service providers in the security services industry publicly disclose who their clients are by attaching to all premises which they monitor a sign indicating the identity of the security services firm monitoring the premises. The identity of the client base, so it is contended, is accordingly public knowledge.

[16] It is common cause that all contracts in the industry are concluded on a month to month basis so that any client can leave any service provider on one month's notice. It is not uncommon for a security services provider to appoint a sales officer to canvas clients of the opposition. The applicant's tariffs, so the respondents allege, are similarly public knowledge in that the applicant itself publishes its tariffs in the local newspaper.

[17] None of the aforegoing is seriously disputed. The applicant contends, however, that there are some customers, without any further explanation thereof, who prefer not to have the identity of the security service provider advertised on the building and in certain instances it may happen that a special tariff might be negotiated with any particular customer. Again no further information is divulged as to the frequency of this phenomenon.

[18] In its replying papers the thrust of the applicant's case was considerably changed. Heystek states that at the time when he deposed to his founding affidavit he was not aware of the financial and operational information which the first

respondent had, on his own admission, conveyed to the second respondent. He states that the financial position of the applicant, the decline in its sales figures, the fact that it had fallen into arrears with its VAT payments and the alleged negative feelings amongst the company's employees towards the applicant clearly constitutes private and confidential information which the first respondent was contractually bound not to convey. Heystek says that this clearly illustrates that the first respondent became privy to confidential private information of the applicant which was not in the public domain and most certainly not within the knowledge of the opposition, including the second respondent. He concludes that "*it is obvious*" that having regard to the averments set out by the first respondent and the second respondent in their answering affidavits they abused this private and confidential information in order to persuade applicant's customers to terminate their contracts with the applicant. Whilst this conclusion might represent a substantial leap in logic the first and second respondents chose to file an additional set of affidavits in order to respond to new matter raised in the replying papers and neither of them denied that they have used this information.

<u>Covenant in restraint of trade</u>

[19] It is not in dispute that the employment contract contained the restraint of trade. The respondents, however, contend that the restraint of trade was cancelled by the conclusion of the second agreement which superseded the original agreement and did not contain a similar restraint. The argument turns on the interpretation of clause 13.5 of the second agreement.

[20] It is well recognised that over the last century there have been numerous developments in the law relating to the interpretation of documents. In **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at 603F-604B Wallis JA set out the current state of the law thus:

> "The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. "

[21] Clause 13.5 provides that the second agreement "*supersedes all prior agreements, … concerning the subject matter of this agreement*". In argument before me there was no dispute between the parties that the subject matter of the second agreement related to the engagement of the first respondent in the performance of his sales duty to sign up new clients and sell alarm systems. It concerns essentially the same subject matter as the first agreement. It is trite that notwithstanding the termination of the employment contract by consent the term prohibiting the disclosure of confidential information and the restraint of trade, by their very nature, remain operative and binding on the parties.

[22] When regard is had to the wording of these two clauses in the contract of employment it is abundantly clear that at the time of the conclusion of the second agreement both parties would have been acutely aware of the continued force of these two provisions. The parties would also have been aware of the functions which the first respondent did perform during his very brief tenure as an employee of the applicant and the extent of the knowledge which he may have gained of confidential information and the interaction which he may have had with the applicant's clientele.

[23] Against this factual background the second agreement was drawn and concluded and, as recorded earlier, it did not contain a restraint of trade clause. Rather, it stipulated that the second agreement would supersede all prior agreements relating to the performance of the first respondent's duties as a sales officer. The only agreements in place at the time related to the confidential information, which was again incorporated in the second agreement, and the restraint of trade.

[24] The term "*supersedes*", in the context used, appears to me to carry one of the following meanings: (a) "*render superfluous or unnecessary*", (b) "*make ineffective or void; annul; override*", (c) "*take the place of; succeed and supplant in some respect*;" or (d) "be replaced by something regarded as superior". (See *New Shorter Oxford English Dictionary 1993 ed*.) Attributing any one of these meanings to the term "*supersedes*" I consider that it was clearly the intention of the parties upon concluding the second agreement that the applicant abandon any reliance on the terms of the first respondent's contract of employment, in particular the covenant in restraint of trade. During argument Mr **Pretorius** was unable to suggest any other

"*prior agreements*" which the parties may have contemplated. In these circumstances the covenant no longer finds application and it is not open to the applicant to rely on the restraint of trade.

Unlawful competition

[25] In the absence of a covenant in restraint of trade the applicant bears the onus to establish the requirements for a final interdict founded on unlawful competition. In order to do so the applicant will be required to establish a clear right to the relief which it seeks. It relies on the alleged misuse of confidential information by the respondents in order to advance the second respondent's business interests and activities at the expense of the applicant. (Compare **Schultz v Butt** [1986] 2 All SA 403 (A), 1986 (3) SA 667 (A); and **IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (aka Baghas) and Another** 2004 (4) SA 174 (W).)

[26] As recorded earlier it was the applicant's case in the founding papers that the confidential information which had been abused related to the identity of the applicant's customers and its tariffs. The respondents have convincingly shown that the identity of the clients of a security services company is a matter of public knowledge as the security company itself advertises this fact on the buildings which it monitors. It has shown too that the applicant itself advertises publicly what its tariffs are. It is true that the applicant contends that there are certain instances where a client does not wish the security services company to place its identification board on the building and that there are instances where special tariffs are negotiated. It is, however, not contended that any of the clients approached by the first respondent to

cancel their contracts with the applicant fell into either of these categories. In these circumstances Mr **Pretorius,** correctly in my view, did not attempt to rely on the misuse of this information. He concentrated his argument on the misuse of financial information.

[27] It is common cause that the first respondent conveyed such information to the second respondent in seeking to obtain a contract with the second respondent as is set out earlier. Essentially all that information was also conveyed to the second respondent by Heystek himself at a meeting two days after the contract between the first respondent and second respondent was concluded. This notwithstanding it is argued that the first respondent, who had already breached the terms of his contract in respect of the revelation of confidential information, remained bound by his contract and accordingly that the persistent use of such information to canvas clients of the applicant remained unlawful and therefore entitles applicant to an interdict.

[28] I have set out the confidentiality clause earlier herein. It has, however, been held that irrespective of whether the applicant seeks to enforce an implied term or an express term of agreement the applicant must first establish that there is in fact confidential information to be protected. (See for example **Alum-Phos (Proprietary) Limited v Spatz and Another** 1997 (1) All SA 616 (W) at 623f.) In order to qualify for protection in law as confidential information the information concerned must comply with certain prescribed requirements. General information about a business, or for that matter of the financial standing of a business, does not become confidential because the proprietor chooses to call it confidential. (See **Alum-Phos** *supra* at 623i-j and **SA Historical Mint (Pty) Ltd v Sutcliffe and Another** 1983 (2)

SA 85 (C) at 89H-90D; **Meter Systems Holdings Ltd v Venter and Another** 1993 (1) SA 409 (W) at 428A-430H.)

[29] The requirements to which the information concerned must conform in order to qualify for protection are three-fold. First, it must involve and be capable of application in trade or industry: i.e. it must be useful, in this sense. Second, it must not be public knowledge and public property: i.e. objectively determined it must be known to only a restrictive number of people or to a closed circle. Thirdly, the information objectively determined must be of economic value to the person seeking to protect it. (See **Alum-Phos** *supra* at 623f-j; **Townsend Productions (Pty) Ltd v Leech and Others** 2001 (4) SA 33 (C); **Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd** [1999] 3 All SA 321 (W) at 333f and **Experian SA v Haynes** 2013 (1) SA 135 (GSJ) at 141I.) Whether or not information constitutes confidential information is a question of fact.

[30] I will accept for purposes of this judgment, in the applicant's favour, but without making any finding in that regard, that the information in issue complies with the second and third requirements as set out above. To qualify, however, as a trade secret or as confidential information the information involved must first of all not only relate to, but also be capable of application in trade and industry. Provided that it can be applied in trade and industry to advance the business of a competitor the nature of the information is irrelevant. It may involve trade secrets, for example the knowhow of business, an unpublished trademark, customer lists, customer or trade connections, credit records, pricelists, tender prices, business discussions, technical process and computer software. (See for example *Law of South Africa* 2nd ed vol 2

part 2 paragraph 266 page 267.) All the specific categories of information listed in clause 12.1 of the second agreement would meet this requirement. It seems to me therefore that it is private and sensitive information of this nature which was contemplated in the second agreement. I do not consider, however, that private information about the financial prosperity of a competitor in the market can be said to be useful in the sense that it relates to and is capable of application in trade and industry.   The information used by respondents, although private, is therefore not confidential information protected in law.

[31] Even if I err in the conclusion to which I have come in respect of the nature of the information I still do not consider that the applicant has established a clear right to the interdictory relief which is sought. I have recorded earlier that a mere two days after the first respondent had concluded his contract with the second respondent Heystek approached Trahms in order to negotiate for an agreement between applicant and second respondent and he voluntarily conveyed all the information which the first respondent had earlier conveyed to the second respondent. There is no evidence of any express or tacit contractual obligation on the second respondent to refrain from using or disclosing such information as Heystek had conveyed to Trahms in the course of the negotiation.   The second respondent is therefore at liberty to utilise such information to advance its business. It seems to me that the disclosure and use of this information by the second respondent, its employees and agents (including first respondent) to advance the business of the second respondent does not constitute unlawful competition. (Compare **MV Lina Union Shipping and Managing Co SA v Lima Maritime Ltd** 1998 (4) SA 633 (N) at 637H; and **Gordon Lloyd Page & Associates v Rivera and Another** 2001 (1) SA 88 (SCA) at 95-97.)

[32] In these circumstances I do not consider that the applicant has shown a clear right to the interdictory relief which he seeks.

[33] In the result, the application is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv B Pretorius instructed by Jacques du Preez Attorneys, Port Elizabeth

For Respondent: Adv H van der Linde SC instructed by Wikus van Rensburg Attorneys, Port Elizabeth