IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 675/2019

Date heard: 23 April 2019

Date delivered: 30 April 2019

NOT REPORTABLE

In the matter between:

SIZONKE TRADING NELSPRUIT (PTY) LTD	**First Applicant**
SIZONKE TRADING PORT ELIZABETH (PTY) LTD	**Second Applicant**

And

JOHAN ANDRE STANDER	**First Respondent**

ANDRE STANDER **Second Respondent**

SURFACE PREPARATIONS EQUIPMENT
AND COATINGS (PTY) LTD **Third Respondent**

JUDGMENT

Goosen J:

[1] This is an application to compel production of certain documents pursuant to Rule 35(12). The application is made in the context of an urgent application to restrain the first and second respondents from breaching contracts in restraint of trade pending the institution of action to enforce such contracts. It will be appropriate, in this application, to refer to the parties as cited in the main application.

[2] The main application was launched by the applicants on 15 March 2019. The notice of motion set out truncated time periods for the delivery of a notice of opposition and answering affidavits and enrolled the matter for hearing on 26 March 2019. The relief, *inter alia*, sought against the first and second respondents consists

of an interdict restraining each of them for a period of twelve (12) months (operative from different dates) from directly or indirectly carrying on or being interested or engaged in or being employed in any company, close corporation, or an undertaking which makes available products or products provided by the applicant from the operative date. This relief is founded upon the terms of a contract concluded by the first and second respondents as employees of the applicants. The contract incorporates terms which, it is alleged, constitutes an enforceable restraint of trade against the first and second respondents.

[3] As against the third respondent, the applicant seeks orders interdicting it from directly or indirectly encouraging or enticing any employee of the applicants to terminate his or her employment with the applicant. It also seeks to restrain the third respondent from taking any action which directly or indirectly is designed or calculated to result in the applicants' customers terminating their association with the applicant or transferring business to the third respondent. This relief is founded upon the allegation that the third respondent, having engaged or employed the first and second respondent, has sought to utilize their knowledge of the business practices of the applicants to advance its own business.

[4] In the main application, the applicants seek interim relief pending the institution of an action in which final interdictory relief will be sought. On 26 March 2019, the application was postponed by agreement, to 16 April 2019. An order was made regulating the filing of answering and replying affidavits[1]. The reason therefor relates to the application to compel which is before this court.

[1] It was agreed that the respondents would file answering affidavits on 2 April 2019 and that the applicants would file replying affidavits (if any) by 10 April 2019.

[5] On 20 March 2019, the respondents filed a notice in terms of Rule 35(12) in which they required certain documents to be produced for inspection. The items listed related to documents alleged to have been referred to in the founding affidavit or annexures thereto. The applicants replied to the Rule 35(12) notice on 29 March 2019. In respect of certain items (items 1 and 7-10, the details whereof will be dealt with hereunder), the applicants refused to make them available contending that they are irrelevant. In relation to those documents sought under item 1, the applicants also alleged that they comprise confidential information of the sort which the application seeks to protect.

[6] On 2 April 2019, the respondents initiated the application to compel production of the documents. It was enrolled for 9 April 2019. The application is supported by a founding affidavit which incorporates a "provisional answering affidavit" in the main application. The notice of motion in the application to compel includes an order seeking to "amend" the order of 26 March 2018 (the so-called postponement order) by further postponing the main application and permitting the respondents to file an answering affidavit seven (7) days after the applicants have complied with the Rule 35(12) notice and after they have effected the joinder of all interested parties. The respondents also seek an order that the filing of a replying affidavit be filed and that the main application be postponed *sine die*.

[7] The applicants filed an answer to the application to compel and a reply to the "provisional" answering affidavit on 8 April 2019. When the application to compel was called on 9 April 2019 it was postponed to 16 April 2019 to enable the respondents to file a reply and for the matter to proceed in conjunction with the main application. As it is to be gathered from what is set out above both the

interlocutory application to compel and “postponement” application and the main application served before this court. Mr *Richards*, for the applicants, took the stance that insofar as the court is able to rule upon the interlocutory applications, the main application ought also to be adjudicated. Mr *Nepgen*, for the respondents, took the stance that a ruling in favour of production of the documents would necessarily require postponement in order to facilitate such order. He also submitted that, in any event, the respondents should be allowed to file a “complete” answering affidavit since they had only filed a “provisional” answer under reservation of the right to inspect the documents sought.

[8] I turn now to the application to compel compliance with the Rule 35(12) notice. Rule 35(12) provides that:

> “(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.”

[9] The Rule contains no time periods within which production is to occur. Indeed it is accepted that it imposes no positive obligations to produce documents for inspection. The sanction imposed for non-compliance with the Rule is that the party failing to produce same is precluded from using such documents in the proceedings,

the consequence of which may be that the party is unable to prove its case[2]. It is the reference to a document which gives rise to the entitlement to seek its production[3]. In the event that the requested party does not respond to the notice or refuses to make a requested document available the requesting party may seek an order compelling production. It does so in terms of the provisions of Rule 30A[4]. The filing of a Rule 35(12) notice does not suspend the operation of the time periods within which a party is required to file a plea or answering affidavit[5].

[10] In ***Centre for Child Law v Hoërskool Fochville***[6] the Supreme Court of Appeal set out the basis upon which an application to compel compliance with a Rule 35(12) notice is to be approached, as follows:

> "For my part, I entertain serious reservations as to whether an application such as this should be approached on the basis of an onus. Approaching the matter on the basis of an onus may well be to misconceive the nature of the enquiry. I thus deem it unnecessary to attempt to resolve the disharmony on the point. That notwithstanding, it is important to point out that the term onus is not to be confused with the burden to adduce evidence (for example, that a document is privileged or irrelevant or does not exist). In my view the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition

[2] Potpale Investments (Pty) Ltd v Mkhize 2016 (5) SA 96 (KZP)
[3] Protea Assurance Co Ltd v Waverley Agency CC 1994 (3) SA 247 (C) 249B-D
[4] Minister of Safety and Security v Tembop Recovery (0016/15) [2016] ZASCA 52; Machingawuta and Others v Mogale Alloys (Pty) Ltd and Others 2012 (4) SA 113 (GJS) par [17] and [18].
[5] Cf Machingawuta (supra); Tembop Recovery (*supra*); Centre of Child Law v Hoërskool Fochville 2016 (2) SA 121 (SCA) par [16]; Potch Boudienste CC v Firstrand Bank Limited (Unreported) Case 23898/15 GNP 22 April 2016 at par [20].
[6] See Potpale Investments (*supra*) at par 18 – 21.

> either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.

[11] Mr *Nepgen* submitted that distinction drawn between an onus and a burden to adduce evidence is consistent with earlier decisions which suggest that the burden falls upon the party refusing to produce the document[7]. Mr *Richards*, on the other hand, argued that the determination of the entitlement to inspect is not to be approached on the basis of an assumption of relevance which is to be rebutted by adducing evidence. It is equally necessary that the party seeking production of the document lay a basis for the need to produce the document[8].

[12] In my view, the dictum in ***Fochville*** quoted above provides adequate guidance. It requires a court which considers an objection to the production of a document on the basis, for example of relevance, to consider, *inter alia*, the context and circumstances in which reference is made; the nature of the case made out in the pleading or affidavit; and, where relevance is denied, the reasons advanced for its required production. All of these factors are to be considered in the exercise of the court's discretion.

[13] It is with this in mind that I turn to a consideration of the documents which the respondents seek.

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[7] Garfunkel v Gross Hendler and Frank 1987 (3) SA 766 (C) at 774G; Unilever PLC v Polagric (Pty) Ltd 2001 (2) SA 329 (C) at 336.

[8] See Centre for Child Law v Hoërskool, Fochville (*supra*) (at) where the court noted that the applicant who had merely denied an allegation that the documents were not required, had not explained why this was so.

Item 1

[14] This refers to “customer contracts” to which reference is made in paragraphs 22.4; 26.8; 28 and 48 of the founding affidavit. The applicant disputes entitlement to these documents on the basis of relevance and confidentiality. In regard to the latter, it is contended that the contracts it had with customers necessarily contain crucial proprietary information the disclosure of which will harm the applicant’s interests. It was argued that should same be produced the very purpose of the protection of its interests by way of the application will be defeated. In answer to this, the respondents tender that the documents be redacted to delete/obscure information relating to pricing to avoid such a breach of confidentiality.

[15] It is well established that, in the context of a claim to confidentiality of documents to which a party is entitled, the court retains a discretion to protect confidential information by balancing the interests of the parties by imposing limits upon the form and manner in which production of documents is to occur[9].

[16] In the circumstances of this matter, the applicants’ objection to production of the documents on the basis of confidentiality can, it seems to me, be addressed by an appropriate order as to the form in which they are to be produced.

[17] That, however, is not the only consideration. The applicants object to the production on the basis that the contracts, such as are referred to in the relevant passages, are not relevant. The applicants point out that in paragraph 26.8 and 48 references are not made to “contracts” but rather to the prescribed customers of the applicants, some of which are listed. In regard to the reference to “contracts” made in

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[9] See Fochville (*supra*) referring to Masetla v President of the Republic of South Africa and Another 2008 (1) SA 31 (CC) at par 27.

paragraphs 22.4 and 28, this reference occurs in the context of the establishment of a customer base by the applicants. The applicants submit that the reference to contracts concluded with customers serves no more than to establish the reasonableness of the period of restraint upon which it relies. The terms of the contracts, where concluded, are not relevant.

[18] The respondent seeks to meet the objection by submitting that the reference to the "contracts" must be construed in the context of the founding affidavit as a whole and since the applicants assert a proprietary interest it seeks to protect it is necessary that the applicants produce the contracts in order to enable the respondents to determine whether such protectable interest exists.

[19] In my view the contention by the respondents is without substance. The applicants' case against the first and second respondents is premised upon a contractual term imposing a restraint, *inter alia*, in respect of the customers of the applicants as at the date of commencement of the restraint period (the prescribed clients). It is for the applicants to prove its customer base and that the first and second respondents have acted in breach of the established terms of the restraint relied upon. The terms of the contractual arrangements with clients are not generally relevant to that issue. Even if it is accepted that the existence of a protectable interest is an issue, it is for the applicants to prove its existence. In my view, therefore, the documents sought under item I are irrelevant and accordingly the applicants are not obliged to produce them.

[20] In any event, the respondents also misconstrue the ambit of Rule 35(12) in regard to what constitutes a reference to a document. The entitlement to seek disclosure is not triggered when the existence of a document is to be inferred from

an allegation that there is likely to be a document[10]. That is so in this instance. Their existence is to be inferred from the process by which the applicants have established a customer base. While the applicants state that contracts were concluded with certain customers, I am not persuaded that such generalised reference triggers the entitlement in terms of Rule 35(12).

Item 7

[21] This concerns “contracts” which were transferred to the applicants pursuant to a sale of business agreement which is annexed to the founding affidavit in the main application. In the founding affidavit, the applicants provide an outline of the group of companies of which the first and second respondents form part. In 1995, Uni-Trading (Pty) Ltd (Uni-Trading) was incorporated. In 1998, Uni-Trading was appointed as a distributor of the products of Chesterton International Inc (Chesterton International). Chesterton International is a foreign company and a manufacturer and distributor of Industrial lubricants, corrosion protection products, seals, gaskets and related products. It is based in the United States. Over the course of time, Uni-Trading was appointed by Chesterton International as a distributor of its products in various parts of the country. Chesterton International had incorporated a company in South Africa, Chesterton Industries Pty Ltd (Chesterton Industries) which was responsible for the distribution of Chesterton products in Gauteng.

[22] The sale of business agreement relates to the purchase by the first applicant of the business of Chesterton Industries. This occurred in 2011.

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[10] See Penta Communication Services (Pty) Ltd v King and Another 2007 (3) SA 471 (C)at par 15 -15; Holdsworth and Others v Reuner Ltd 2013 (6) SA 244 (GNP) par 12 as referred to in Potch Boudienste CC (*supra*) at par 23

[23] The sale of business agreement refers to contracts entered into by Chesterton Industries, operative as at the date of the sale, which were ceded and assigned to the purchaser, the first applicant. The applicants state that the contracts referred to were transferred almost eight (8) years ago. It is to be doubted that the applicants are still in possession of said contracts. In any event, it is submitted that these contracts are irrelevant to issues raised in the present application.

[24] The respondents submit that the applicants rely upon a bald denial of relevance and that they do not set out any basis for that assertion. The objection, it was submitted, amounts to no more than an assertion that the respondents do not require the documents to set out their defences. It is so that the denial of relevance is baldly stated. However, regard must be had to the applicants' founding affidavit. In it, the applicants state that the restraint upon which it relies relates to the provision of certain prescribed services and its prescribed customers, such services and customers as existed at the time of termination. It is in this context that the assertion of irrelevance is to be understood.

[25] In argument, however, Mr *Nepgen* submitted that since the cardinal issue relates to whether the applicants enjoy a protectable interest in respect of its customer base, the requested documents are relevant to the issue. It is not for the applicants to decide what may be relevant to the defences thus far raised. Since there is no contention that the documents are protected by considerations of confidentiality, and no substantive reason for failing to make the documents available has been advanced, the court ought to exercise its discretion in favour of the respondents. The effect will be to not unduly halter the respondents in the presentation of their case.

[26] This court is in an invidious position in determining the relevance of a requested document. It can only base its assessment upon what is before it. That includes the applicants' founding affidavit and the documents annexed thereto. It includes also the content of the affidavits in the application to compel.

[27] The documents that are sought are those referred to in an annexure to the affidavit. A reading of the annexure indicates that the contracts referred to include all contracts entered into by the seller prior to the sale of the business. The ambit of the definition extends beyond agreements with customers. It is in this light that the assertion of relevance to the determination of the existence of a protectable interest must be viewed. Having regard to this the assertion is, in my view, no more than that. I have already pointed to the nature of the applicants' case and its duty to establish its protectable interest as at the date of termination of the employment of the first and second respondents. I am not persuaded that the broad category of documents constituting contracts transferred from Chesterton Industries to the first applicant on sale of the business in 2011 is relevant to the issues now raised. In these circumstances, the disclosure must be refused.

Item 8

[28] This relates to an Annual Business Plan and Performance Review envisaged in the Distribution Agreement which forms part of the sale of business agreement. The Distribution Agreement referred to is a *pro forma* agreement that it was envisaged would be concluded between Chesterton International and the first applicant. That agreement provides for an annual review of the performance of the distributor "*year-to-date against the current year Business Plan and objectives,*

including a year-end forecast respecting same". The respondent seeks disclosure of these reviews from 2011 until 2019.

[29] The respondents contend that these are relevant since they will go to show that the applicant acted in breach of its obligations to Chesterton International and therefore that the applicant does not enjoy a protectable interest. It is difficult to conceive how a business plan review, such as that described above, may be relevant. The terms in which the assertion of relevance is made is in itself speculative. The deponent states that he "anticipates" that the documents may demonstrate the alleged breach. Against this must be weighed the applicants' denial that these documents are relevant to the enforcement of its contractual rights against the first and second respondents.

[30] Similar considerations apply to this category of documents as apply to Item 7. I am accordingly of the view that the requested documents are irrelevant and the request for disclosure is to be refused.

Item 9

[31] In Item 9 the respondents seek disclosure of "written consents" envisaged in Clause 28, the *pro forma* Distribution Agreement annexed to the sale of business agreement. The clause makes provision for the distributor (the first applicant) to enter into contractual agreements with affiliated or subsidiary entities to fulfil its obligations to Chesterton International, with the consent of Chesterton International.

[32] This set of documents it is alleged will establish the applicants' rights to distribute Chesterton products to its customers. Accordingly, they are relevant to a central issue, namely the lawfulness of the interests the applicants seek to protect. Whether that is so or not cannot be definitively determined at this stage. The consent of Chesterton International to distribute its products by entities within the Group of companies of which the first and second applicants are part, may bear upon the enforceability or ambit of the restraint relied upon by the applicants. The mere assertion that this is not so and that the documents are irrelevant is insufficient to find that they are irrelevant. In these circumstances, the respondents are entitled to inspection of the documents described under Item 9.

Item 10

[33] These concern a list of Distribution Agreements which were terminated by Chesterton International on 17 January 2019. In my view, similar considerations apply to these specified agreements as apply to Item 9. The applicants contend only that they are irrelevant and not that their disclosure is protected by considerations of confidentiality. In the circumstances, the respondents are entitled to inspect these documents.

[34] It follows from what is set out above that the respondents are entitled to some of those documents sought by way of the application to compel. In the light of this conclusion it necessarily follows the hearing of the main application ought to be postponed in order to enable the applicants to comply with the order to be made. The order seeking to "amend" the Order of 26 March 2019 is ill-conceived. All that is required is that the main application be postponed for an appropriate period. It

should be mentioned that the respondent's initially sought the further postponement also on the basis of an alleged non-joinder. At the hearing of the matter this point was quite properly not persued.

[35] As indicated at the outset the respondents have filed a provisional answering affidavit. They seek leave to file a "complete" once the documents have been made available. Although there was some argument about the competence of such approach, practical considerations favour it. During argument respondents' counsel accepted that the court ought, however, to make provision for the early enrolment of the main application since the applicants are entitled to its early adjudication.

[36] In regard to costs both parties have in my view achieved success in relation to the application. The final determination, however, will depend upon the established relevance of the documents to be disclosed and the content of the final answering affidavit. Accordingly, the court hearing the main application will be in a better position than this court to determine the costs of this application.

[37] In the result I make the following order:

1. The Applicants are ordered to produce for inspection the documents referred to in paragraphs 9 and 10 of the Respondents' Rule 35(12) Notice and to allow the Respondents to make copies thereof within 5 (five) days from date hereof.
2. The Respondents shall complete the filing of their answering affidavit within 5 (five) days after the Applicants have complied with paragraph 1 above.

3. The Applicants shall file their replying affidavit within 5 (five) days after receipt of the answering affidavits of the Respondents.
4. The main application is postponed *sine die* to be enrolled on the opposed roll on a preferential date on no less than 5 (five) days' notice after filing the Applicants' reply.
5. The costs of the application to compel are reserved for determination by the Court hearing the main application.
6. The wasted costs occasioned by the postponement of the application on 26 March 2019 are postponed for determination by the Court hearing the main application.

G.G GOOSEN

JUDGE OF THE HIGH COURT

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