



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 922/2023

In the matter between:

R700 TRUCK STOP (PTY) LTD

Applicant

and

PIETER IGNATIUS SMIT

1st Respondent

MARNU SMIT

2nd Respondent

MELINDA SMIT

3rd Respondent

ESTEAN SMIT

4th Respondent

HOOPSTAD LANDBOUDIENSTE (PTY) LTD

5th Respondent

CORAM: LOUBSER, J

HEARD ON: 23 MARCH 2023

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 21 APRIL 2023. The date and time for hand-down is deemed to be 21 APRIL 2023 at 15:00

[1] This application first came before Bomela, AJ on 22 February 2023 in the form of an urgent application brought *ex parte* and without notice to the respondents. On that day, the following orders were granted:

- "1. The Applicant's non-adherence to this court's rules related to time periods and service is condoned and the application is heard as an urgent application in terms of Rule 6(12).
2. A rule *nisi* is issued returnable on **23 MARCH 2023** at 09h30, calling upon the Respondents to show cause, if any, why the following orders should not be made final:
 - 2.1 The Respondents are to permanently return to the Applicant the documents and information listed in annexure "**FA4**" to the Founding Affidavit;
 - 2.2 Ordering the Respondents to permanently destroy and/or delete any copy or original documents or information listed in annexure "**FA4**" to the Founding Affidavit;
 - 2.3 Interdicting the Respondents from contacting the Applicant's clients as listed in the clientele list as well as the clients mentioned in annexure **FA6**" to the Founding Affidavit, for purposes of obtaining employment and/or to generate sales, and/or to refer the clients to another supplier and/or to benefit in any way.
 - 2.4 The First to Fourth Respondents are to pay the costs of this application.
3. The orders in prayers 2.1 to 2.3 shall serve as interim interdict with immediate effect pending the aforesaid return date.
4. Pending the aforesaid return date, that:
 - 4.1 The First, Third, Fourth and Fifth Respondents or the person on whom service is effected in terms of paragraph 4.8 below is ordered to allow the sheriff, Jaco Jooste (an accountant from Hoopstad Financial Services acting as an independent supervisor) together with LH Roux (the Applicant's attorney), and Gideon Johannes Pienaar (the director of the Applicant) accompanying them, to immediately enter the following premises, namely **29 Hoofd Street, Hoopstad**, and any vehicles on such premises, for the purposes of searching for, examining and downloading onto a computer storage device, data identified in annexure "**FA4**" to the Founding Affidavit (*"the listed items"*) or which any of the aforementioned persons believe to be listed items, and to deliver to the sheriff such computer storage devices.
 - 4.2 The Second Respondent or the person on whom service is effected in terms of paragraph 4.8 below is ordered to allow the sheriff, Jaco Jooste (an accountant from Hoopstad Financial Services acting as an independent supervisor) together with LH Roux (the Applicant's attorney), and Gideon Johannes Pienaar (the director of the Applicant) accompanying them, to immediately enter the following premises, namely **9 Voortrekker Street, Hoopstad** and any vehicles on such premises, for the purposes of searching for, examining and downloading onto a computer storage device, data identified in annexure "**FA4**" to the Founding Affidavit (*"the listed items"*) or which any of the aforementioned persons believe to be listed items, and to deliver to the sheriff such computer storage devices.
 - 4.3 The Respondents or the person on whom service is effected in terms of paragraph 4.8 below is ordered to permit the said persons to remain on the premises until the search has been completed, and if necessary, to re-enter the premises on the same or the following day in order to complete the search.
 - 4.4 The supervising party shall, together with the sheriff, make a list of all items removed by the sheriff in terms of this order. A copy of this list shall be handed by the supervising party to the Applicant's attorney and to the Respondents or the person to which service was effected, if present, and a copy shall be retained by the sheriff.
 - 4.5 In the event that any of the listed items exist only in computer-readable form, the Respondents or the person to which the service was effected, is ordered to forthwith provide the sheriff with effective access to the computers, with all necessary passwords to enable them to be searched, and cause the listed items

to be displayed on the computer screen so that it may be read and downloaded by or for the sheriff.

- 4.6 All computer storage devices containing the listed items handed to the sheriff pursuant to this order shall be retained by the sheriff until the court orders otherwise. Save as provided that the Applicant shall be given a copy of the listed items immediately upon receipt of such items by the sheriff.
- 4.7 On the return day, there shall be placed before the court the report by the supervising party that a copy thereof was served on the Applicant's attorneys and the Respondents (or their attorney).
- 4.8 Service of this order together with the notice to the Respondents shall be effected by the sheriff on the Respondents or the person in charge of the premises and the contents thereof explained by the supervising party before the provisions of paragraphs 4.1 to 4.3, as the case may be, of this order are carried out.
- 4.9 In addition to the service referred to in paragraph 4.8 above, service of this order together with the notice of motion and supporting affidavits and accompanying notices to the Respondents shall be effected by the sheriff in accordance with the rules of court.
- 4.10 The provisions of paragraphs 4.1 to 4.4 of this order may only be carried out in the presence and under the supervision of the supervising party."

- [2] The respondents anticipated the return date to 13 March 2023, on which date Reinders, J postponed the proceedings to 23 March 2023 for hearing, and the *rule nisi* was extended accordingly, with costs to stand over for later adjudication. On 23 March 2023 the matter came before this court, and judgement was reserved after submissions by the respective counsel appearing for the parties were presented.
- [3] The founding affidavit of the applicant was deposed to by mr. G. J. Pienaar, who described himself as the sole director of the applicant company. The purpose of the application was to have clientele information that belongs to the applicant and that was unlawfully removed by the respondents, returned to the applicant, and to interdict the respondents from using such information for their own interest and benefit, he said in the affidavit.
- [4] Mr Pienaar further stated the following in the affidavit: On 1 October 2021 he purchased the applicant as a running concern. It was the business of the applicant to store diesel in tanks on its premises along the R700 road. Transport companies then purchased diesel from the applicant when their trucks pass the premises on the R700. Prior to the purchase of the applicant, the seller company outsourced the day-to-day operations of the business to the 5th respondent, where the 1st to 4th respondents were employed. When he purchased the

applicant company, he also purchased the entire list of clientele from the 5th respondent, for which he paid the amount of R500 000.00. Mr Pienaar appended to his affidavit proof of the payment.

- [5] It is further stated in the founding affidavit that the purchase of the clientele list was part of a verbal agreement between the applicant, represented by himself and the 5th respondent, represented by the 1st and 4th respondents. In terms of this agreement, the applicant purchased the entire clientele from the 5th respondent, and upon payment of the purchase price, ownership of the clientele would pass to the applicant. The clientele would be used for the sole benefit of the applicant, and the 5th respondent would be refrained from using the clientele for its own or for its member's interests.
- [6] Mr Pienaar further stated that the clientele list with all the specific details of the clients was then given to the applicant in the form of an excel sheet that was stored in a desktop computer on the applicant's premises. The applicant then also employed the 1st to 4th respondent as full-time employees who earned a monthly salary. From then on, the operations of the applicant were managed by the 1st to 4th respondents as the employees of the applicant. They made use of the details on the clientele list stored in the computer in order to run the day-to-day operations of the applicant.
- [7] It is further mentioned in the affidavit that there were negotiations for the purchase of shares in the applicant by the 1st and 2nd respondents. The purchase price would be R800 000.00 for the shares, but this never materialised and the 1st and 2nd respondents consequently never became shareholders of the applicant. However, the 1st respondent became a director of the applicant in October 2021, but he resigned again on 19 October 2022. He did so because his indebtedness to creditors prevented the applicant from obtaining a loan from the bank at the time.
- [8] According to mr. Pienaar, the 1st respondent was later found guilty of serious misconduct in that he had made unlawful payments on behalf of the applicant to the 5th respondent. It was further found that the 1st and 2nd respondents were involved in the theft of diesel from the applicant to the value of R18 500.00. They

agreed to pay back this amount in a written agreement dated 26 January 2023, which is appended to the founding affidavit. In this document, the 1st and 2nd respondents appear to have admitted their involvement in the theft of diesel from the applicant. As a result, the services of the 1st respondent were terminated on 3 February 2023. On the same day, the 2nd, 3rd and 4th respondents resigned from their employment with the applicant, and the 1st to 4th respondents left the applicant's premises on that day.

- [9] When they all left the premises of the applicant on 3 February 2023, they took the computer with them which contains, inter alia, the updated clientele list, the supplier list with updated contact details and updated excel sheet with a recon of diesel purchased by clients and the amount of diesel that the clients have in credit, as well as the dates on which they purchased the diesel, the amount paid, and when they refuelled. According to mr. Pienaar, WhatsApp messages were exchanged between him and the 1st respondent as from 6 February 2023 in respect of this information which the 1st respondent had in his possession. These WhatsApp messages are appended to the founding affidavit.
- [10] In the messages mr. Pienaar demand the return of the "external", that is the device the information is stored on. On 6 February 2023, mr. Pienaar first demanded that the "external" be brought back the following day. On 7 February 2023 the 1st respondent responded by saying "ek sal more by jou uitkom met die external". On 8 February 2023, the 1st respondent informed mr. Pienaar that he had to travel to Bloemfontein urgently and would like to meet with mr. Pienaar the next day, namely 9 February 2023. Mr. Pienaar responded by warning that should the external not be delivered within an hour, he will open a criminal case. According to mr. Pienaar, the 1st respondent failed to respond to his further messages, and the "external" with all the information was never returned.
- [11] The information is of vital importance to the applicant, mr. Pienaar alleged in his affidavit. The applicant uses the client information to keep in contact with its clients. Monthly statements are sent to them to indicate any outstanding payments due, and when any of them had not bought diesel recently, such client is contacted to generate new sales and to ensure that the applicant retains a favourable relationship with its clients. In addition, the applicant is now unable to

properly account for any previous purchases and credit of the clients without the information, and is therefore unable to advise the clients on the status of their accounts. It creates the impression that the applicant does not have its affairs in order, and the applicant will lose business if this continues.

- [12] Lastly, mr. Pienaar mentioned that the applicant needs the information urgently in order to inform its clients of the new contact person who has replaced the 1st to 4th respondents. This would serve to prevent the respondents from contacting the clients directly and thereby to take the applicant's business away.
- [13] After the granting of the order by Bomela, AJ, the 1st respondent filed an opposing affidavit, with the 2nd to 5th respondents filing confirmatory affidavits in support thereof. The 1st respondent states in his affidavit that he owns 42% of the shareholding in the applicant and that he is *de facto* a director of the applicant. He denies that the applicant has ever contracted with the 5th respondent. He further says that the information on the external device in his position had already been delivered to the applicant on 7 February 2023, long before the application was launched. He points out that the bookkeeper of the applicant in any event keeps duplicate records of all the information sought by the applicant, and mr. Pienaar could simply have asked for it
- [14] The 1st respondent also referred to the salient background of the matter, and alleged that during 2021 the then shareholders of the applicant indicated their intention to sell the applicant company. He wanted to buy the company, but he did not have the capital to pay the purchase price. His friend at the time, mr. Pienaar, then offered to pay the purchase price of R1.7 million. The purchase price was for the business of the company and for its clientele. The 1st respondent and Pienaar then agreed that Pienaar would receive a 58% shareholding in the applicant, while the 1st respondent would own 42% of the shareholding. The value of the 42% shareholding was agreed between the two of them to be R800 000.00, which amount the 1st respondent would pay to Pienaar through dividends received and/or profits received from the applicant's income. Further to this, mr. Pienaar would pay a sign-on of R500 000.00 to the 1st respondent through the 1st respondent's wife, trading as Hoopstad Landboudienste. The R500 000.00 had nothing to do with the purchase of

clientele from her or the 5th respondent, he says. It was also agreed that mr. Pienaar and the 1st respondent would be directors of the applicant.

- [15] According to the 1st respondent, he and Pienaar then purchased the applicant per their abovementioned agreement, and they both became directors of the applicant. When the applicant started to experience cash flow difficulties soon thereafter, they applied for a working capital loan, but the bank declined the application due to the credit score of the 1st respondent. The 1st respondent and Pienaar then resolved on 1 and 19 October 2022 to remove the 1st respondent from the applicant's official CIPC records as a director for the purpose of obtaining finance for the applicant. The 1st respondent appended the resolutions to this effect to his affidavit. In terms of those resolutions, the 1st respondent resigned as a director until such time as the facilities provided by the bank are registered. In the meantime, all decisions concerning the applicant must be taken with the co-operation and with the consent of both the 1st respondent and mr. Pienaar. As things turned out, mr. Pienaar never managed to obtain finance from the bank thereafter despite the 1st respondent having been removed as a director. The loan application was declined. Notwithstanding, he remained a *de facto* director of the applicant, the 1st respondent says. He also continued to work for the applicant and to make contributions to its operations.
- [16] The 1st respondent also denies that he or the 2nd respondent ever stole money or defrauded the applicant. He explained that at the time, he and mr. Pienaar would obtain funds from other entities on the pretext that the applicant had sold fuel to such entities, which never in fact happened. In turn, the applicant would then provide credit in the form of deliverable diesel to the entity. This was all done with Pienaar's involvement and consent. The 1st respondent appended WhatsApp messages between him and Pienaar, which he alleges to be proof of his allegations in this respect. In some instances, the money so obtained by the 1st respondent would be deposited in his own account or in the account of the 2nd respondent.
- [17] The 1st respondent further conceded that he and the 2nd respondent have signed the last page of the agreement between the parties dated 26 January 2023, in terms of which they undertook to pay back the R18 500.00 to the

applicant. They signed this document under duress, he says, because Pienaar threatened to have them arrested by the police. On 6 February 2023 Pienaar dismissed him from his employment, and on the same day the other respondents resigned and left the applicant's premises. The 1st respondent says that when he left, he took some of his personal effects and his external storage device and left the premises. On 7 February 2023 the 4th respondent attended the premises of the applicant and transferred all the information and duplicated it from the external device to Pienaar's desktop computer. After this, Pienaar declined the suggestion of a round table meeting and threw out all the 1st respondent's movable property stored at the applicant's premises on the street, he says.

[18] The 1st respondent also disputes the authority of Pienaar to act on behalf of the applicant in these proceedings. He says that he did not sanction this, and Pienaar cannot so act in his absence. This is so, because Pienaar is not the sole director of the applicant. He, the 1st respondent, is also a director and still a shareholder of the applicant.

[19] The 1st respondent further states that, by virtue of his 42% shareholding, he also owns the client list. There is no basis upon which the applicant can prevent him or any other respondent to trade freely, he says. The information sought is not confidential nor worthy of protection by way of an interdict. Despite this, he had intended to hand over the information to the applicant.

[20] In his replying affidavit, mr. Pienaar states the following: He denies most of the allegations in the opposing affidavit, and points out that the purchase price of R800 000.00 for the shares was never paid by the 1st respondent. He therefore did not become a shareholder. The information contained in the external drive was also not delivered on 7 February 2023. Although the 1st respondent was a director since October 2021, he resigned on 26 October 2022 and has never been appointed as a director ever since. The certificate dated 27 October 2022 and signed by a professional accountant, shows that mr. Pienaar was the sole director of the applicant on that date. A CIPC document shows that the 1st respondent was not again appointed as a director after his resignation. Currently the police are investigating a case of fraud or theft against the 1st and 2nd respondents, and as a result, the bank has frozen their accounts. Mr. Pienaar

also denies the allegation that the agreement of 26 January 2023 was signed under duress. He furthered denies that the respondents' property were thrown out on the street. In this respect he appended WhatsApp messages indicating that he warned the respondents in good time to remove their belongings, and that the 2nd respondent undertook to make arrangements to this effect. When the respondents failed to remove their belongings, Mr. Pienaar placed them outside the applicant's office on the premises, where they were later collected. The belongings were not thrown out in the street.

- [21] It is further stated in the replying affidavit that the applicant is not preventing the respondents to trade freely. The applicant is merely attempting to restrain the respondents from contacting its clients, which clientele the applicant obtained through a sale agreement. Mr. Pienaar further suggested that the court refer the issue of the payment of the R500 000.00 and the reasons for the payment for oral evidence, since these issues arose from a *bona fide* dispute that could not have been foreseen at the launching of the application.
- [22] Now it must be clear from the above exposition that there is a multiplicity of factual disputes between the parties on the papers before the court. In such circumstances a court may only find in favour of the applicant if it is satisfied that, on the facts stated by the respondent together with the admitted facts in the applicant's affidavits, the applicant is entitled to relief.¹ The court will follow this course in deciding the material issues in this application.
- [23] To begin with, the respondent states in his opposing affidavit that, per their agreement, Pienaar paid the purchase price for the applicant, which included the business of the applicant and its clientele. While it remains in dispute that the R500 000.00 paid by Pienaar was for the clientele, it is not in dispute that Pienaar in fact did pay an amount of money for the clientele when he purchased the applicant. For this reason, it would serve no purpose to refer the reasons for the payment of the R500 000.00 for oral evidence. Whether Pienaar had paid that amount or any other amount for the clientele, makes no difference. The fact remains that Pienaar had paid something for the clientele, which fact shows that

¹ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635

the clientele was regarded by both Pienaar and the 1st respondent as something with value.

- [24] The 1st respondent further states that after his dismissal by Pienaar, he took some of his personal effects and the external storage device with the information of clientele on it with him when he left. It remains in dispute whether the information on the external device were transferred to Pienaar's desktop computer on 7 February 2023. The 1st respondent states that he had intended to hand over the information to Pienaar. If this was the position on 7 February 2023 it does not make sense because the 1st respondent had sent a message to Pienaar on the same day saying that he would return the external device the following day, 8 February 2023. It follows that Pienaar's evidence must be accepted that the 1st respondent is still in possession of the external device because it was not returned on 8 February 2023. It must also be accepted that the information on the device were not transferred on 7 February 2023. Therefore, the information sought by Pienaar, which he had purchased on behalf of the applicant, is still in possession of the 1st respondent.
- [25] The respondents provide no explanation for their possession of the information. The only reason one can think of is that they want to use the information for their own purposes and benefit. In any event, if they have no intention of doing so, then the final relief sought in this application will not affect them.
- [26] The 1st respondent's stance that he is a director and a shareholder of the applicant, is without any substance. Since the applicant never managed to get a loan from the bank, the 1st respondent never became restored in his position as a director. The claim of the 1st respondent that he is a *de facto* director of the applicant, is also without any merit. The official documentation show that he is not a director at all. In addition, there is no merit in his averment that he is still a shareholder of the applicant. On the contrary, he has not paid the R800 000.00 for his shareholding and he can therefore not claim to be a shareholder at all. Also keeping in mind that the 1st respondent was dismissed before the application was launched, I find that mr. Pienaar had the necessary *locus standi* to launch these proceedings on behalf of the applicant.

- [27] The allegation that the 1st and 2nd respondents signed the document under duress, acknowledging their indebtedness to applicant because of theft and fraud, must also be rejected. If they had such a solid defence to such charges as they make out in the opposing papers, one can only wonder why they were afraid of the police at the time.
- [28] A further unsatisfactory element of the respondents' version appear from the allegations that the 1st respondent's possessions were thrown out on the street by Mr Pienaar. Mr Pienaar produced WhatsApp messages showing that he had requested the removal of the positions in good time, and that the 2nd respondent had undertaken to remove same. It was therefore not a situation where the possessions were simply thrown out without formality.
- [29] The respondents contend that the information sought is not confidential nor worthy of protection by way of an interdict. If this was the case, then the question arises why the 1st respondent, on his own version, intended to hand over the information to the applicant. According to him, the information was indeed handed over on the 7th February 2023 by the 4th respondent. If this was the case, the further question arises why the applicant had deemed it necessary to launch this application. In this respect it needs mentioning that the case for the applicant goes further than a mere reliance on the confidentiality of the information. Its case is also based on the fact that mr Pienaar had paid for the clientele list, that the applicant needs the list to stay in contact with its clients in order to conduct its business properly, and that the respondents should be prevented from using the list to the prejudice of the applicant.
- [30] The conclusion is inevitable that the applicant is the owner of the clientele list and the information relating to each client. A final order will not prevent the respondents from trading freely. It will only prevent them from using the information on the clientele list in doing so.
- [31] As far as paragraph 4 of the order made by Bomela, AJ is concerned, the supervising party did provide the court with his report. In the report, he informs that the 1st respondent has handed over a computer box and an external hard

drive to him. Since very little information could be gained from these sources because of an absence of passwords, it was sent to specialists in Johannesburg to be examined forensically. This task is still ongoing, according to the report.

[32] Having regard to the version presented by the respondents, it is common cause that the applicant had paid for the clientele list, that the 1st respondent had removed the external device with all the clientele information stored on it, that the respondents are still in possession of the device, and that they are refusing to return it. I am therefore of the view that a punitive costs order would be appropriate. The following order is made:

1. The rule nisi issued by Bomela, AJ is confirmed and made a final order of court.
2. The respondents are ordered to pay the applicant's costs on the attorney and client scale, inclusive of the costs occasioned by the postponement of the application on 13 March 2023.



P. J. LOUBSER, J

For the applicant:	Adv. M. C. M. Pieterse
Instructed by:	Pieter Skein Attorneys
	Bloemfontein

For the respondents:	Adv. S. Grobler SC
Instructed by:	Kruger Venter Attorneys
	Bloemfontein