

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 1179/21P

In the matter between:

S D NOORGAT TRADING ENTERPRISE CC	APPLICANT
T/A POWERTRADE CASH AND CARRY (FOCUS GROUP)	

and

IRFAAN DEEN MAHOMED	RESPONDENT
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ORDER

The following order is granted:

1. The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.
2. The applicant is directed to pay the costs consequent upon the hearing of 10 June 2021, as well as the costs incurred by the respondent as a result of the applicant's opposition to the respondent's application for condonation, such costs to include the costs consequent upon the employment of two counsel.

JUDGMENT

BEZUIDENHOUT AJ

Introduction

[1] The applicant, SD Noorgat Trading Enterprise CC trading as Powertrade Cash and Carry (Focus Group), is seeking far reaching final interdictory relief against the respondent, Mr Irfaan Deen Mahomed, who was previously employed by the applicant as a senior buyer, and who the applicant claims is in possession of its confidential or sensitive information.

[2] The respondent informed the applicant on 4 February 2020 that he intended to resign from the applicant's employment with effect from 29 February 2020.

[3] On 23 February 2021, the applicant instituted the current application against the respondent, seeking the following relief in the form of a rule *nisi*:

'1.1 The respondent is interdicted and restrained forthwith from utilising or disclosing in any way to any third party the confidential information of the applicant and in particular the confidential information relating to the applicant's:

1.1.1 suppliers and business associates;

1.1.2 marketing strategies;

1.1.3 contractual arrangements between the applicant, its suppliers and business associates;

1.1.4 financial details including credit and discount terms relating to the applicant's suppliers;

1.1.5 the details of prospective and existing customers;

1.2 The respondent be interdicted and restrained from soliciting business from the applicant's suppliers and from engaging himself or through any third party the confidential information he received whilst employed by the applicant in relation to the applicant's business;

1.3 The respondent is interdicted directly or indirectly or for the benefit of any other person or entity from approaching associates including suppliers of the applicant and holding out to be still in the employ of the applicant;

1.4 The respondent is ordered to deliver to the applicant all and any hard copy documents and the hard drive in his possession relating to the copied documents of the applicant's business referred to in paragraph 16 of the founding affidavit [which I may add, contains a vague reference to certain information such as the product item, cost price of the item, where the item sells best, the discount granted by the supplier etc];

1.5 The respondent is ordered to delete from any electronic medium, including any computer, hard drive, flash drive, cloud storage and any other medium of any nature

whatsoever the specific details downloaded by him from his computer and referred to in the founding affidavit or any part thereof;

1.6 The respondent is directed to bear the costs of the application, such costs consequent upon the employment of two counsel.'

[4] The respondent opposed the application and filed an answering affidavit whereafter the applicant filed its replying affidavit. As a result of new facts being raised in the replying affidavit, the respondent was granted leave by Van Zyl J on 10 June 2021 to file a supplementary affidavit by 15 August 2021 in response to the applicant's replying affidavit, which he did, albeit out of time. The respondent filed an application for condonation for the late filing of the supplementary affidavit, which was opposed by the applicant. At the commencement of the hearing of the matter before me, I indicated to applicant's counsel that I was inclined to grant condonation and would prefer not to waste time on the argument of the condonation application. The applicant's counsel elected not to pursue the opposition of the condonation application and instead chose to proceed with argument on the main application.

Background

[5] It is common cause that the respondent was employed by the applicant for a period of approximately 18 years at the time when he resigned in February 2020. As mentioned above, he was employed as a senior buyer at the time. The parties did not enter into an employment contract at any stage. The applicant conducts business by *inter alia* providing health and beauty services by selling haircare and healthcare products, toiletries and household goods at eight stores within KwaZulu-Natal.

[6] Before his resignation, the respondent was responsible for securing goods and commodities from various suppliers for placement in the applicant's stores.

[7] It is the applicant's case that the respondent, during his employment, *inter alia* gained intimate knowledge of the identity of its various suppliers, knowledge regarding the costing of goods supplied, and awareness and personal knowledge of which products sold at which localities depending on the customer basis at such localities. Over time, the applicant conducted a comprehensive analysis of all products and particularly which products did well at which stores, which resulted in

generating more profits and reducing losses. Discounts were furthermore obtained from the applicant's suppliers in relation to substantial purchases of only certain products using these so-called tried and tested methods of the applicant to ensure that these particular products would sell well.

[8] The applicant also alleges that this information which the respondent now possessed is critical and any new or existing enterprise would benefit greatly from the information 'in that it would not require to purchase a range of products within a particular line given the already tried and tested method used by the applicant'.

[9] The respondent, on the other hand, alleges that the applicant uses methods applied by other similar stores such as Dischem and Clicks, and that there is nothing exclusive about the methods or processes used by the applicant. The respondent's current employer, the Save Group, where he commenced working at in March 2020, has over time formulated its own models of how to place products in particular stores for particular markets, based on its own research and analysis of its sales.

[10] Although disputed by the applicant, it is clear from the evidence before me that the respondent resigned from the applicant's employment on 4 February 2020, and subsequently indicated in an email dated 5 February 2020 that his resignation will be effective from 29 February 2020. It is common cause that the respondent had been provided with a laptop by the applicant, which he utilised up until it was returned to the applicant around 17 February 2020.

[11] On the applicant's version, it became aware shortly after the laptop was returned to it, that the respondent had saved all the data and information relating to the applicant's business on an external hard drive and also emailed such data to his personal email account. The information and data had then been deleted from the laptop prior to its return to the applicant.

[12] The applicant also became aware that the respondent had contacted one of its service providers, a company referred to as 4Most. In its founding affidavit, it is alleged very specifically that the respondent contacted 4Most under false pretences, 'requesting their assistance in uploading data from an Excel spreadsheet, into the

SAP business 1 system'. The respondent apparently specifically requested 10 000 items to be uploaded. The applicant alleges that this information would include *inter alia*, the product item, its cost price, the locality where the item sells best, the discount granted by the supplier in respect of bulk purchases, and the products in particular ranges which sell well.

[13] Although it is common cause that the respondent commenced working for the Save Group, it is the applicant's case that the Save Group was in the process of expanding their health and beauty section, and that the information retained by the respondent 'would be of critical importance to his new employer as it will allow them to easily identify those commodities that they should focus on without having to undergo the exercise the applicant had undertaken for the past 20 odd years'. The applicant anticipated a substantial loss in revenue. The applicant provided no further information as to where the Save Group's stores are located in relation to its own stores, in respect of which the retained information would have been utilized. The Save Group has furthermore not been joined to these proceedings.

[14] The respondent denies that he contacted 4Most under false pretences. The respondent attached the actual email sent by him to 4Most on 7 February 2020, from which it appears that he requested a quote 'on only the Master Data Import function for now'. He also informs 4Most that he has around 10 000 line items that he requires to be imported and sets out a list of criteria. He used the applicant's company information and contact details together with his own name. The respondent was still in the applicant's employ but was on leave, and continued to respond to emails and assisted some of the other employees.

[15] The respondent explains at length that he had previously, during or about 2016, been requested by the applicant to import in excess of 10 000 items or products onto the applicant's SAP software in order to generate a master data file which would be used as an electronic automated catalogue of the products kept in stock by the applicant. The applicant was not happy with the costs a service provider would charge and requested the respondent to do it manually, which he did in his personal time over a period of three weeks. The applicant apparently agreed to remunerate the respondent for this work done.

[16] At the time of the respondent's resignation, the applicant had not paid the respondent for this work done, and according to the respondent, that was the purpose of requesting the quotation from 4Most. The quotation would be forwarded to the applicant 'to prove the amount owed to me for this work based on what the service provider would have charged for doing the same work'.

[17] It is the respondent's version that Mr MFS Noorgat, the deponent to the applicant's founding affidavit, contacted him telephonically after his resignation to discuss his alleged claims against the applicant. During this conversation, Mr Noorgat accused him of using the company email without permission and of 'taking company information'. The respondent explained to him why he had emailed 4Most and why he retained the information.

[18] The respondent also sent an email to the applicant on 10 March 2020, which came about after Mr Noorgat contacted the respondent's employer, and during which conversation he defamed the respondent and tried to persuade his new employer not to keep him on. In the email, the respondent confirms that he was asked by the applicant to import all 10 000 items onto SAP so as to allow SAP to create the master data file, that he completed the task after normal working hours 'due to its urgency' and that the quotation requested from 4Most was to enable him to provide a quantification of the work done by him in Rand value. The email was not referred to in or attached to the applicant's founding affidavit.

[19] The applicant's attorney of record forwarded a five page letter dated 26 March 2020 to the respondent. The letter referred to the company laptop, which had been provided to the respondent to work from and reference was made to 'all data that was copied off the company server and stored on this laptop'. Reference was made to the respondent's alleged failure to replace stock timeously and accurately, and in most cases not at all. It was also alleged that as a result, the applicant's business has suffered a huge financial loss.

[20] The respondent was furthermore accused that he 'deliberately and maliciously set about sabotaging' the applicant's business. Also, that he made

misrepresentations to suppliers in order to cause harm to the applicant's business and that he deliberately reduced quantities that were required for the conduct of applicant's business.

[21] It was further noted in the letter that as an employee, the respondent had regularly downloaded information from the applicant's server and saved it on the company laptop, and that it consisted of complete lists of items and sales information, current and historical. It was also noted that after being requested to return the laptop, the respondent saved all the data on an external hard drive and emailed such data to his personal account.

[22] The respondent was referred to the email that he had sent to the applicant's service provider on 7 February 2020. In contrast to what the actual email says, the respondent was accused of 'requiring their assistance in uploading data from an excel spreadsheet'. The respondent was warned that the use of company data was a criminal offence and that his actions in downloading the data could result in financial loss and harm to the applicant.

[23] The applicant's attorney also issued a list of demands, and failing compliance with, it would proceed to the high court, interdicting the respondent from using the stolen data at the business of his present employer and requesting the return of the data.

[24] The respondent sent a reply to the applicant's attorney's letter in an email dated 23 April 2020. He indicated that he first received the letter dated 26 March 2020 via email on 21 April 2020 and that due to the national lockdown, he was unable to obtain legal advice to respond more fully to the letter.

[25] The respondent expressed his concern at certain aspects of the letter and stated that he was responding to the letter to avoid being drawn into unwarranted and unnecessary litigation. He informed the applicant's attorney that he had 'certain potential claims' arising from his previous employment with the applicant which he would consider more closely once he had obtained legal advice. He remarked that 'it

is apparent that your client's allegations in your letter are aimed at dissuading and hamstringing' him from pursuing such claims.

[26] The respondent also stated that the content of the letter was based on incorrect facts, and that events such as his resignation, were discussed between himself and the applicant from 1 February 2020 up to 10 March 2020, which had not been referred to in the letter. He also wrote the following:

'I categorically deny the allegations contained in your letter and specifically deny that I acted fraudulently or unlawfully in any way whatsoever, neither have I caused your client any financial loss prior to or subsequent to my resignation. This will be borne out by the fact that your client asked me to return to its employ during February 2020....

I have not made unlawful use of any of your client's confidential data or other business information to the benefit of myself, my current employer or any other party. As I have stated above the work laptop has been returned to your client.

The only information I have retained relates to proving any claim I may have in law against your client which I will take advice on in due course as I am entitled to. With the greatest of respect to your client, my present employer is a well established wholesale and retail supermarket chain with hundreds if not thousands of product lines which do not even fall into the category of products which your client provides.

I digress to mention that your client has contacted my present employer, messaged and called me threateningly and made defamatory statements about me to my present employer.'

[27] The respondent concluded his email by saying that he did not want to engage in unnecessary and costly litigation and offered to discuss any further issues at a meeting which could be arranged after the lockdown was lifted. The applicant did not attach or refer to this email by the respondent in its founding affidavit.

[28] No further steps were taken by the applicant after the respondent sent his email of 23 April 2020. Mr Noorgat however instituted an action out of the Pietermaritzburg Regional Court against the respondent for repayment of monies in respect of a loan advanced to the respondent. It was pleaded that the respondent

was employed by Mr Noorgat in his personal capacity as a sole proprietor. The respondent defended the matter and an application for summary judgement followed. The respondent indicated in his opposing affidavit that he intended instituting a claim against the applicant for monies due, owing and payable to him arising out of his employment with the applicant (who was not a party to that litigation). His opposing affidavit was delivered on 2 February 2021, and an order was taken by consent, refusing summary judgement on 4 February 2021. As mentioned above, the present application was instituted by the applicant on 23 February 2021, a few weeks later.

[29] In returning to the present application, the applicant, in its founding affidavit referred to and attached a report it obtained from a computer expert, Mr Sean Morrow of Paradigm Forensic Services (Pty) Limited. The services of Mr Morrow were sought because of the delay in the return of the laptop by the respondent, and after it was established that information on the laptop had been deleted.

[30] In his report dated 17 November 2020, Mr Morrow concluded *inter alia* that the respondent had intentionally and without authority 'deleted/destroyed all data relating to the business activities of The Focus Group from the laptop . . . in so doing he deprived The Focus Group of access to that data', that the respondent intentionally copied data to an external drive prior to deleting all the data, and in so doing, that he may have obtained an unfair advantage as he had access to their data, to which they no longer enjoyed access.

[31] The respondent in his answering affidavit pointed out that the data which he dealt with during his employment with the applicant and which he had saved on his external hard drive, was saved on the applicant's server, and that the applicant had not lost any information due to his actions. The conclusions by Mr Morrow were therefore incorrect. The applicant failed to address this issue in its replying affidavit. The respondent also explained that when he received the laptop in September 2019, the data on it had been wiped clean. The laptop only contained the profile of Mr Farouk Noorgat and the applicant was aware that the respondent used the laptop under this profile. The respondent also stated that he deleted all the data on a weekly basis and reloaded updated files from the applicant's server to avoid

duplications and to manage available storage. The respondent invited the applicant to request Mr Morrow to comment on this aspect but the applicant did not do so in reply.

[32] The respondent repeated what was contained in his email of 23 April 2020 in that the information which he retained was necessary to quantify and prove his claim against the applicant. He also stated that the information retained was material to him in asserting a defence against the applicant's allegation that he had deliberately and/or negligently caused it to suffer damages in the performance of his work duties towards the latter part of his employment with the applicant.

[33] From both the respondent's answering affidavit as well as his supplementary answering affidavit, it is made clear that the information which he downloaded consisted of his pivot tables, the information relating to the incentives paid to the applicant by the Shield Group (which incentives were allegedly not paid over to the respondent) and stock and sales lists and purchase orders. These documents would demonstrate that the stock levels were adequate and that the applicant did not suffer any financial losses, as alleged by the applicant's attorney in his letter of 26 March 2020 and would also serve to prove his claims against the applicant.

[34] The applicant, in his founding affidavit, also refers to the so called pivot tables, extracted and downloaded by the respondent, as being company information unlawfully procured by the respondent. In his answering affidavit as well as in his supplementary answering affidavit, the respondent was at pains to explain that the pivot tables were not company information but something he had formulated as an IT tool after conducting research on the internet, to assimilate and analyse data to do his job. The pivot tables themselves did not contain any permanent information or data and was merely a formula which the respondent shared with the applicant's other employees.

[35] The deponent, on behalf of the applicant, in its replying affidavit (which I may point out dealt only with a limited number of issues raised by the respondent together with a very general bare denial of the remaining allegations) mentioned for the first time that he had received a phone call from the respondent's new employer, Mr

Faheem Noorgat, in March 2020, apparently enquiring as to what the issues were between the applicant and the respondent. Mr Faheem Noorgat was advised that the respondent was in possession of the applicant's sensitive information and data. Mr Faheem Noorgat advised that he would talk to the respondent and that he would get back to him – which he allegedly did. The respondent apparently denied being in possession of sensitive information but that he 'had taken' a few pivot tables. Mr Faheem Noorgat allegedly also advised that the respondent had offered the pivot tables to his new employer.

[36] In response to these allegations, an attorney acting on behalf of the Save Group, referred to as Save Wholesalers Cash and Carry CC, the respondent's current employer, wrote a letter to the applicant's attorney on 7 June 2021, indicating that he has had sight of the application papers, including the applicant's replying affidavit. It was *inter alia* denied that Mr Faheem Noorgat stated that the respondent had offered the pivot tables to his new employer. It was also denied that any alleged business expansion by the Save Group was as the result of information originating from the applicant. The respondent also denied these allegations by the applicant and stated that his current employer uses advanced software that carries out a similar exercise and that the applicant's information would be useless. He also pointed out that offering his previous employer's information to his new employer would create the perception that he cannot be trusted with confidential information.

Legal principles and applicable case law

[37] It is clear from the limited facts set out above that a number of factual disputes are apparent. Counsel for the applicant as well as the respondent have in their heads of argument referred to the approach to be followed in application proceedings. In the well-known matter of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,¹ the court held that where

' . . . disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.'

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-I.

[38] Counsel for the respondent, in their heads of argument, also referred to *Wightman t/a JW Construction v Headfour (Pty) Ltd and another*² where Heher JA said the following:

‘[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers . . .

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. . .’

[39] Counsel for the applicant submitted, quite rightly, that the matter should be determined on the respondent’s version. It is common cause that the respondent downloaded information onto his external hard drive. It was submitted that it does not matter whether the respondent intended to make use of the information, and whether it was for a lawful purpose or not, what matters is that the respondent downloaded information which belongs to the applicant, and to which the respondent is not entitled to. It was submitted that the fact that the respondent had the information is the end of the story, from which I understood the submission to be that the mere act of downloading and possessing the applicant’s confidential information justifies the final relief being claimed by the applicant.

[40] Counsel for the respondent, in their heads of argument, furthermore referred to *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others*³ in terms of which the applicant is required to make out his or her case in the founding affidavit. A litigant should furthermore not be allowed to try and make out a

² *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) paras 12-13.

³ *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) para 43.

case in a replying affidavit. The founding affidavit must furthermore contain sufficient facts in itself upon which a court may find in the applicant's favour.

[41] In *Amler's Precedents of Pleadings*,⁴ reference is made to a general duty not to use confidential information, which may be protected by an interdict. The essential allegations are listed as follows:

- '(a) The plaintiff must have a proprietary, quasi-proprietary or other legal interest in the confidential information.
- (b) The information must have had the necessary quality of confidentiality.
- (c) A relationship, usually contractual, between the parties, which imposes a duty (expressly, impliedly or tacitly) on the defendant to preserve the confidence of the information. An example of a contractual relationship is that between employer and employee or between partners and business associates . . .
- (d) The defendant must have had knowledge of the confidentiality of the information and its value. (Actual knowledge is probably not required.)
- (e) Improper possession or use of the information, whether as a springboard or otherwise, by the defendant.
- (f) Damages suffered, if any.'⁵ (Case references omitted.)

[42] The essential allegation which in my view requires careful thought is whether it can be found that the respondent improperly possessed or used the information downloaded by him, as a springboard or otherwise.

[43] Counsel for the applicant, in their heads of argument, referred to *Waste Products Utilisation (Pty) Ltd v Wilkes and another*⁶ where the court examined in detail the six essential allegations referred to by *Amler's*. The following was said with regard to springboarding:

"Springboarding" entails not starting at the beginning in developing a technique, process, piece of equipment or product, but using as the starting point the fruits of someone else's labour. Although the springboard concept applies in regard to confidential information, the misuse of the fruits of someone else's labour may be regarded in a suitable case as unlawful even where the information copied is not confidential.'⁷

⁴ LTC Harms *Amler's Precedents of Pleadings* 9 ed (2018) at 93.

⁵ Ibid at 93-94.

⁶ *Waste Products Utilisation (Pty) Ltd v Wilkes and another* 2003 (2) SA 515 (W).

⁷ Ibid at 582F.

[44] It was furthermore held that '[i]n terms of the springboard doctrine, an interdict against the use of confidential information may be limited by the duration of the advantage obtained, or the time saved, by reason of having had access to the confidential information'.⁸ Reference was made to *Multi Tube Systems (Pty) Ltd v Ponting and others*⁹ where Broome J dismissed an application for an interim interdict where the application was only launched some six weeks after the offending behaviour was discovered. Broome J said the following:

'... I take the view that the unfair advantage of the headstart or springboard is usually of limited duration and that there must come a time when the matters in question are no longer secret and that an interdict would not then be warranted.'¹⁰

See also in this regard *Valunet Solutions Inc t/a Dinkum USA and another v eTel Communication Solutions (Pty) Ltd*.¹¹

[45] At the commencement of the hearing before me, I asked counsel for the applicant to address me on *Multi Tube*, especially in light of the remarks by Broome J and the delay by the applicant in only instituting the application a year after the respondent's resignation. It was submitted that the facts of the present matter were distinguishable from those in *Multi Tube* and that there can furthermore be no limit to the time period when dealing with the applicant's personal information. I will return to this issue in due course.

[46] As far as the relief being claimed by the applicant is concerned, counsel for the applicant indicated that he would be seeking the relief as set out in the notice of motion in the form of a final interdict, subject to an amendment to para 1.2, which I will deal with should it become necessary. I was referred to *Southern African Institute of Chartered Secretaries and Administrators v Careers-in-Sync CC*¹² and in particular to the relief granted by Weiner J. It was submitted that the relief being claimed by the applicant was loosely based on the orders granted by Weiner J. From

⁸ Ibid at 583F-G.

⁹ *Multi Tube Systems (Pty) Ltd v Ponting and others* 1984 (3) SA 182 (D).

¹⁰ Ibid at 189H-I.

¹¹ *Valunet Solutions Inc t/a Dinkum USA and another v eTel Communication Solutions (Pty) Ltd* 2005 (3) SA 494 (W).

¹² *Southern African Institute of Chartered Secretaries and Administrators v Careers-in-sync CC* [2014] ZAGPJHC 283 (the pdf version).

her judgment, it is clear that Weiner J undertook a detailed discussion of the relevant case law relating to the misuse of confidential information. She dealt with each of the essential allegations referred to by *Amler's* separately and held the following regarding improper possession:

[62] The applicant further contends that having taken possession of the appointments register upon the commencement of its contractual obligations and following its receipt of information distributed to it on a confidential basis by the applicant's members under the auspices of the applicant, the respondent cannot treat this body of information as its own. The conduct of the respondent when viewed against the backdrop of the terms of the SLA in continuing to make use of the information that comprises the appointments register in the furtherance of its own business interests is wrongful and gives rise to the delict of unlawful competition.

...

[65] By seeking to retain the appointments register in the furtherance of its own business endeavours the respondent will gain an unfair advantage or "springboard" over the applicant, which is neither legally justifiable nor one that it is legally entitled to (see *Multi Tube Systems (Pty) Ltd v Ponting and others* 1984 (3) SA 182 (D) at 189; see also *Waste Products Utilisation (supra)* at 582).'

[47] These findings are important, especially in light of the submissions by counsel for the applicant to the effect that what is relevant is that the information downloaded by the respondent is the applicant's information, and that it is irrelevant that it could be useful to the respondent's new employer. With reference to the respondent's version that he has not made use of the information unlawfully, it was submitted that it did not matter, as the mere fact that he downloaded the applicant's information was sufficient to entitle the applicant to the relief sought.

[48] I was also referred to *Traka Africa (Pty) Ltd v Amaya Industries and another*¹³ by applicant's counsel, as the relief claimed by the applicant in paragraph 1.1 of the notice of motion is likewise loosely based on the order granted by Adams AJ. The matter related to a confidentiality agreement entered into between the parties, and it was evident that the respondent had used confidential information after his resignation when he emailed quotes to the applicant's clients. Adams AJ rejected the respondent's version as being far-fetched and also noted that the respondent at no

¹³ *Traka Africa (Pty) Limited v Amaya Industries and another* [2016] ZAGPJHC 24.

stage offered to return the information which he had acquired to the applicant. The applicant's counsel also placed specific reliance on what was held at para 53, namely that it did not avail the respondent to claim that he had no intention of using the applicant's information. The finding was substantiated with reference to *Experian South Africa (Pty) Ltd v Haynes and another*¹⁴ where the court dealt with the enforcement of a protectable interest in a restraint agreement. The facts and circumstances are however clearly distinguishable from the present matter. Counsel for the applicant was at pains to point out that the applicant in this matter is not relying on any type of restraint of trade clause or agreement between the parties.

[49] As far as the essential allegations referred to by *Amler's* is concerned, counsel for the applicant did not make any particular submissions in this regard before me during argument but some of the essential allegations were addressed in the heads of argument, albeit to a very limited extent. It was submitted that the evidence shows on a balance of probabilities that:

- (a) The applicant has an interest in the information acquired by the respondent;
- (b) The information appropriated by the respondent was the applicant's confidential information;
- (c) The respondent had a contractual relationship with the applicant which imposed a duty on him to preserve the confidence of the information imported to him during the course of his employment with the applicant;
- (d) The respondent knowingly misappropriated the information to the prejudice of the applicant.

[50] In *Rectron (Pty) Limited v Govender*¹⁵ Levinsohn DJP, as part of a full bench on appeal, held (as per the head note) :

'that the appellant bore the onus of proof in respect of the proprietary interests sought to be protected. The court found that there was no reasonable possibility that the first respondent would use the confidential information of the appellant. It also considered whether the appellant's rights to protection of its confidential information relating to its customers' needs and buying patterns was outweighed by the respondent's right not to be economically inactive. The court found that the respective bargaining positions of the parties to the

¹⁴ *Experian South Africa (Pty) Ltd v Haynes and another* 2013 (1) SA 135 (GSJ).

¹⁵ *Rectron (Pty) Limited v Govender* [2009] JOL 23969 (N).

restraint agreement were such that the respondent's rights to be economically active had to be given greater weight.'

The court dismissed the appeal.

[51] As far as the requirements for a final interdict is concerned, it is trite that a court must be satisfied that the applicant has a clear right, that an injury has actually been committed or is reasonably apprehended, and that there is no other satisfactory remedy available to the applicant. Both sides referred me to *Setlogelo v Setlogelo*¹⁶ in which these requirements are clearly set out.

The applicant's contentions

[52] The applicant's counsel concentrated most of his efforts on one of the respondent's reasons for downloading the applicant's information, namely to quantify his claim against the applicant. A lot was made about how the claim, which was attached to the respondent's supplementary affidavit, was formulated. It was suggested that the respondent could simply have copied the information regarding the amounts instead of downloading all the information he did.

[53] It was also submitted that the respondent could have requested the information utilising the provisions of the Promotion of Access to Information Act 2 of 2000, instead of 'stealing' the information from the applicant.

[54] I requested the applicant's counsel to address me on the 'with prejudice' tender made by the respondent in a letter dated 21 September 2021, namely that he will delete all the applicant's information provided that an undertaking is given that the applicant will not pursue a damages claim against the respondent, failing which, the respondent will place the hard drive together with all hard copies in the custody of the registrar of the high court for safekeeping for use in the pending action and any future actions. The response by counsel was simply that it was too late.

[55] Very little was said about the respondent's other reason for downloading the information, namely to protect himself against the damages claim which the respondent was threatened with in no uncertain terms by the applicant's attorney.

¹⁶ *Setlogelo v Setlogelo* 1914 AD 221.

[56] Counsel for the applicant persisted with the relief in the notice of motion, despite the fact that at the time of the hearing, some 20 months have elapsed since the respondent had left the employment of the applicant.

[57] Counsel for the applicant conceded that the applicant failed to explain why there was a delay of a year before instituting the application.

The respondent's contentions

[58] Counsel for the respondent submitted in their heads of argument that the applicant's founding affidavit was replete with misrepresentations and false information. The respondent's counsel concentrated his efforts on what he referred to as 'the eight lies' by the applicant in his founding affidavit, as well as the drastic infringement the relief sought by the applicant would have on the respondent's rights. The word 'lie' might be a bit strong in certain of the instances - I will however only refer to a few.

[59] It was submitted that the applicant stated that the respondent resigned on 4 February 2020, whereas he only resigned with effect from 29 February 2020.

[60] It was submitted that the allegation by the applicant that it had become aware only 'recently' that the respondent had failed to return the laptop immediately, that all the applicant's information had been deleted and that the information containing *inter alia* pivot tables had been extracted from the server was simply not true. Whilst the founding affidavit was attested to on 22 February 2021, the letter from the applicant's attorney and the discussions held in February and March 2020 clearly indicate that the applicant had known about the downloaded information as early as February and March 2020.

[61] With reference to the allegation that the respondent contacted 4Most and requested their assistance in uploading data, it was submitted that this was a blatant lie and was not borne out by the email sent by the respondent to 4Most, requesting a quote. In this regard, the email sent by the respondent to 4Most speaks for itself and it is clear that what is contained in the founding affidavit is indeed incorrect.

[62] It was also submitted that the applicant had conceded that the respondent had done the work referred to although it says it was done in 2015 and not 2016.

[63] The respondent's counsel also referred to the conclusions by the expert Mr Morrow, and in particular the reference to the respondent having deleted or destroyed data, thereby denying the applicant access to such information or data. It was submitted that the inclusion of these so-called conclusions were engineered to bolster the applicant's case. The respondent's response to these conclusions, namely that all the information was still contained on the applicant's server, was left unchallenged by the applicant. It was submitted, and I agree, that this aspect must clearly have been within the knowledge of the applicant, yet he failed to correct the impression created by Mr Morrow and simply quoted what was contained in his report almost verbatim.

[64] It was also submitted that the allegation that the Save Group was expanding its health and beauty sections, with a hint that the respondent's knowledge would have assisted his new employer, was a fabrication. It was also submitted that no evidence had been provided to support these allegations, and if the applicant had a genuine apprehension that the Save Group was utilising its information, it would have joined the Save Group as a party to these proceedings.

[65] Counsel for the respondent also referred to the allegations by the applicant in its replying affidavit that the respondent's new employer had phoned and *inter alia* informed him that the respondent had only taken a few pivot tables, which contained information which was offered to the respondent's new employer. It was submitted that these important allegations were not included in the founding affidavit as it was a fabrication, and clearly an afterthought, to bolster the applicant's case in reply. It is also interesting to note that none of this was mentioned by the applicant's attorney in his letter dated 26 March 2020. In my view, these allegations by the applicant in reply raises a concern in that the applicant, allegedly knowing that the respondent's new employer has been offered its pivot tables, and is allegedly expanding its health and beauty range as a result of receiving this information, does nothing for a period of a year, and when it takes action, it makes no mention of this in its founding papers

and, as already mentioned, does not join the respondent's employer to these proceedings. I have to agree that these allegations were clearly a fabrication.

[66] With reference to the respondent's tender to either destroy the information or hand the hard drive to the registrar, it was submitted that the hard drive had in fact been handed to the registrar after the applicant failed to respond to the tender. The respondent was therefore no longer in possession of the hard drive.

[67] In responding to the submission by the applicant's counsel that the offer came too late, it was submitted that the respondent had consistently showed that he wanted to avoid incurring legal costs, especially after a threat by the applicant that he would drown the respondent in legal costs. The respondent offered to attend a meeting in his email of 23 April 2020 in order to resolve any issues, to which no reply was received.

[68] Counsel for the respondent also briefly referred to *Waste Products supra*, which was referred to by applicant's counsel, and submitted that in the present matter there is no indication that any information was used as a 'springboard' of any kind. It was submitted that the information downloaded by the respondent was crucial to him, securing proof of his claim against the respondent and to resist and defend himself against the applicant's threatened damages claim.

[69] Reference was also made to *Multi Tube supra* and it was submitted that the applicant's delay in bringing the application is inexcusable.

[70] In conclusion it was submitted, with reference to the requirements of a final interdict and the relief being claimed by the applicant, that the applicant has not shown that it has a clear right and that it has an alternative remedy in the form of a damages claim. It might also be appropriate at this stage to refer to a submission by the respondent's counsel that the relief being sought in the notice of motion would severely restrict the respondent's ability to perform his duties at his current employer. Reference is made in the relief to the applicant's suppliers. It was submitted that it is well known that both the applicant and the Save Group would order products from the same supplier. It was submitted, with reference to section 22 of the Constitution,

that the respondent's rights would be severely infringed if an order in this regard is granted.

Discussion

[71] The applicant seeks far reaching relief against the respondent, simply because the respondent downloaded its confidential information, arguing that the mere possession of its confidential information is enough to satisfy the requirements for such relief.

[72] Bearing in mind what was stated in *Amler's* and the authorities referred to above, I am of the view that an applicant claiming relief such as in the present matter, has to show that there was improper use or possession of the confidential information, whether as a springboard or otherwise. In this matter there is absolutely no indication whatsoever that the information was used as a springboard by the respondent or his new employer for that matter.

[73] What is meant by the word 'otherwise' is of course open to interpretation but such use or possession for something 'otherwise' would still have to be shown to be improper. The meaning of the word 'improper' is described by the Cambridge English Dictionary as being against a law or a rule, dishonest or illegal. The applicant has failed to provide any evidence of the improper use of the downloaded information. What I am left with is the respondent's version that he downloaded the information to be able to calculate the quantum of his claim against the applicant and to be able to defend himself against the applicant's threatened damages claim.

[74] Counsel for the applicant urged me to consider the probabilities and argued in reply that it is improbable that the respondent downloaded all the information he did during February 2020, purely to protect himself. I am however of the view that the probabilities do in fact support the version of the respondent. It is clear from the correspondence put up by the respondent that he was of the view that the applicant had to pay him for work he had done and that the applicant was apparently reluctant to do so. The correspondence addressed to the respondent by the applicant's attorney furthermore makes it clear in no uncertain terms that the applicant was

accusing the respondent of causing it huge financial losses. I can find nothing far-fetched or clearly untenable in the respondent's version.

[75] As mentioned above, the applicant placed reliance on *Traka Africa* as authority that it does not avail a respondent to claim that he had no intention of using the applicant's information; mere possession by implication being sufficient. To accept this with reference to the present matter would fly in the face of what is required by *Amler's*, and what was found in *Waste Products* and *Careers-in-Sync*.

[76] There is much to be said about certain misrepresentations and apparent fabrications contained in the founding and replying affidavit attested to on behalf of the applicant. It is in my view clear that the applicant only decided to pursue the present application after receipt of the respondent's opposing affidavit in the summary judgment application in the regional court matter. It is possible that memories have faded, bearing in mind that the application was instituted a year after the respondent resigned, but it does not excuse the blatant misrepresentation of what the respondent allegedly requested 4Most to do. The failure to correct the impression created by Mr Morrow that the information which was deleted was no longer available, also leaves a bitter taste in my mouth and is inexcusable.

[77] Another consequence of the applicant's delay in instituting the application is of course the effectiveness and fairness of the relief being sought more than a year and a half after the respondent's resignation. Bearing in mind what was stated by Broome J in *Multi Tube*, the applicant wants to restrain the respondent from disclosing information which must be seriously outdated by now. It also bears mentioning that the relief in this regard, set out in paragraph 1.1, refers to the applicant's 'suppliers and business associates' and 'prospective and existing customers' without mentioning any entities by name, making it vague and probably impossible to enforce.

[78] The relief set out in paras 1.2 and 1.3 seek to interdict and restrain the respondent from soliciting business from the applicant's suppliers and to approach the applicant's suppliers and associates whilst holding out to be in the applicant's employ. Once again no names of these suppliers or associates are mentioned but

from the papers it is clear that the respondent is employed as a buyer for the Save Group, and would have to engage with suppliers whom his current employer has in common with the applicant, just through the nature of its business. I agree with the submissions made on behalf of the respondent that this relief would amount to a restraint on the respondent and is an infringement of the respondent's right in terms of section 22 of the Constitution to freely choose his occupation. There is furthermore no evidence that the respondent has approached any suppliers or associates of the applicant whilst holding out to still be in the applicant's employ, or that there is any likelihood that he will do so.

[79] As far as the relief in paras 1.4 and 1.5 is concerned, it is clear that in light of the respondent having handed over the hard drive as well as the hard copies of the information to the registrar for safekeeping, not much further can be done in this regard. I accept, as submitted by the applicant's counsel in reply, that the applicant was not aware of this. However the tender filed on behalf of the respondent makes it clear that in the absence of the applicant responding, the hard drive and documents would be handed over to the registrar's office.

[80] In my view the applicant has failed to satisfy the requirements for a final interdict. Interdictory relief is *inter alia* aimed at preventing future unlawful conduct, of which I can find no evidence. Bearing all the aforesaid in mind, I am not satisfied that the applicant has made out a case for the relief sought and it is accordingly not entitled to the relief claimed.

Costs

[81] Only counsel for the respondent addressed me specifically on the question of costs. I was urged to consider ordering costs against the applicant on a punitive scale. It was submitted that the devious manner in which the founding affidavit was couched, together with the number of misrepresentations contained therein, justified costs on a punitive scale.

[82] I was referred to the proceedings on 10 June 2021 before Van Zyl J, who reserved the costs on that day. I was also addressed on the costs of the condonation application. It was submitted that the applicant's opposition was frivolous and it

should therefore pay the costs of the application. One has to consider though that the respondent's supplementary affidavit was out of time, and that he was therefore obliged to seek condonation. I do however agree that the opposition was not justified.

[83] It is trite that the question of costs falls within the discretion of the court. The general rule is that costs should follow the result. Although the applicant's founding affidavit, not to mention the replying affidavit, contains various misrepresentations, I am of the view that a punitive cost order is not justified in this instance and I will accordingly refrain from exercising my discretion in the respondent's favour in this regard. Both parties instructed senior and junior counsel and I see no reason not to include costs consequent upon the employment of two counsel.

Order

[84] I accordingly make the following order:

1. The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.
2. The applicant is directed to pay the costs consequent upon the hearing of 10 June 2021, as well as the costs incurred by the respondent as a result of the applicant's opposition to the respondent's application for condonation, such costs to include the costs consequent upon the employment of two counsel.

BEZUIDENHOUT AJ

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Date of hearing : 7 October 2021
Date of judgment : 28 January 2022

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