REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA 20/2/18

CASE NO: 3711/2018

Not Reportable

Not of interest to other judges

In the matter between:

MILKOR (PTY) LTD	**First Applicant**
MILKOR SPECIAL PRODUCTS (PTY) LTD	**Second Applicant**
And	
AFRICA DEFENCE GROUP (PTY) LTD	**First Respondent**
KEYSTONE SPECIAL PRODUCTS (PTY) LTD	**Second Respondent**
WILLIAM ALBERT FARQUHAR	**Third Respondent**

JUDGMENT

Petersen AJ:

Introduction

[1] This matter came before me as an urgent application on 06 February 2018. On 07 February 2018, I handed down an order in the following terms:

"This application will be heard as one of urgency in terms of rule 6(12) dispensing with the forms and service and time periods applicable to the bringing of applications."

The relief sought

[2] The relief sought with other ancillary relief is premised on an alleged Restraint of Trade Agreement entered into between the applicants' and the third respondent, more particularly the enforcement of a restraint of trade with ancillary relief. The relief sought is set out in the notice of motion as follows:

"2 Interdicting each the first, second and third respondents from designing, developing, producing or assembling multiple grenade launchers ("the weapon") in contravention of section 13 of the National Conventional Arms Control Act, 41 of 2002 ("the Act");

3 Interdicting the third respondent, for a period of three years, commencing on 1 October 2016; from:

3.1 directly or indirectly, for his own account or for and on behalf of any business or undertaking or other entity or person which competes with the business of the applicants, canvassing any clients of the applicants;

3.2 disclosing to anyone any information concerning the identity of the clients of the applicants or the know-how, business methods or any other matters concerning the affairs of the applicants;

3.3 directly or indirectly being interested in or concerned with any company, including the first and second respondents, or other person (whether as employee, profit sharer, associate or director) carrying on a business in the Republic of South Africa in the same field of business as the applicants or any part of the business carried out by the applicants;

4 Interdicting the first and second respondents, for a period of three years, commencing on 1 October 2016, from employing the third respondent, whether directly, or being associated with the third respondent, to perform any duty or task in the same field of business as the applicants.

5 Pending the outcome of an action instituted in the Gauteng Division of the High Court OF South Africa under case no Case No.: 62833/17,

5.1 Interdicting and ordering the third respondents at all times to keep confidential and not to disclose:

5.1.1 The applicants' trade secrets, processes, customer and supplier lists;

5.1.2 other confidential information of known practices in regard to the applicants' business;

and

5.1.3 any information whatsoever relating to the applicants' business;

5.2 Interdicting the first and second respondents from receiving and making use of any confidential information about the applicants' business from the third respondent.

6 Ordering the first, second and/or third respondents forthwith to deliver up to the Registrar of this Honourable Court, in material and electronic form, all designs, sketches, drawings, 3-dimensional models or prints, prototypes, moulds, plates, parasolid files of the weapon; and to serve on the applicant and this Court, an inventory of the items so delivered to the Registrar within 5 days of the Order herein;

7 Ordering the first, second and third respondents to pay the costs of this application on the attorney and client scale, jointly and severally, the one paying the others to be absolved, including the costs of two counsel;

8 Granting the applicants further and/or alternative (sic) relief."

The relief sought in prayer 2 of the notice of motion is not persisted in as ADG and Keystone have been certified in terms of the National Conventional Arms Control Act, 41 of 2002.

Background

[3] The applicants' ("Milkor") and the first and second respondents' ("ADG" and "Keystone") are involved in linked litigation with two ex-employees of Milkor, Messrs da Silva and Van Rensburg. The litigation is based on a weapon known as a Multiple Grenade Launcher ("MGL"), which the applicant, as one of many manufacturers worldwide, all seemingly with their own design of the MGL, has designed, developed, manufactured, marketed and sold over a number of decades. The applicant considers itself the leader in this field, alleging that its detailed designs are trade secrets. Messrs da Silva and Van Rensburg resigned from the applicants' employ at the end of November 2016; and took up employment either with ADG or Keystone. ADG has been a competitor in the munitions industry in South Africa since January 2017 in association with Keystone, seemingly in a similar scenario to Milkor. Milkor alleges that it received information, around mid-2017, that ADG and Keystone had developed an MGL which had reached the manufacturing stage. The information is said to have been accompanied by detailed drawings of the MGL designed by ADG and Keystone. It is alleged that the detailed designs of Milkor had been used in

designing the ADG and Keystone's weapon. Consequently Milkor launched an application to this court for Anton Pillar orders against ADG, Keystone, da Silva and Van Rensburg. The Anton Pillar order was granted by Janse van Nieuwenhuizen J, on 16 August 2017.

[4] The return day of the Anton Pillar order which has been extended since being granted, until 17 January 2018 when Milkor became aware of the alleged breach of a restraint of trade agreement into between it and the third respondent ("Farquhar"). Farquhar disputes that he entered into a restraint of trade agreement with Milkor. The dispute which arises from the affidavits, brings the rule set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), squarely into focus. This court is faced with contradictory affidavits from Milkor and Farquhar on the restraint of trade agreement. The determination of the disputed restraint of trade agreement could be dispositive of the other issues in dispute raised in the papers. If this court does not reject the defence that the restraint of trade is a forgery the matter must be referred for oral evidence or trial. In deciding this issue regard must be had to the evidence on the papers and applicable case law.

[5] In a supporting affidavit deposed to by Farquhar in response to the expert opinion of Milkors' expert in the linked litigation, dated 8 January 2018, it comes to the fore that he was employed by ADG as the chief designer of ADG's MGL.[1] On his account he has redesigned the MGL of ADG personally from scratch.[2] In the respondents' answering affidavit in the present application, deposed to by da Silva on 1 February 2018, it is confirmed that Farquhar started working for ADG during January 2017[3]. The employment of Farquhar by ADG is said to have been on the very premise that he was not bound by a restraint of trade agreement. da Silva further states[4] that Farquhar did not sign the letter of appointment containing the restraint of trade clause, he has no recollection thereof, the signature on the document differs from his signature and he will accordingly seek leave from the court at the time the application is heard to place further evidence before the court in this regard. Farquhar in a confirmatory affidavit similarly dated the 1 February 2018 confirms the content of the answering affidavit, insofar as it relates to him.

[1] Page 95 Para 14 of the Supporting Affidavit
[2] Page 111 Para 34.5 of the Supporting Affidavit
[3] Page 316 Para 9 of the Answering Affidavit
[4] Page 316 Para 8 of the Answering Affidavit

[6] Farquhar places the following evidence before court on the disputed restraint of trade agreement[5]:

"8.1. … that, during July 2007, Richard Potgieter of the applicants' advised him that the applicants wanted to offer him a fulltime position.

8.2. Shortly after having been advised of the aforesaid he was handed an unsigned copy of the letter of appointment. He was not willing to agree, to the following, namely – clause 5 – place of work; clause 6 – hours of work and annexure "B" (the restraint of trade agreement) and advised the applicants of this.

8.3. He indicated the portions of the letter of appointment with which he was not happy. Importantly, he marked the restraint of trade agreement with an "X" indicating that he wanted the entire portion scrapped as he was not willing to sign it.

8.4. After he made the markings on the document, he had a meeting with Mr Richard Potgieter and/or Andries Piek of the applicants and he showed them his marked up document and informed them verbally of the clauses and portions of the letter of appointment that were unacceptable. A copy of the original agreement, which he kept after advising the applicants of what he was willing to agree to (and what was unacceptable, is still in his possession. The original will be made available at the hearing and a copy is attached and marked as annexure "AD5".

8.5. He recalls that after he had the aforesaid meeting there were further attempts by the applicants to get him to sign the letter of appointment containing the restraint of trade agreement and that he had refused to sign the document. Promises were then made to him that an amended letter of appointment would be sent to him to sign. Those promises however, never materialized and he never signed a letter of appointment.

8.6. The signature appearing on the letter of appointment attached to the applicants' founding affidavit differs from the signature of the third respondent…

8.6.1 …

8.6.2 …

9. When the third respondent started working for the first respondent during January 2017, the first respondent asked him whether he was bound by a restraint of trade. He immediately responded that he had no restraint of trade in his employment contract."

The contents of paragraph 8.6.1 to 8.6.2 constitute an inadmissible opinion by da Silva.

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[5] Paras 8.1 to 8.6 of the Answering Affidavit

[7] The employment contract relied on by Milkor incorporating the restraint of trade agreement[6], both of which are initialed and signed on behalf of Milkor and by Farquhar differs materially in respect of the employment contract produced by Farquhar containing a different date of commencement, different initials on each page and the absence of signatures. As background to the employment of Farquhar by ADG, the evidence shows that he "retired" from the employ of Milkor on 05 September 2016, premised on an inability to reach an agreement on his employment package.[7] The retirement of Farquhar was short lived as he took up employment with ADG within at least three months.

[8] In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), the approach to contradictory affidavits was clarified:

"That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials (my emphasis). More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be "a *bona fide* dispute of fact on a material matter". This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence (my emphasis). In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or *bona fide* dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is "fictitious" or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."

[6] Page 113 to 119
[7] Page 215 Notification of Retirement

[9] In *Wightman v Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), it was said at paras 12 and 13:

"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: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635c...

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. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied (my emphasis). I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter (my emphasis)."

[10] Having regard to the evidence on the papers regarding the restraint of trade agreement, against the relevant authorities, I hold the view that the relief sought against Farquhar in prayers 3 and 4 of the notice of motion, which finds itself inextricably linked to the issues in the litigation involving ADG, Keystone, da Silva

and Van Rensburg should be referred to trial in that matter. Farquhar should be joined as party in those proceedings and the relief sought against him on the restraint of trade agreement should be formulated against him in those proceedings.

[11] The relief sought in prayer 5, with due regard to the fact that the relief sought in prayers 3 and 4 is to be referred for trial, is on a somewhat similar footing to that which was sought and granted against da Silva and Van Rensburg in the Anton Pillar application. The interim relief granted in that application was in the following terms:

"1. Pending the finalization of an action for final interdicts and damages against the respondents, to be issued out of this Honourable Court:

1.1. the first and second respondents (da Silva and Van Rensburg – my insertion) are interdicted and restrained from divulging or disclosing to any third party or from applying/utilizing same for any purpose whatsoever:

1.1.1 any information whatsoever relating to the applicants' business;

1.1.2 all the applicants' trade secrets, processes, customer and supplier lists; and confidential information relating to the applicants' practices in regard to the applicants' business;

1.1.3 any confidential information relating to the business secrets of the applicants', including technical and design specifications of the applicants' products, as contained in data packs or parasoid files, drawings, diagrams or any other form.

1.2. The third and fourth respondents (Keystone and ADG – my insertion) are interdicted and restrained from utilizing any information confidential to the applicants' of whatsoever nature imparted to it, or to be imparted to it in future, by the first and second respondents; pertaining to the manufacture or marketing of a multiple grenade launcher..."

[12] The question is whether similar relief should be extended in respect of Farquhar in the present application. The attorneys for the respondents' in correspondence addressed to the attorney for Milkor dated 26 January 2018[8] referred to the retrenchment of Farquhar at the end of November 2017, indicating that:

"2.1.3 For the time being, the third respondent has stopped designing and manufacturing any of the weapons (Multi Grenade Launchers), which form the subject of the present application. That project which precipitated this litigation is, for the moment, not being

[8] Page 277 Letter from BDK Attorneys to Edward S Claasen and Associates

continued with. In the event of our client deciding in the future to continue with the project, we will give you written notice in order that your client may act in a manner as advised.

3. Furthermore, we hold instructions to give an undertaking that the first respondent and the second respondent will not employ or make use of the services of the third respondent to design multi grenade launchers."

[13] In reply to the correspondence from the respondents' attorneys, Milkors' attorney responded as follows:

"We note the undertakings tendered in par. 3 of your letter under reply. Given the undertakings tendered and the circumstances of the litigation between the parties, we are instructed to propose, in order to avoid the hearing of the matter on 6 February 2018 and the concomitant wastage of costs, that your clients consent to orders being taken in terms of paragraphs 2 to 5 of our Notice of Motion. The balance of the relief, including the issue of costs, sought in our Notice of Motion may then be heard in the ordinary course or together with the Anton Pillar matter which is pending."[9]

This proposal was rejected on 31 January 2018.

[14] It is clear from the affidavit deposed to by Farquhar in response to Milkors' expert, the correspondence from Farquhar's attorneys and the answering affidavit that he has been designing an MGL for Milkors' competitor. Farquhar was retrenched by ADG at the end of November 2017 in terms of a Mutual Separation and Settlement Agreement, with the prospect of re-employment "...if a posting opens which fits the skills set of the Employee within a period of six months from the date of retrenchment."[10] Notably da Silva was retrenched with the same undertaking. The aforementioned agreement at face value contradicts the undertaking of ADG and Keystone that they will not employ Farquhar, albeit that the proposal has been withdrawn, whether to design MGL's or any other weapons for that matter. Counsel for Milkor refers to *Mcilongo NO v Minister of Law and Order* 1990 4 SA 181 (E) at 186 A-B, where Jennet J said the following in respect of an undertaking instead of an interdict, namely the issue:

"is not whether appellant is adequately protected by an undertaking as he would be by an interdict, but whether it would be reasonable for the man in the position of the appellant to

[9] Page 284 Letter from Edward S Claasen and Associates to BDK Attorneys

[10] Page 371 Mutual Separation and Settlement Agreement

nevertheless apprehend injury despite the undertaking or assurance by the respondents' that the alleged infringements of the appellants' rights will not recur."

[15] The facts in this application demonstrate that the applicant has demonstrated a clear right and well-grounded apprehension of irreparable harm if interim relief, at the very least is not granted in respect of Farquhar's association with ADG and Keystone, in respect of prayers 3 and 4.

[16] The submissions in respect of prayers 5 and 6 is premised on the defence of confidentiality. Both the applicants' and ADG and Keystone contend that their designs are confidential. The issue of the design of the MGL is one of the main issues in dispute in the pending litigation. Without derogating from the comprehensive submissions put forward by counsel for the applicants' and respondents in this regard, it is not open to this court to pronounce on this issue. I am not convinced that the relief sought in prayer 6 should be granted.

[17] I am satisfied that the relief sought in prayers 3, 4 and 5 should be granted as interim relief.

[18] In the result:

1. It is declared that the matter is urgent and the applicants' failure to comply with the requirements of the time periods is condoned;
2. The applicant is to ensure that steps are taken, within 30 (thirty) days of this order, to join the third respondent as a party in the pending action against the first and second respondents', and da Silva and van Rensburg; with the relief sought against the third respondent formulated accordingly.
3. pending the outcome of the action under Case No. 62833/17 in the Gauteng Division of the High Court, Pretoria ("the action") the third respondent is interdicted for a period of three years commencing on 1 October 2016, from:

   3.1 directly or indirectly, for his own account or for and on behalf of any business or undertaking or other entity or person which competes with the business of the applicants, canvassing any clients of the applicants;

   3.2 disclosing to anyone any information concerning the identity of the clients of the applicants or the know-how, business methods or any other matters concerning the affairs of the applicants;

3.3 directly or indirectly being interested in or concerned with any company, including the first and second respondents, or other person (whether as employee, profit sharer, associate or director) carrying on a business in the Republic of South Africa in the same field of business as the applicants or any part of the business carried out by the applicants;

4. pending the outcome of the action, the first and second respondents are interdicted for a period of three years, commencing on 1 October 2016, from employing the third respondent, whether directly or indirectly, or being associated with the third respondent, to perform any duty or task in the same field of business as the applicants;
5. pending the outcome of the action, the third respondent is interdicted and ordered, at all times to keep confidential and not to disclose:

   5.1 the applicants' trade secrets, processes, customer and supplier lists;

   5.2 other confidential information of known practices in regard to the applicants' business; and

   5.3 any other information whatsoever relating to the applicants' business;
6. pending the outcome of the action, the first and second respondents are interdicted from receiving and making use of any confidential information about the applicants' business from the third respondent;
7. the costs of this application are costs in the action.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances

For the Applicants': PF Louw SC with him D Vetten

For the Respondent': R Michau SC with him L Uys

Date Heard: 07 February 2018

Date of Judgment: 20 February 2018