

INTRODUCTION

[1] The application before me is about the protection of alleged confidential information and the respondents' alleged unlawful competition with the applicant by unlawfully exploiting the applicant's alleged confidential information.

[2] The applicant seeks relief against the respondents and has approached court on an urgent basis for an interim interdict on the basis that the respondents are unlawfully interfering with contractual relationships and unlawful competition. The urgency is not challenged.

BACKGROUND

[3] It is said that the applicant provides pump equipment in the form of trucks and pipes that allow wet concrete to be pumped from a concrete truck (being the truck that brings concrete to the construction site) to the area in which the concrete will be poured. Through its years in this business, exceeding a decade, the applicant has acquired a substantial reputation in the industry in relation to the service it provides.

[4] It is common cause that on or about 23 July 2014 the applicant and the second respondent concluded a contract of employment in terms of which the second respondent was employed by the applicant as a fleet manager. As a fleet manager, the second respondent dealt primarily with all the clients of the applicant by ensuring that trucks were deployed timeously to the clients and

scheduling the various trucks to be dispatched to the respective clients. Based on this position, it is alleged that he was familiar with the pricing relating to each customer, the identity of each customer and each project that was taking place. He was also privy to and had access to the applicant's documentation and confidential information.

[5] In terms of a clause in the contract the second respondent was required not to disclose to any person/s any information as to the company's practice, dealings, business or affairs which may come to his knowledge by reason of his employment with the applicant during or after termination of employment.

[6] The first respondent on the other hand had a subcontracting agreement with the applicant. The second respondent has resigned his position with the applicant and is presently under the employ of the first respondent. It is thus alleged that he is in a position to influence or induce and entice the applicant's clients to follow him to the first respondent. The argument is that the first respondent as a subcontractor of the applicant is in a position to compete directly with the applicant.

[7] Applicant avers that it has come to its knowledge that the respondents are unlawfully competing with him and have also lured some of its clients, namely: Limpopo Ready Mix; Triangle Ready Mix and Concrete and Adamson and Neilson.

[8] With this application the applicant wants to enforce its rights in terms of the employment agreement with the second respondent and to interdict the first and second respondents from competing unlawfully with the applicant. The applicant relies in its claim, on breach of contract and the principles of unlawful competition. The contention is that the respondents are unlawfully using confidential information obtained by the second respondent during the course of employment with the applicant and are using such information to compete with the business of the applicant.

THE APPLICANT'S CASE

[9] The applicant alleges in its founding documents that it is the proprietor of, and has invested a substantial amount of time, effort, and financial resources in acquiring and developing its:

- 9.1 Client and potential client connections; and
- 9.2 Secret and confidential information;
- 9.3 Know-how, processes and techniques utilised by the applicant in relation to the cement pumping industry involving *inter alia*, pricing, premiums, customer information and contact details and client transaction history;
- 9.4 The contractual arrangements between the applicant, its clients and subcontractors;
- 9.5 The financial details of the applicant's relationship with its clients and subcontractors;

- 9.6 Other matters which relate to the business of the applicant and in respect of which, information is not readily available in the ordinary course of business to a competitor of the applicant; and
- 9.10 The names of existing clients and subcontractors and their requirements in relation to the service provided by the applicant.

THE RESPONDENTS' CASE

[10] The respondents are, of course, opposing the application and have raised several defences against the applicant's claim. The defences raised are set out in the respondents' heads of argument as follows:

- 10.1 The applicant has not made out a cause of action against the respondents in that –

10.1.1 It is not known in which way the applicant is, the proprietor of, and has invested a substantial amount of time, effort and financial resources in acquiring and developing its client and potential client connections; secret and confidential information comprising of *inter alia*, the know-how, processes and techniques utilised by the applicant in relation to the cement pumping industry.

10.1.2 The applicant has not specified the precise nature and details of the confidential information and trade secrets relied upon in regard to these claims.

- 10.1.3 The applicant does not provide any particulars as to how it invested substantial time, effort and financial resources in creating the alleged proprietary right that constitute the confidential information.
- 10.1.4 The unfounded allegations in the founding affidavit do not prove the existence of confidential information worthy of protection, which is a requisite for proving unlawful competition.
- 10.1.5 The applicant has failed to demonstrate that the respondents are competing unlawfully with it.
- 10.1.6 The allegations by the applicant that its customer connections and price lists constitute confidential information are without merit in that the applicant has failed to demonstrate the requirements necessary for such information to qualify as trade secrets.
- 10.1.7 The applicant has failed to establish that the respondents are competing unlawfully against it.
- 10.1.8 The incident referred to by the applicant of work previously being performed by the applicant on behalf of Limpopo Ready Mix and for who the respondent now perform, does not constitute unlawful competition. This, according to the respondents, is the characteristics of a free enterprise which requires the successful functioning of a

competitive market where personal skills and expertise may be exploited.

10.2 The applicant has failed to establish the requisite for interim relief or final relief in that –

10.2.1 Clear Right

The case made out by the applicant in its papers falls far short of establishing that there is a protectable interest in the form of confidential information or trade secrets worthy of legal protection.

The applicant has not shown that the respondents were in possession of any secret or confidential information which would have been of economic value to any other competitor, and detrimental to the applicant.

10.2.2 Irreparable Harm

The applicant does not make the assertions that its clients are return clients and as such run the real risk that it would suffer irreparable harm should the respondents not be interdicted.

The infringement has already occurred and there is no fear that it will be repeated.

10.2.3 No other Remedy

It is clear from the applicant's papers that it has another remedy available to it in that it can claim damages. The damages are quantifiable as *per* the various customer sales annexed to the papers.

ANALYSIS OF EVIDENCE

Confidential Information and Unlawful Competition

[11] A party that seeks to protect its confidential information, its trade secrets, and intellectual property must show that the information, know-how, technology or method is unique and peculiar to its business and that such information is not public property or that it falls within public knowledge. Furthermore the party must show that the interest that it has in the information it seeks to protect is worthy of protection. See *Strike Productions (Pty) Ltd v Bon View Trading* 2011 JDR 0022 (GSJ)

[12] It is said that an applicant must raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof. See *Swissborough Diamond Mines v Government of the Republic of South Africa* 1999 (2) SA 279 (T)

[13] I am not convinced that the applicant was able, in its papers, to prove that the information it seeks to protect is worthy of protection or that the

respondents are in unlawful competition with it. The averments made by the applicant are bald and speculative and as such fails to demonstrate the existence of confidential evidence worthy of protection or the conduct of the respondents that demonstrates unlawful competition. Most of the evidence proffered by the deponent Ms Elize Wolvaart (Ms Wolvaart) in the founding affidavit came to her knowledge. Ms Wolvaart does not say how these facts came to her knowledge and who provided them. There is no confirmatory affidavit/s to such facts.

[14] In trying to show that it has confidential information or trade secrets, the applicant in its founding papers states only that it is the proprietor of and has invested a substantial amount of time, effort and substantial amount of time, effort and financial resources in acquiring certain information, know-how, processes and techniques without stating what exactly is that information, know-how processes and techniques. The allegations in the founding affidavit do not specify the precise nature and details of the information and trade secrets. As such it will be impossible for the respondents to know which information, know-how, processes and techniques it must not use. For instance, the applicant alleges that the second respondent solicits its clients because he knows the pricing related to each customer but does not show how the second respondent would be able to remember all the price structures of each of its client. To the extent that the information is inevitably carried away in the second respondent's head after the employment has ended, the information may be freely used for the benefit either of himself or others. See *Knox D'Arcy v Jamieson & Others* 1992 (3) SA 520 (W) at 526E.

[15] The evidence of the applicant does not show in what way is the alleged information, know-how, technology, methods, customer connections and price lists are unique or peculiar to its business and as such worthy of legal protection. What I could ascertain from the papers as perhaps unique and or peculiar is the knowledge of the client. The applicant state that 'the cement pumping business is, a very specialised business and the knowledge of the clients would not be within the general public's knowledge'. But it is not clear from the papers for instance why 'the knowledge of the client should be protected.

[16] There is no evidence presented in the founding affidavit that confirms the applicant's allegation that it's erstwhile clients – Limpopo Ready Mix, Triangle Ready Mix and Concrete and Adamson and Neilson – were lured and enticed from the applicant. If we are to accept that they were lured and enticed the applicant does not show how this was done and whether its information or trade secrets were used when this was done. The only confirmatory affidavit is that of Mr Roy Gibb who telephonically informed Ms Wolvaart that the second respondent wanted to redirect his job to the first respondent. Ms Wolvaart does not state in the founding affidavit what she did with that information. Did she ask the second respondent about it? It does not appear so. The second respondent denies ever having discussed the redirecting of work from the applicant with Mr Gibb.

[17] The applicant's allegations that the second respondent erased and deleted jobs that were booked in the roster can also not assist it. It is apparent that this deletion, if ever there was one, must have happened at the time the second respondent was still in the employ of the applicant. The applicant does not show that the information so erased was confidential or was a trade secret. It cannot also be said that such information was used as a springboard for the business of the first respondent. There is no evidence that proves that the erased information was used by the first respondent as a springboard. In any event, it appears from the papers that the first respondent had been in operation for sometimes before the second respondent was employed by it and the information referred to by the applicant could as such not have been used as a springboard for it. In the applicant's own version the first respondent was its subcontractor.

[18] There is no evidence in the papers that establish the applicant's allegation that the respondents have unlawfully targeted the client base and business of the applicant and have as a result taken over a number of the applicant's clients. There is also no prove before this court that the respondents use the applicant's confidential information to obtain an unfair advantage over the applicant regarding its business and for competing unlawfully with the applicant.

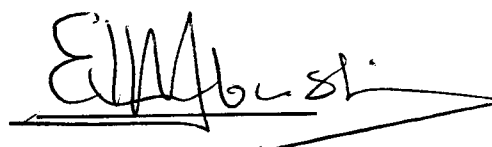
Interim Interdict

[19] The applicant having failed to prove that the information it seeks to protect is worthy of protection or that the respondents are in unlawful

competition with it has in the circumstances failed to establish that it is entitled to the relief it seeks.

[20] I therefore make the following order

20.1 The application is dismissed with costs.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE	: 01/03/2017
DATE OF JUDGMENT	: 03 March 2017
APPLICANT'S COUNSEL	: ADV. S J van Rensburg
APPLICANT'S ATTORNEYS	: Tintingers Incorporated
RESPONDENT'S COUNSEL	: ADV. R C De Alcantara
RESPONDENT'S ATTORNEY	: Tuckers Incorporated