IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 38789/2014

Date: 5/5/15

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

5/5/2015 ....
DATE SIGNATURE

In the matter between:

HI CELL V SHOPS (PTY) LTD
(Registration No. 1999/019031/07)

APPLICANT

And

ANDRE LOUBSER

1ST RESPONDENT

SUNE BESTER

2ND RESPONDENT

CHATZ CONNECT ZAMBESI CC t/a CHATZ ZAMBESI

3RD RESPONDENT

KLATRADE 262 (PTY) LTD

4TH RESPONDENT

VODACOM (PTY) LTD

5TH RESPONDENT

JUDGMENT

PRETORIUS J.

[1] The applicant applies for interdictory relief as set out in para 1.1 of the Notice of Motion as follows:

> *"1. That the First, Second and Third Respondents be hereby interdicted and ordered not to:*
>
> *1.1 Entice away, whether directly or indirectly, any of the persons, companies, close corporations, or institutions, of whatsoever nature, which appear on or form part of the client base that was part of the res vendita that the Applicant purchased from the Fourth Respondent in terms of the sale agreement dated the 1st of March 2013 annexed as Annexure "HVS2" to this application"*

[2] The applicant furthermore asks for costs of the application to be paid by the respondents. The applicant abandoned prayer 1.2 of the Notice of Motion.

[3] The first and third respondents raised a point *in limine*. According to counsel for the first and third respondents bona fide disputes of fact exist on the papers which cannot be determined on the papers.

[4] The first and third respondents are of the view that the matter should

be referred for trial so that the facts can be properly ventilated and placed before the court. According to the first and third respondents they were not aware that the second respondent had at any stage been in possession of the client bases of her previous employer. One of the main issues is the contents of the e-mails the second respondent sent to four clients of the applicant, which all read the same.

> *"Ek is nie meer by Vodacom Shop Brooklyn nie. Ek het 'n beter aanbod gekry by Andre Loubser wat nous y eie Vodacom winkel oopgemaak het.*
>
> *Ek wil graag nog steeds julle kontrakte hanteer as dit julle so sal pas. Ons gaan di took meer gerieflik vir julle maak da tons na julle toe sal kom, julle hoef dan glad nie meer in te kom winkel toe nie.*
>
> *As julle wil hê ons moet nog steeds vir julle diens gee op julle Vodacom Rekening kan julle asseblief net vir my formele brief stuur wat so aanvra.*
>
> *Vriendelike Groete*
>
> *Sune Bester*
>
> *Chatz Connect Zambesi*
>
> *0728099007"*

[5] The respondents all deny that this e-mail was sent to solicit and entice clients away from the applicant.

[6] Background:

The applicant purchased the Vodacom shop, Brooklyn, from the fourth respondent in terms of the sale agreement dated 1 March 2013. The Vodacom shop was sold as a going concern, which included the existing short term and long term purchase and supply contracts and clients. The effective date of sale would be 1 April 2013. Clause 2.1.6 of the agreement provides:

> *"All VSP airtime bases attached to the business (including all commissions due and payable from the effective date) (Dealer ID: D202: VDSBR)"*

[7] VSP airtime bases are the list of clients that entered into contracts with the fifth respondent. The list of clients is the main income generating asset of the business bought by the applicant. The applicant earns commission on each subscription, on each call made by its clients and on all data usage by each customer. The list of clients comprises of 17 000 individuals and 1 000 corporate customers.

[8] The applicant paid R40 million in respect of the purchase of the business, relying on the number of customers on the client list.

[9] The first respondent was the manager of the applicant at the time of purchase and was a 10% shareholder in the applicant. After the sale of the Vodacom shop, Brooklyn, the first respondent bought his own cellular service provider shop and was no longer involved in the Vodacom shop. Brooklyn.

[10] The applicant earns commission on each subscription call made and data used by each customer listed on the client base of the business, which earns the applicant approximately R5.5 million per annum. A further R2 million is generated when existing clients upgrade their

contracts with the fifth respondent as service provider.

[11] The second respondent was an employee of the Vodacom shop in Brooklyn prior to the applicant buying the shop. She was a sales consultant when the applicant took over the business on 1 April 2013. She left the employment on 30 April 2013 due to not being satisfied with the new terms of her employment. It is common cause that the second respondent had emailed the client base of the Vodashop, Brooklyn to her private email address. The client base so e-mailed consisted of a list of corporate customers of the applicant. There were 3 200 customers on the list, according to the applicant. According to the second respondent this was done by her to organise a base of all corporate clients for her work at the applicant. According to the second respondent she had deleted this e-mail when she left the applicant's employ. Both the first and third respondents denied having any knowledge of these actions by the second respondent. The second respondent commenced employment at the third respondent on 1 May 2013, after her resignation from the employ of the applicant.

[12] The applicant alleges that the first and second respondents enticed 154 clients away from the applicant during May and June 2013. The first and third respondents deny that any business was solicited from the clients of the applicant. The third respondent admitted that services were provided to clients of the applicant, but it was done under the dealer code for the applicant, which would result in the applicant still receiving all of the benefits from these services provided by the third respondent. Neither the first nor the third respondents had

ever had the client base of the applicant in their possession, nor had they insight into the client base. The applicant denies that it had received any benefits from deals done by the third respondent on the applicant's code. There is thus a factual dispute in this regard.

[13] The affidavit by Mr Nel supporting the applicant's application is based on hearsay. Furthermore the first and third respondents attached an affidavit by Mr Froneman denying the contents of Mr Nel's affidavit, causing a further factual, material dispute.

[14] The first and third respondents denied having solicited business from the 154 clients, who, according to the applicant, had been solicited by the first, second and third respondents, which in itself is a genuine factual dispute.

[15] In any event, the court cannot draw inferences from this list, as there is no proof that these are or were the applicant's clients. No evidence was provided to support these allegations. The first and third respondents admitted to rendering certain services to certain clients of the applicant, but it was allegedly done on the applicant's dealer code. The first and third respondents attached the list of clients to the opposing affidavit. The first and third respondents explained that these upgrades done by the third respondent through its employees were done under the dealer codes of the applicant and therefor the applicant did not suffer any loss due to the third respondent doing the upgrades.

[16] The applicant denied these allegations as untrue. This court cannot make a decision to the veracity or not of the applicant's and respondents' statements in this regard. These are issues which

should be ventilated through oral evidence and cross-examination.

[17] The court further has to establish whether the client list constitutes confidential information.

[18] In the present instance the first respondent had become the manager of the Vodacom shop, Brooklyn, for a considerable length of time. He had a 10% interest in the shop.

[19] In **Neil van Vuuren v Geneva Printotek (Pty) Ltd, Case no. A5046/2007**, an unreported full bench appeal in the WLD on 17 November 2008 where van Oosten J held:

> *"The first building block counsel argued is the fact that the appellant established a competing business which was fully functional within three weeks of him leaving the employ of the respondent. To do that from scratch on his own in a record time counsel further submitted, without using of the respondent's confidential information, must be regarded as inconceivable. I am unable to share counsel's reservations: the appellant as I have alluded to, firstly, was possessed of certain knowledge, experience and skills in the printer industry prior to joining the respondent and secondly, was entitled in the absence of a restraint of trade to carry with him the knowledge, experience and skills he had acquired whilst employed at the respondent."*

[20] This *dicta* applies in the present instance where the facts of the present matter regarding the establishment of the third respondent is similar. The first and third respondents denied that they were in possession of the client base or that they had ever used it to solicit

business from the applicant's clients. Similarly the second respondent denied using the client base or giving the client base to the first and third respondents. The court has to accept this as these are motion proceedings. The applicant should have foreseen that there would be disputes in this regard before proceeding by launching an application. There is no evidence that the client base constitutes confidential information.

[21] *In limine*: Dispute of fact:

Counsel for the applicant urged the court to deal with the application on the papers as they stand and not to refer the application to trial and to apply the so-called Plascon-Evans rule.

[22] The general rule was stated in **Stellenbosh Farmers Winery Ltd v Stellenbosh Winery (Pty) Ltd 1957(4) SA 234 (C)** at 235 E-G, by van Wyk J (De Villiers JP and Rosenow AJ concurring):

> *"...where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."* (Court's emphasis)

[23] In **Moosa Bros & Sons (Pty) Ltd v Rajah 1975(4) SA 87 (D&CLD)** Kumleben J found at p93 F-H:

> *"Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this Rule, in my view oral evidence in one or other form envisaged*

by the Rule should be allowed if here are reasonable grounds for doubting the correctness of the allegations concerned. In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinised." (Court's emphasis)

[24] I have considered all the arguments, facts and authorities carefully. I am of the opinion that there is a genuine, *bona fide* dispute of facts which cannot be decided on the papers without oral evidence. The issues are of such a nature that the matter should be referred to trial and not to oral evidence only.

[25] I cannot agree with the applicant that interim relief should be granted pending the outcome of the trial. The applicant failed to annexe a client base to the papers. This court is not prepared to give an interim interdict in the circumstances where the respondents do not know and cannot determine who the applicant's clients are.

[26] I make the following order:

1. **The application is referred to trial;**
2. **The notice of motion shall stand as a simple summons;**
3. **The notice of intention to oppose shall stand as a notice of intention to defend;**
4. **The applicant shall deliver a declaration within 20 (twenty) days of this order;**
5. **Thereafter, the rules relating to actions shall apply;**
6. **The costs of the application will be costs in the trial.**

Judge C Pretorius

Case number	: 38789/2014
Application heard on	: 14 April 2015
For the Applicant	: Adv. AJH Bosman SC / Adv Z Schoeman
Instructed by	: Ronel Coetzee Attorneys
For the Respondent	: Adv. PJ Greyling
Instructed by	: Botha & Human Inc.
Date of Judgment	: 2015