

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: NO
(2) INTEREST TO OTHER JUDGES: NO
17/8/12 DATE
<i>[Signature]</i> SIGNATURE

17/8/2012

CASE No. 45533/2012

In the matter between:-

ERMELO SAND CC t/a PRO FIRE

Applicant

and

ADAM BARNARD
LIZ-MARI HATTINGH
A & M INDUSTRIAL SUPPLIES

First Respondent
Second Respondent
Third Respondent

JUDGMENT

Van der Byl, AJ:-

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[1] In this application the Applicant, Ermelo Sand CC, trading as Pro Fire, seeks, as is apparent from its initial Notice of Motion, as a matter of urgency, in addition to a punitive order of costs, an order -

- (a) committing the First and Second Respondents to imprisonment for a period of 90 days for contempt of the court order granted on 25 May 2012 in Case No. 24512/12 (**prayer 3**);
- (b) interdicting the Respondents from approaching or soliciting business from any of the Applicant's clients listed in Annexure S3 to the founding affidavit (**record p. 81**) regarding signage requirements and the sales and annual service of fire-extinguishers and fire fighting equipment for a period of 18 months from 24 February 2012 (**prayer 4**).

I may mention that these orders were at first sought by way of a rule *nisi* and interim relief, but all the parties having filed their papers, the matter was argued on the basis that final relief is claimed.

[2] The Applicant, being an entity established more than 19 years ago, conducts the business of servicing and supplying fire extinguishers and fire fighting equipment to the mining and corporate industries in various towns and areas in an around Mpumalanga and also conducts the business of designing and manufacturing for the same clients signs mainly relating to prescribed safety signage and also the branding of motor signage and general signs.

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[3] It is common cause that the First Respondent was previously employed by the Applicant as a technician and a representative of the Applicant's business until he left the Applicant's employ on 24 February 2012. Whilst in the employment of the Applicant he was "*the face of the business*" and had a cell phone of his own on which clients could at all times contact him. After having left the Applicant's employ he obviously took the cell phone with him.

[4] The Second Respondent was similarly employed by the Applicant as a graphic designer, was also in charge of the production of signage manufactured by the Applicant and had contact with many of the clients until she resigned and left the Applicant's employ on 23 March 2012.

[5] It is an indisputable fact that the First and Second Respondents obtained in the course of their employment by the Applicant information relating to the Applicant's clients, the Applicant's price structures and business opportunities which clearly constitute a protectable interest.

[6] Their employment agreements contained confidentiality and restraint of trade clause.

[7] It is also common cause that the First Respondent, after having left the employment of the Applicant, registered an incorporated the Third Respondent which conducts business in direct competition with the Applicant and has taken up a position in the Third Respondent in the exact same capacity in which he was employed by the

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Applicant. The Second Respondent was after her resignation from the employment of the Applicant on 23 March 2012 employed by the Third Respondent where she admittedly conducts the same functions as she conducted when employed by the Applicant.

[8] Having received information that the First Respondent diverted business away from the Applicant and has with the benefit of inside knowledge of the Applicant's pricing structures approached clients of the Applicant and, *inter alia*, offered to manufacture signage at prices lower than the prices of the Applicant and that the Second Respondent designed the same graphic designs to produce signage for former clients of the Applicant.

[9] On this information the Applicant launched an urgent application against the three Respondents on 4 May 2012 and obtained on 25 May 2012 an order in terms of which the First and Second Respondents were interdicted, *inter alia*, from -

- (a) *"approaching and soliciting business from any of the Applicant's clients listed in Annexure F to the Founding Affidavit pertaining to the annual service of their fire extinguishers and fire-fighting equipment for a period of 18 months from 24 February 2012" (para 1.6 of the order, record p. 25);*
- (b) *"utilising any information and documents belonging to the applicant of any nature whatsoever, including client lists, whether compiled by the first respondent during his term of employment of any other person employed by the applicant"*

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(para 1.7 of the order);

(c) "*competing unfairly with the applicant*" (para 1.9 of the order).

[10] It would appear that the clients referred to Annexure F are not all the clients of the Applicant (who are now listed in the aforesaid Annexure S3), but only refers to clients which were serviced by the First Respondent.

[11] It is, briefly stated, the Applicant's case in this application that it established that the Respondents, equipped with knowledge of the Applicant's trade secrets, continued to conduct business under the name of the Third Respondent and competing unfairly with the Applicant in defiance of, particularly, prayers 1.6, 1.7 and 1.9 of that order.

[12] On having investigated this state of affairs it established -

- (a) that AVBOB Funeral Services, being a former client of the Applicant, but not listed in Annexure F, elected to no longer make use of the services of the Applicant due to the fact that it elected since June 2012 to make use of the services of the Third Respondent which services constituted the supply of signage similar to that provided by the Applicant;
- (b) that the Mashaia Mine Group and Vunene Mine Group, being clients specified in Annexure F, were also making use of the services of the Third Respondent for the service and supply of its fire fighting equipment;

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- (c) that the Ligbron High School in Ermelo, being a client which is also listed in Annexure F, was contacted by the First Respondent to confirm a quote given to the school during April 2012 to finalize the acceptance of the quote to supply safety signs to the school;
- (d) that the Respondents during June 2012 sold fire extinguishers and signage to the Mooiplaats Mine, forming part of Coal of Africa Group of mines which business forms a substantial part of the Applicant's business turnover and also obtained a vendor number from it and have contacted the Coal of Africa Group from which they also applied for a vendor number;
- (e) that the Respondents during June 2012 approached the Umlabo Mine, also an established client of the Applicant which forms part of the S.T.A Group of Mines.

[13] According to the deponent to the Applicant's founding affidavit he, following up a quotation submitted to Mooiplaats Mine on 26 June 2012 for the annual service of its fire-extinguishers, on 4 July 2012 visited the workshop of the Mooiplaats Mine and, upon entering the main entrance, he saw the First Respondent in his vehicle branded with the Third Respondent's insignia exiting the premises with approximately 40 fire extinguishers on the back of the vehicle. On enquiry at the workshop he was informed that the Respondents are in business with Mooiplaats Mine and took the Applicant's fire-extinguishers to be serviced.

[14] In an attempt to amicably resolve the dispute between the Applicant and the

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Respondents the Applicant, through their attorney of record arranged for a meeting between the parties which eventually took place of 24 July 2012. At the meeting the Respondents were requested to sign an undertaking (**Annexure S15, record p. 111**) in which they declare that their actions are covered by paragraphs 1.6, 1.7 and 1.9 of the court order of 25 May 2012 and undertake not to unfairly compete with the Applicant (see: **record p. 18, para 8.33 of the founding affidavit**).

[15] The Respondents were not prepared to sign the undertaking in the form it was submitted to them and suggested various amendments to the undertaking which in effect had as its aim to limit any undertakings to the clients specified to Annexure F as they obviously did not regard them restricted in approaching any other clients (**Annexure S16, record p. 117**).

[16] As is apparent from the Respondents' opposing affidavit deposed to by the First Respondent, it appears, apart from a number of technical defences raised, to be the Respondents' case -

(a) that they are in terms of prayer 1.6 only interdicted from approaching and soliciting business from any of the Applicant's clients "*listed in Annexure F*" pertaining to the "*annual service of their fire extinguishers and fire-fighting equipment*" and not from approaching and soliciting business from any of its other clients and not from approaching and soliciting business from all clients pertaining to business other than the "*annual service of their fire extinguishers and fire-fighting equipment*";

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(b) that the Applicant failed to make out a case that they are in contempt of prayers 1.7, 1.8 and 1.9 of the court order in question as the Respondents at all times acted in accordance with prayer 1.6 and, therefore, never competed unfairly with the Applicant;

(c) that the Applicant is not entitled to the relief claimed in prayer 4 of the Notice of Motion as it merely envisages an amendment of prayer 1.6 of the court order of 25 May 2012 by extending the interdict to all three Respondents in relation to any of the clients of the Applicant regarding also signage requirements and the sales.

[17] Furthermore, it is contended by the Respondents -

(a) that they concede that they conducted business with entities not listed in Annexure F;

(b) that, in so far as the Applicant purports to extend the interdict to the clients listed in Annexure S3, the Applicant is no longer dealing with various clients referred to in paras 4.11.1 to 4.11.7 of the opposing affidavit (**record pp. 137 to 138**);

(c) that the Applicant failed to submit any proof that the Second Respondent is in contempt of the court order;

(d) that, in relation to the Applicant's allegations relating to AVBOB Funeral,

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Services, AVBOB Funeral Services was not part of the previous order which in any event does not restrict the provision of signage and that it is in any event free to decide with whom it wishes to conduct business;

- (e) that, in relation to the Applicant's allegations relating to the Mashala Mine Group, the Respondents never contacted the Mashala Mine, but that they were contacted by the Group itself, that they informed the Group of the order, but that the Group nevertheless elected to conduct business with the Respondents;
- (f) that, in relation to the Applicant's allegations relating to Vunene Usutu Mine Group, the Respondents did not approach the Group, but that they were approached the Group which indicated that it has not used any supplies or services from the Applicant in the last three years and that although it was aware of the order it in any event wish to do business with the Respondents;
- (g) that, in relation to the Applicant's allegations relating to the Ligbron High School, the Respondents were contacted by the school to come and give a quotation for signage in the school hall and to fit brackets to the wall as the school was hosting a musical and it wanted the signs and the brackets, that during a visit to the school the First Respondent discussed the court order but as signage was not part thereof the school was comfortable to make use of the Respondent's services, but that the Respondents were later phoned by the school and informed the Respondents that it was phoned by the Applicant's attorney and does not want to become part of the legal battle between the parties;

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- (h) that, in relation to the Applicant's allegations relating to Mooiplaats Mine, the Third Respondent was indeed awarded a vendor number, but that Mooiplaats Mine is not included in Annexure F and that there was accordingly nothing prohibiting the Respondents to obtain such a number;
- (i) that, in relation to the Applicant's allegations relating to Coal of Africa, Coal of Africa does not appear on Annexure F;
- (j) that, in relation to the Applicant's allegations relating to Umlabo Mine, that Umlabo Mine does not appear in Annexure F and if that mine forms part of the S.T.A Group of Mines the Respondents were not aware of thereof;
- (k) that, in relation to the Applicant's allegations relating to the Applicant's visit to Mooiplaats Mine, it is noted that the Applicant waited until 3 August 2012 to issue this application, that Mooiplaats Mine does not appear in Annexure F, that the Respondents were contacted by an employee of Mooiplaats Mine and that the fire-extinguishers at the back of his vehicle were not that of Mooiplaats Mine but belong to Kwena Mining who acts as a contractor of Mooiplaats Mine.

[18] In response to these allegations made the Respondents, the Applicant contends in its replying affidavit -

- (a) that the clients referred to paragraphs 4.11.1 to 4.11.7 of the opposing affidavit are, referring to various quotations and tax invoices and, particularly, the fact

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that these clients formed part of the goodwill of the business that was purchased by the Applicant during May 2010 (see: p.9, para [19] of the judgment of Hiemstra AJ handed down on 25 May 2012 in Case No.24512/12), indeed clients of the Applicant;

- (b) that the Respondents' conduct, in so far as they conducted business with the Applicant's clients who are not listed in Annexure F, constitutes a breach of clauses 1.7 and 1.9 of the court order of 24 May 2012.

[19] The disputes between the parties calls for an interpretation of all the paragraphs the court order of 24 May 2012 read in context and regard being had to the allegations contained in the papers filed in the application which had given rise to that order.

[20] It is on the one hand the Respondents submissions that paragraph 1.6 of the court order (1) that only prohibits the First and Second Respondents from contacting the clients listed in Annexure F; (2) that the prohibition exclusively pertains to service of fire-extinguishers and fire fighting equipment; (3) that nothing restricts them from approaching and soliciting the business of the business of the Applicant's clients not specifically mentioned in Annexure F.

[21] Having read the papers in the application that served before Hiemstra AJ and the judgment handed down by him, it is in my view clear that he held that the Applicant has a protectable interest and that the Respondents should be restrained from doing business with all the clients of the Applicant as such business will constitute unfair

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competition, hence the order contained in paragraph 1.9 of the order.

[22] If regard is had to paragraph 1.9 in all the circumstances of the disputes between the parties, it is in my view clear that it could not have been the intention to restrict the First and Second Respondents from approaching and soliciting business from not only the clients listed in Annexure F. If that was the intention paragraph 1.9 must be construed of having no effect and to be superfluous. Any such interpretation will defeat the whole case of the Applicant (see, eg.: **record p. 51, para 9.13, record p. 52, para 9.14, record p. 54, para 10.6, record p. 436, para 26 and record p. 452, para 53**).

[23] The Respondents' conduct in conducting, with their inside knowledge of the Applicant's business, business which entails not only the service of fire-extinguishers and fire fighting equipment, but also in relation to all the other activities comprising the Applicant's business, with clients of the Applicant, whether or not listed in Annexure F and whether or not the Respondents or the clients approached each other, in my view clearly constitutes unfair competition, as was indeed held by Hiemstra AJ.

[24] The next question is whether the First and Second Respondents in having acted in the manner they did, they did wilfully and in bad faith acted in defiance with the court order.

[25] In my view the fact that they interpreted the court order and, particularly, paragraphs 1.7 and 1.9 thereof as being limited to the circumstances set out in

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paragraph 1.6, there is insufficient proof beyond all reasonable doubt that their actions constitute *mala fides* and wilfulness on their part.

[26] I am, however, satisfied that the matter calls for an order which clearly prevent them from conduct which constitutes unfair competition in the context of their contractual obligations to the Applicant.

[27] As far as costs are concerned, I am satisfied that the Applicant is, although only partially entitled to the relief claimed, entitled to its costs as it had no option other than to approach the court so as to protect its protectable interests.

[28] Apart from these considerations, I, sitting in the urgent court where I am swamped by various other urgent applications, am unable to deal in particular detail with all the allegations contained in the papers and the submissions made in relation to those allegations on behalf of the parties, except to say that I have read and considered all the allegations made therein and all submissions made by counsel on both sides.

[29] In the result I make the following order:-

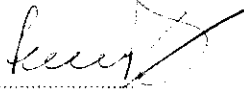
1. **THAT** the relief claimed in prayer 3 be dismissed.
2. **THAT** the First, Second and Third Respondents be interdicted from conducting any business with the Applicant's clients listed in Annexure S3 of the founding affidavit (**record p. 81**) regarding signage requirements and the sales and

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annual service of fire-extinguishers and fire fighting equipment for a period of 18 months, in the case of the First Respondent, as from 24 February 2012 and, in the case of the Second Respondent, as from 23 March 2012.

3. THAT the First and Second Respondents be ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the Applicant.



P C VAN DER-BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

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ON BEHALF OF THE RESPONDENTS

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DATE OF HEARING

15 August 2012

JUDGMENT DELIVERED ON

17 August 2012