



IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

CASE NUMBER: 10188/2009

DATE: 20/4/2009

20 4 09

DATE

SIGNATURE

TG MEDICAL (PTY) LTD
APPLICANT

V

GENE JACOBS
RESPONDENT

JUDGMENT

SAPIRE, AJ

The applicant conducts a small business distributing rapid diagnostic testing kits and related products in South Africa. It has a sole distributorship agreement in relation to the products of two companies namely CS Innovations Pty Ltd and the Scientific Group Pty Ltd. The first name supplies blood testing kits and the latter mucosa testing kits. The kits are use to detect a number of medical conditions including pregnancy and the presence of the HIV virus.

The applicant since its inception in early 2007 had only 2 shareholders and 3 directors. The shareholders are the Theo Roelofs

family trust and the respondent. The directors until the resignation of the respondent were Theo Roelofs junior and senior and the respondent. These persons are parties to a shareholders agreement which regulated their relationship but did not provide for any restraint of trade or competition. The respondent resigned as a director on the 30th of January. Since his resignation the respondent has obtained permission from CS Innovations to distribute its products in competition with the applicant. CS Innovations in agreeing to allow the respondent to distribute its products in competition with the applicant is in breach of its sole distributorship agreement with the applicant.

The respondent has joined a business Dynamic Diagnostics and in competition with the applicant intends to market and distribute the products of CS Innovations to clients including customers of the applicant. The respondent has in his possession and insists on retaining her data in a client file the exact nature of the information being in dispute. He also has data in an electronic format contained on a laptop. The applicant maintains that the respondent by his actions is acting unlawfully and that his proposed business constitutes an unfair competition with the applicant.

The applicant complains that the respondent is using confidential information that is the property of the applicant, and it is the applicant's contention that this constitutes a breach of his fiduciary duties and his also unlawful competition. The applicant further alleges that the respondent's interference in the contractual relationship between the applicant and its supplier CS Innovations is unlawful. It must be said that if any party is in breach of a contractual relationship it is CS Innovations which is not party to these proceedings.

As far as the applicant is concerned the position is exacerbated by the fact that the respondent misrepresents to both CS Innovations and the applicant's client's information regarding the applicant and the respondent's respective rights and obligations. The applicant has brought this application as a matter of urgency in which it seeks relief in the following terms: (insert par 1-6 on pages 1-4).

The respondent is opposing the application and has made a counter application to rent the applicant from informing the suppliers that the respondent's actions are illegal and that he is in breach of some duty owed to the applicant by sitting up a business in competition.

The applicant contents that the urgency is that the respondent's conduct threatens to cause the applicant's business immediate and irreparable harm in relation to which the applicant has no alternative remedy. The applicant in so alleging states that the respondent is determined to proceed with the cause he has adopted and maintains that he has every right so to do. I have grave reservations as to the urgency of the matter. What the respondent has done has already taken place and it is not possible by way of an interdict to undo any damage which may have been done. This also involves the finding that what the respondent has done is not unlawful and the steps he has taken to establish a business in competition with the applicant does not constitute unfair trading which can be stopped.

I have already observed that there is no restraint meaning covering the position. It must also be remembered that the information which the respondent has about the applicant's suppliers and its customers is not of a confidential nature and either has been committed to the respondent's memory or easily ascertainable from sources available to him.

The respondent admits that when he left he took with him his "client file" and his laptop computer. The respondent has in heads of argument submitted on his behalf, quoted extensively from LAWSA Second Edition, part 2, paragraph 266 to demonstrate that the information both documentary and electronically recorded does not constitute secret information which can be protected. In arguing that the applicant is not entitled to the relief claimed in the notice of motion the respondent made reference to *METER SYSTEMS HOLDINGS LTD vs VENTER AND ANOTHER* 1993 (1) SA 409 W in which Stegman J had decide whether the applicant are entitled to inter alia certain relief directed at the protection of alleged confidential information. In that case as in the present, the respondent was an x-director and x-employee. In the cause of his judgment Stegmann J warned that English law could not be applied slavishly and in this connection made reference to *ATLAS ORGANIC FERTILIZER PTY LTD vs PIKKEWYN GHWANO PTY LTD AND OTHERS* 1981 (2) SA 173 T.

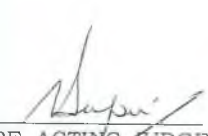
In dealing with the customer lists Stegmann J observe that customer lists drawn up by a trader and kept confidential for the purposes of his own business contain confidential information and property of a trader and distinction is drawn by the judge between such a situation and the circumstances where the employee or former employee who leaves a business retains in his own memory details of the clients. In these circumstances an employee is free to use and disclose such recollected knowledge in his own interest or in the interest of anyone else who competes with the old employer. In this case it is quite clear that the limited number of customers, some 55 in all is all known to the respondent as he has had personal contact with them and the knowledge which he has gained of the requirements and preferences cannot be erased from his mind.

There is nothing on the papers to show that the applicant has adopted any specific policies, strategies or targets of a kind which are to be

protected as confidential information and the conclusion to which I had come is that the respondent is not trading or preparing to trade in unfair competition with the applicant. In so far as the applicant has sole distributorship agreements with the suppliers of the equipment in which it trades, Applicant may have a remedy against the suppliers and may be able to stop them trading with the respondent.

As far as the counter claim is concerned no urgency attaches thereto and anything which may have been said by the applicant cannot now be undone. This order, subject to what has been observed regarding sole distributorship agreements, may afford the respondent sufficient answer to any allegations which the applicant may make to its suppliers and customers who thereof:

1. I make no order on the counter application
2. The application is dismissed with costs including the reserved costs of the 24th of March 2009.


SAPIRE, ACTING JUDGE
OF THE HIGH COURT