IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 5045/2003

In the matter between:

SQUARE ONE POWER SOLUTIONS (PTY) LTD	Applicant
and	
LUTHER NORVAL	First Respondent
BELINDA NORVAL	Second Respondent
RENDEALS FORTY FOUR BK	Third Respondent

CORAM: **MUSI, J**

HEARD ON: **29 JANUARY 2004**

DELIVERED ON: **4 MARCH 2004**

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[1] The applicant is a duly incorporated company with its head office in Sandton, Gauteng. It is represented in these proceedings by its managing director, Mr Neill Cunningham Schreiber (Schreiber). The applicant's main business is the sale and service of Uninterruptible Power Supply products (UPS products). According to the first respondent, the correct name is Uninterrupted Power Supply, but there is no doubt that it is essentially equipment which is connected to things like computers or cash registers and which ensures that there is continuing power

supply in the event of a cut or disruption in the normal electrical power supply. The applicant conducts its business operations countrywide and has a branch in Bloemfontein that serves the market in the Free State, Northern Cape and Lesotho.

[2] During April 2000 the first respondent was appointed as manager of the applicant's Bloemfontein branch and took full responsibility for its management, the marketing, selling, installation and service maintenance of the applicant's UPS products in the areas under his control. The first respondent is also a shareholder of the applicant and is signatory to a shareholder agreement Annexure "FA2" to the applicant's founding affidavit. The shareholder agreement contains a clause relating to confidential information which is one of the issues around which the dispute herein centres. Annexed to the applicant's founding affidavit and marked "FA3" is also a contract of employment which was apparently not signed by the first respondent. It can be accepted though that the terms thereof are binding on the first respondent and no contrary argument has been proffered. The contract embodies a confidentiality clause which is also central to the dispute herein.

[3] The second respondent is the wife of the first respondent and she was hitherto the sole member of the third respondent, which is a duly registered close corporation which trades under the name of Power Unlimited, with its principal place of business in Bloemfontein. As its trading name suggests, the third respondent's main business is also the sale, installation, repairs and maintenance of the UPS products. It is, however, not a bulk supplier and does not import the products. It used to buy some of its products from the applicant. In that sense it is alleged that it is not a competitor of the applicant.

[4] This matter first came by way of urgency before Wright, J when the applicant sought an interim interdict against the respondents as set out in prayer 2 of the notice of motion pending finalisation of this application, alternatively an action to be instituted. The second part of the notice of motion reads as follows:

> "AND TAKE FURTHER NOTICE that the Applicant intends to make application to this Court at 10h00 on 22 January 2004:
>
> 1. That the Respondents be interdicted and restrained from approaching, contacting, soliciting or doing business with the Applicant's

customers as set out in the list attached as annexure "A" to this notice of motion. …"

On 19 December 2003 Wright, J granted an order in the following terms:

"1. An order in terms of paragraph 1 of the notice of motion.

2. That the respondents be interdicted and restrained from approaching, contacting, soliciting or doing business with the applicant's customers as set out in the list attached as Annexure A to the notice of motion in respect of UPS products sold by applicant up to 29 January 2003.

3. That the application be postponed to 29 January 2004.

4. The applicant must supply respondent with any further documents on which it may rely on or before 28 December 2003.

5. The respondents may file further documents, a further affidavit on or before 8 January 2004.

6. The applicant may reply to such an affidavit on or before 19 January 2004.

7. The costs of today to stand over to the final hearing of this

application."

Paragraph 2 of the order is clearly an interim interdict pending the further hearing of the matter on 29 January 2004 when the parties would have had enough time to file further papers, in particular the respondents were afforded the opportunity to file supplementary opposing affidavits and the applicant was entitled to reply thereto. This has happened and the matter was then ripe for full hearing on 29 January 2004.

[5] The applicant has to date not instituted any action and it appears that it was contemplated that the application that was to be heard on 29 January 2004 was to be the one set out in the second part of the notice of motion. There being no pending action this would, in my view, be an application for a final interdict. In order to succeed, therefore, the applicant must establish the three requirements for a final interdict, namely a clear right, a reasonable apprehension of harm and the absence of an alternative remedy. Urgency is no longer an issue and no contrary contention has been made. Having heard full argument on 29 January 2004, I postponed the matter and extended the interim order to 26 February 2004. I, however, amended paragraph 2 of the interim order by

replacing the phrase "doing business with the applicant's customers" with the phrase "or in any way touting the applicant's customers". On the latter date I was ill-disposed and not available and arranged for the interim order to be extended further to 4 March 2004.

[6] In his heads of argument Mr Bothma for the applicant submitted that the applicant has made out a case for a clear right. He says that the first respondent has over a period of time and whilst employed by the applicant high-jacked the applicant's business, in that he transferred the applicant's clients and orders to the third respondent and used the applicant's confidential information to promote the business of the third respondent to the detriment of the applicant's business, with full collaboration of the second respondent. The respondents have thus been engaged in unlawful competition with the applicant, are still doing so and intend continuing doing so. He submits that there is a reasonable apprehension of harm and that the applicant has no alternative remedy.

[7] In argument before me, however, Mr Bothma appeared to lose

confidence in one aspect of his argument, namely whether the applicant has established a clear right and he shifted focus to the alternative argument raised in paragraph 7 of the heads of argument to the effect that the issue of whether the applicant has a clear right be referred to oral evidence. He handed in a draft order wherein he included the question of whether the applicant has a well-grounded apprehension of harm for referral to oral evidence. He submitted that there was a dispute of fact which could not be resolved on the papers in regard to these two issues. He proceeded to elaborate on the relevant considerations that should guide the Court in the matter of referral to oral evidence.

[8] Mr Van der Merwe, for the respondents, vigorously opposed the application for referral to oral evidence and submitted that the dispute of facts were clearly foreseeable and that the applicant must stand or fall by the affidavits filed of record. In his heads of argument he dealt in detail with the issues raised in the papers and elaborated further in oral argument. Mr Van der Merwe focused on two main issues. Firstly, the confidentiality of the customers' list Annexure "A" to the applicant's founding affidavit (hereinafter referred to simply as Annexure "A"), and the knowledge, expertise

and experience of the first respondent. Secondly, the confidentiality of the applicant's pricing structure. Mr Van der Merwe conceded that the first respondent breached the terms of his employment by promoting the work of the third respondent whilst still employed by the applicant and that such conduct was unlawful. He argued that the picture has however changed with the resignation of the first respondent. In the absence of a restraint of trade contract the first respondent was at large to compete with the applicant and was free to canvas the applicant's clients and to do business with them. The conduct of the first respondent can only amount to unlawful competition if, *inter alia*, the information relating to the clients list and the pricing structure was confidential or secret, so he argued. In relation to the unlawful conduct of the first respondent whilst still employed by the applicant, it was contended that the only remedy available to the applicant is an action for damages, and that an interdict was no longer available to it.

[9] In my view, the real issues for determination in this matter are firstly whether the clients list, Annexure "A", constitutes confidential information, for if it is and the first respondent used it

even after his resignation to promote the business of the third respondent to the detriment of the applicant's business, then that would constitute unlawful competition. (Compare **<u>CAMBRIDGE PLAN AG AND ANOTHER v MOORE AND OTHERS</u> 1987 (4) SA 821 (D&CLD) at 846C; <u>COOLAIR VENTILATOR CO (SA) LTD v LIEBENBERG AND ANOTHER</u> 1967 (1) SA 686 (W) at 691B**). Secondly, and if such list is not confidential, whether the first respondent's conduct in luring the applicant's clients in the circumstances of this case nonetheless constitutes unlawful competition.

[10] The collateral issue raised by the respondents that the third respondent is not a competitor of the applicant is, to put it mildly, devoid of any merit and can be summarily dismissed. Even if the third respondent had in the past ordered UPS products from the applicant, and was the applicant's associate, it is now clear that it is in cahoots with one of the applicant's chief rivals, UPS Direct. The affidavit filed by Mr Andrew Ingram of the latter firm in support of the respondents speaks for itself and the tone of his averments betrays his desire for vengeance against the applicant. The third

respondent may not compete with the applicant in terms of pricing but it still actively lures away the applicant's clients with products supplied by the applicant's rivals, and there is nothing preventing the third respondent from negotiating prices with such rivals in order to undercut the applicant's pricing. Now if that is not competition, I do not know what else is.

[11] The disputes around the confidentiality of the pricing structure and whether the knowledge and expertise that the first respondent has acquired in this specialised field of business, were acquired through his employment with the applicant and are of the kind that can be classified as being trade secrets of the applicant and therefore worthy of protection, can be left out of the reckoning. The simple reason for this is that the applicant has not seriously countered the respondents' averments in regard thereto. In relation to the knowledge and expertise of the first respondent, even the probabilities favour his version that he was employed and given incentives precisely because of such knowledge and expertise.

[12] In support of his argument for referral to oral evidence, Mr Bothma indicated that there is a dispute of fact as to whether Annexure "A"

constitutes confidential information, but he links this to the question of whether the applicant has a clear right. I think counsel confused issues here. The absence of confidentiality is not equal to the absence of a clear right. The applicant has a right to the goodwill of its business and to the protection of such right against wrongful infringement. What is in issue here is whether there is a wrongful infringement of such right. Now legitimate competition in trade normally entails infringement of a competitor's right to goodwill. (Neethling, Potgieter and Visser, **Law of Delict** at p.316 refers to this as factual infringement). It is only when the infringement is regarded as wrongful that we talk of unlawful competition. Filching confidential information of a trader to promote the interests of another to his prejudice is one of the instances that are recognised by our law as unlawful competition. And a trader needs no restraint of trade contract to obtain protection against such unlawful conduct. The position was put as follows in **EASYFIND INTERNATIONAL v INSTAPLAN HOLDINGS 1983 (3) SA 917 (W) at 927D**:

> "What is clearly established in our law is that it is unlawful for a servant to take his master's confidential information or documents and use them to compete with the master."

(See also **<u>COOLAIR VENTILATOR CO (SA) LTD v LIEBENBERG & ANOTHER</u>** (***supra)***).

[13] Confidential information is, broadly speaking, information that is meant for the exclusive use of a trader and circulates within the confines of such trader's business. It is not readily available to the public or, as it is generally expressed, it is not public knowledge. The position was stated as follows in **<u>VAN CASTRICUM v THEUNISSEN AND ANOTHER</u> 1993 (2) SA 726 (T) at 730H**:

> "The information must have the necessary quality of confidence about it, namely it must not be something which is public property and public knowledge."

(See also **<u>TOWNSEND PRODUCTIONS (PTY) LTD v LEECH AND OTHERS</u> 2001 (4) SA 33 (C) at 53J-54A**). Whether the requirements for confidentiality have been met is an issue to be decided with reference to the facts of the particular case. But there are certain factors that would point to the confidential nature of the information. Usefulness to a rival is one such factor in the sense that the information would give him/her an advantage over the trader from whom the information comes. The presumption of confidentiality would be even stronger where an employer's information divulged by his/her employee has in fact been used by a rival to the detriment of the employer. (See **COOLAIR VENTILATOR CO (SA) LTD v LIEBENBERG AND ANOTHER** (***supra***) at **699F-H**). Our law also recognises certain categories of information or documents as being of a confidential nature. A customer's list is one such type of document. Van Heerden & Neethling, **Unlawful Competition** at p.227 specifically lists a customer's list as such. In **EASYFIND INTERNATIONAL v INSTAPLAN HOLDINGS** (***supra***) at **929D** it is categorically stated:

> "Customer lists certainly are confidential information."

Compare also **METER SYSTEMS HOLDINGS LTD v VENTER AND ANOTHER** **1993 (1) SA 409 (W) at 428B**.

Turning to the facts of the instant case the clients list, Annexure "A", would normally qualify as a confidential document. However, in his answering affidavit, the first respondent attacked its confidentiality on various grounds. He says that it was arbitrarily drawn and is not an accurate reflection of the applicant's clients. He challenged the applicant to produce its debtor's list, which would reflect its active clients. The first respondent thereby implies that this list was compiled recently and was not there whilst he was employed by the applicant.

On the other hand, the applicant insists that Annexure "A" is in fact its debtor's list. The first respondent also annexed to his answering affidavit and marked "N6" a list of clients that was allegedly given to the third respondent by Andrew Ingram of UPS Direct which has many of the names that appear in Annexure "A". That was in support of his contention that the particulars of the entities concerned are public knowledge. The applicant's response in this regard was that the allegation is irrelevant. This response would, in my view, be valid in respect of the allegations contained in paragraph 3.5 of the answering affidavit relating to the list that the first respondent allegedly brought from ATG Technologies, his former employer. But information about a list in the possession of the applicant's rivals is very much relevant. There is also a dispute whether Annexure "A" as such was passed onto the second or third respondent. In his founding affidavit Schreiber refers to Annexure

"FA15" as the list that the first respondent sent to the second respondent on 2 October 2002. In his answering affidavit the first respondent says that "FA15" is a different list that was given to him by Rudolf Holzhausen before Rudolf joined the applicant. There are also questions about the motives of some of the deponents to the affidavits filed in support of the respondents. Certainly one of them, Andrew Ingram of UPS Direct, is a fierce competitor of the applicant and he does not disguise his bias and hostility towards the applicant.

[14] It is clear that there are serious factual disputes around this issue of the confidentiality of the clients list which cannot be resolved on the papers. I have, however, decided against referring the issues to oral evidence partly because, in my view, it would not be in the interest of justice to do so given the nature of the matter. Most importantly referral is unnecessary in the view that I take of the matter as set out *infra.* It stands to reason that it has not been shown that Annexure "A" is a confidential document.

[15] What emerges clearly from the papers and which was conceded by counsel for the respondent is that over a period of time, from 2002

up to his suspension on 30 October 2003, the first respondent whilst an employee of the applicant, was engaged in activities that amounted to a breach of his fiduciary relationship with the applicant and contract of employment and therefore unlawful. He stealthily promoted the interests of the third respondent with the full collaboration of the second respondent to the detriment of his employer. He actively solicited, successfully in some cases, orders from the applicant's clients on behalf of the third respondent. He did repairs and maintenance work for the clients thus diverted and other clients of the third respondent for the latter's benefit. Although he denies it, his conduct amounted to unlawful competition *vis-á-vis* the applicant. I have already found that the third respondent was a competitor of the applicant and it makes no difference that it was at some stage branded an associate of the applicant. This fact was initially not disclosed to Schreiber and when he did come to know about it, it was not disclosed to him that the second respondent was the proprietor of the third respondent. On the contrary, he was misled into believing that the second respondent was not involved in the UPS products business. In all probability this association was a camouflage for the first respondent to spring-board the third respondent. As soon as the truth was found out and he was suspended, the first respondent speedily resigned and openly continued his competition with the applicant. The first respondent has tried to explain away his cheating activities in relation to some of the transactions detailed in the applicant's papers, but the explanations can truly be described as disingenuous and irrelevant. There is no *bona fide* dispute of fact in this regard.

[16] The argument advanced on behalf of the respondents in this regard is that the position changed with the first respondent's resignation. That he is now free to compete with the applicant in the absence of a restraint of trade agreement and he has made clear his intention to continue to canvas and do business with the applicant's clients. I have already referred to the details of this argument, the essence of which is that the applicant could only obtain an interdict if it was established that Annexure "A" constitutes confidential information. Put otherwise, the respondents' conduct could only amount to unlawful competition if it was shown that the first respondent had filched confidential information from his former employer.

[17] It has been laid down that for competition to become unlawful it

must infringe upon a legal norm. That norm is the legal convictions of the community, also referred to as the *boni mores* or public policy. There are certain categories of competition that the Courts have classified as being *contra bonos mores* or offensive to the convictions of the community and therefore amount to unlawful competition. The filching of confidential information by an employee or ex-employee to be used to harm the business interests of the employer is one such instance. This does not, however, mean that liability is limited to these recognised categories. The Court has a wide discretion to decide whether any new situation before it amounts to unlawful competition on the basis of the broad principles of the *actio legis Aquiliae*. See Boberg, **The Law of Delict** Vol.1 at p.149 *et.seq*. and the authorities cited there. The learned author puts the position as follows:

> "Declining to define the limits of lawful competition, our Courts have retained flexibility to deal with whatever new schemes for the downfall of others their untiring imagination of the dishonest made …."

As for the factors to be taken into account in determining and applying the relevant norm see **ATLAS ORGANIC FERTILIZERS (PTY) LTD v PIKKEWYN GHWANO 1981 (2) SA 173 (T) at 188-189**; **LORIMAR PRODUCTIONS INC.**

<u>AND OTHERS v STERLING CLOTHING MANU-FACTURERS (PTY) LTD</u> 1981 (3) SA 1129 (T) at 1152 – 1153.

[18] Back to the facts of the instant case. It is clear that whilst in the applicant's employ, the first respondent engaged in unlawful competition with his employer and the employer would have been entitled to stop such activities, *inter alia*, with an interdict. Should the applicant now be denied an interdict simply because the first respondent is no longer its employee? What the first respondent did was to abuse his position as the local manager of the applicant to build a rival business and as soon as he was caught and suspended he quickly resigned and now wants to take with him the applicant's clients. In my view, that is by all accounts morally reprehensible conduct that the trading community would frown upon. It is certainly unfair and dishonest a practice that cannot be tolerated. It does not matter that some of the clients are his former clients that he had brought along when he joined the applicant. He was employed precisely to bring in clients and he himself says that one of the reasons that the applicant took him into its service was precisely his capacity to bring in new clients. Indeed he was paid

monthly for doing that and was even given additional incentive in the form of shares in the applicant. But once the clients were brought on board, they became the applicant's clients and he was not entitled to simply walk away with them as if it were his personal property. It is not the fact that the first respondent has been canvassing the clients after his resignation that taints his conduct. What does taint his conduct is the fact that he abused his relationship of trust to initiate this process of luring away the clients. He now wants to be free to complete that illegitimate process from outside. He wants to use his resignation as a magic wand to legitimise his otherwise unlawful activity. I am positive that that cannot be countenanced by the trading community, and indeed by the community at large. Nor can the provisions of clause 19.3 of the shareholders agreement legitimise such conduct. The position would be different if the first respondent had not been cheating his employer and started canvassing the applicant's clients only after resigning.

[19] The respondents complain that the interdict would deprive them of a means of livelihood as they rely entirely on the business. That cannot be so for they would still be free to canvas people and firms

not included in the applicant's client lists. The first respondent has in fact referred to some of the lists that he has as having more clients than the applicant's list and he has a vast untapped reservoir in other places like Lesotho. Moreover, the respondents' predicament is of their own making and in that sense they are the authors of their own misery. In my view, the protection of the applicant's interests and those of fair competition generally outweigh the interests of the respondents. Moreover, the protection afforded to the applicant will be of limited duration.

[20] I have come to the conclusion that the first respondent's conduct in the particular circumstances of this case amounts to unlawful competition. The applicant has a right to the protection of its goodwill against unlawful infringement. It has established a clear right. There can be no doubt that the conduct of the respondents is calculated to cause the applicant prejudice. It is trite that for the purposes of an interdict it is sufficient that there be potential prejudice. See Harms, **Civil Procedure in the Supreme Courts**, par A5.4. Luring clients away from the applicant obviously entails diminition of its business. I hold therefore that the applicant has shown a reasonable apprehension of harm and the threat of such

harm continued even after the first respondent's resignation. The applicant has contended that it has no alternative remedy. In principle it would be entitled to sue for damages, but its contention that it would be difficult to quantify damages in the circumstances of this case is reasonable and acceptable. It has to be borne in mind that the first respondent was the man in charge of the applicant's Bloemfontein operations and he is the person with intimate knowledge of the workings and transactions of that branch. In his absence it would be difficult to compute damages. Case law also reveals that an interdict is generally a more preferred remedy for unlawful competition.

The position of the second and third respondents presents no difficulty. The second respondent was the sole member of the third respondent and she fully collaborated with the first respondent in the latter's dealings, which were all for the benefit of the respondents.

[21] Finally, a distinction has to be drawn between the confidentiality of the clients list, Annexure "A" and its authenticity as representing the names of the applicant's clients. The first respondent has not

really disputed that these are the applicant's clients. What he says is that they are not exclusive to the applicant. Secondly, that he has himself brought the bulk of them and he wrongly assumes that they remained his even after he resigned. He also says that some of the entities are no longer in operation and that yet others were once-off clients of the applicant. All these are not valid grounds for the contention that these are not the applicant's clients. And the fact that some appear in various other lists is not relevant. Whatever factual dispute is there around this issue is not a *bona fide* one and I accept that Annexure "A" is a true list of the applicant's clients.

It is also only proper that the protection that I propose granting to the applicant should be for a limited period and I think eight (8) months would be appropriate.

[22] In the result the following orders are made:

1. The respondents are finally interdicted and restrained for a period of eight (8) months from date hereof from approaching, contacting, soliciting or in any way touting the applicant's customers as set out in the list attached as Annexure "A" to the notice of motion.

2. The respondents are ordered to pay the costs of suit jointly and severally, the one paying the others to be absolved, which costs shall include the costs of the hearing of 19 December 2003.

H.M. MUSI, J

<u>On behalf of Applicant:</u> Adv. H.C. Bothma
instructed by
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