REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO.: 39907/15

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

30/03/2017 .....

In the matter between

**S G GATEWAY SERVICES** **APPLICANT**
**(a DIVISION OF SUPER GROUP AFRICA (PTY) LTD)**

and

**ROESSTORFF, ORIN** **RESPONDENT**

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**JUDGMENT**

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**VAN DER WESTHUIZEN, A J**

[1] The applicant applies for an order that the respondent is in contempt of a court order granted on 24 November 2015, together with ancillary relief. Initially this application was brought by way of urgency, but was struck from the roll on 13 December 2016 presumably for want of urgency.

[2] The aforementioned order was granted by consent between the parties in an urgent application for an interdict against the respondent and Brandserve Key Accounts Management (Pty) Ltd as second respondent (the main application). The main application relates to an alleged restraint of trade in favour of the applicant against the respondent. To date the main application has not been finalised. In that regard, the applicant has not filed a replying affidavit and has not prosecuted the main application to finality. I shall deal with the applicant's reason for non-prosecution of the main application in due course.

[3] The aforementioned order was granted by agreement pending the finalisation of the main application. The order clearly reserves the respondent's rights in respect of the main application and no concessions were made in the answering affidavit in the main application in respect of any of the issues raised in the main application.

[4] In particular, important issues relating to the validity of the restraint of trade upon which the applicant relies in the main application is, and remains, in dispute. Such include, but not limited thereto, the identity of the applicant's clients, the respective businesses of the applicant and the respondent and the terms of the alleged restraint of trade.

[5] I am not required to decide any of those issues in the present matter despite the applicant's insistence that the allegations in the main application requires consideration in deciding this application. However, for what follows, I decline to opine upon those allegations.

[6] The present application requires consideration of the court order of 24 November 2015 in respect of its scope and whether there has been a breach of that order.

[7] Before dealing with the merits of this application, there is a vexed issue that requires consideration. That issue relates to the *locus standi* of the applicant with particular reference to the identity of the applicant. There is an oblique challenge to the applicant's *locus standi* in the main and present application.

[8] In the present application, the applicant does not identify itself or states its *locus standi,* however in the main application it cites itself as:

> "*4. The Applicant is SG GATEWAY SERVICES:-*
>
> *4.1. a division of Super Group Africa (Pty) Ltd, which itself:-*
>
> *4.1.1. is a private company duly registered and incorporated as such in accordance with the company laws of the Republic of South Africa;*
>
> *4.1.2. has a registration number 2000/019333/07;*
>
> *4.1.3. forms part of the group of subsidiary companies under the management and control of Super Group Limited, which is a company listed on the Johannesburg Stock Exchange;*
>
> *4.1.4. is the erstwhile employer of the First Respondent* (the present respondent)."

[9] The deponent to the founding affidavits in both the main and present application is described as *the Chief Executive Officer of the Applicant".* When read with the resolution taken by the directors of Super Group Africa (Pty) Ltd attached to the main application, it is clear that:

(a) The respondent was employed by SG Gateway Services;

(b) Was under an alleged restraint of trade in favour of SG Gateway Services;

(c) The deponent on behalf of SG Gateway is the Chief Executive Officer of SG Gateway.

[10] The letter of employment containing the alleged restraint of trade is clearly in the name of SG Gateway Services. That much is gleaned from the definition relating to whom employed the respondent.

[11] I am mindful of the judgment in *Clive Francis Ford v Alphera Financial Services (A Division of BMW Financial Services (South Africa) (Pty) Ltd,*[1] in which the issue of the *locus standi* of a division of a company is dealt with and the authorities referred to therein.

[12] However, in the present instance it is not clear who the "true" applicant is. That requires consideration in the main matter. What is clear from the foregoing, is that the alleged rights of SG Gateway Services *vis-à-vis* the respondent are sought to be protected, not that of Super Group Africa (Pty) Ltd including its other "divisions" or the overall holding company or that of other subsidiaries or divisions. The order is clearly limited, at best, to Super Group Africa (Pty) Ltd, t/a SG Gateway Services.

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[1] Unreported judgment under Case no. 20932/10, Western Cape High Court, Cape Town delivered on 20 November 2012

[13] Having determined the aforesaid, the scope of the order of 24 November 2015 requires determination. In that regard, it is to be considered against the background of disputed and undetermined facts in the main application and the disputed facts in the present application.

[14] Further in this regard, neither of the parties sought that all or any of the disputed issues in the present matter to be referred to the hearing of oral evidence thereon. It is trite that in such event as the present, the principles laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,*[2] apply. It applies in particular to the alleged rights in respect of SG Gateway Services' clients and its trade secrets.

[15] The relevant passage of the court order forming the subject of the applicant's complaints reads as follows:

> "*3. Pending the final determination of the application for final relief, the First Respondent* (the present respondent) *undertakes, without admission of liability and without waiver of his rights to raise any argument at the hearing in due course, that:-*
>
> *3.1. he will not deal, whether directly or indirectly, with any of the entities listed in annexure T to the founding affidavit, at page 215 of the papers and annexure E1 at page 73 (copy attached hereto marked X1) in a manner calculated to result in such customer terminating his or her association with the Applicant; and*

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[2] 1984(3) SA 623 (A)

3.2. *he will not disclose any of the Applicant's trade secrets to the Second Respondent or to any other third party."*

[16] The principles relating to the interpretation of a document, whether a court order, other document or a statute, were recently re-stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality.*[3]

[17] Applying those principles in the present instance, the following is gleaned from the order of 24 November 2015:

(a) The respondent is interdicted from dealing directly or indirectly with any of the entities on annexure "T" in a manner calculated to result in such customer terminating his or her association with the applicant, i.e. there must exist an association between the entity on "T" and SG Gateway Services;

(b) The respondent is not interdicted *per se* from contacting or dealing with any of the entities on annexure "T";

(c) If the manner of contact or dealing is not calculated to result in such customer terminating his or her association with the applicant, such dealing is not prohibited by the order;

(d) The respondent is prohibited to disclose any of the applicant's trade secrets. The intended "trade secrets" of the applicant is clearly limited to that of SG Gateway Services to which the respondent became privy to during his employment with SG Services;

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[3] 2012(4) SA 593 (SCA) at [18]; See also *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016(1) SA 518 (SCA) at [29] – [31]

(e) The type of service that the said order aims to protect appears from the provisions of prayer 4 of the said order, albeit with reference to the second respondent. However in the context of the order as a whole it also relates to the present respondent.

[18] The requisites for contempt of a court order that have to be proven are trite.[4] These are:

(a) The order granted and allegedly breached;

(b) Service of the order or knowledge thereof;

(c) Non-compliance of the order (the breach); and

(d) Wilfulness and *mala fides* on the part of the respondent.

[19] In respect of the requirement of wilfulness and *mala fides* on the part of the respondent, the respondent is required to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*. Failing advancement of such evidence, contempt will have been established beyond reasonable doubt.[5]

[20] In the present instance, the first two requisites, (a) and (b) in paragraph 17 above, are common cause between the parties. The disputes relate to whether (c) and (d) in paragraph 17 above have been proven.

[21] The applicant's approach adopted in this application for contempt of the court order of 24 November 2015 is painted with a broad brush. Firstly, the "applicant" is equated with the whole group of business under the pseudo name "Super Group". Secondly the order of 24 November 2015 is interpreted in the broadest way possible, i.e. that the respondent has been prohibited from dealing with any of "Super

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[4] *Fakie NO v CCII Systems (Pty) Ltd* 2006(4) SA (SCA) at p. 345G – J, par [42]
[5] *ibid* at pp 344J – 345A

Group's" customers. Thirdly that the respondent is prohibited from disclosing any of "Super Group's" trade secrets to third parties.

[22] I have already determined the scope of the court order of 24 November 2015. It follows that the aforementioned adopted approach of the applicant is incorrect and stands to be rejected. It is contrary to the canons of construction.

[23] The applicant explains its unwillingness to proceed with the main application to finality in the following manner.

(a) The respondent undertook not to compete unlawfully with "Super Group" and to abide with the terms of the Court order;

(b) "Super Group" did not want to incur further unnecessary legal costs in the light of its rights being protected by the Court order.

[24] It is further stated in the founding affidavit that "Super Group" will be setting the main application down for final determination within 30 days of the hearing of this application. It is not explained why the matter is only to be set down within thirty days of the hearing of this application. This approach is in direct contradiction with the terms of the court order of 24 November 2015 where it was expressly recorded in prayer 2 thereof that *the parties were to co-operate together in jointly seeking the allocation of a preferential date for the hearing of the application for final relief.*

[25] Furthermore, as referred to above, the respondents in the main application disputed many of the allegations proffered on behalf of the applicant and in particular the validity of the restraint of trade that is sought to be protected.

[26] It is explained in the founding affidavit of this application that during the second week of November 2016, it was learnt that the respondent *"is*

*breaching his restraint of trade and confidentiality covenants with Super Group."* There is no reference to the court order of 24 November 2015.

[27] What was learnt, is recorded in the founding affidavit as follows:

> *"Roesstorff has directly approached at least 5 (five) of the customers listed in the Court order with the intention of filching these customers from Super Group; and*
>
> *Roesstorff has expressly disclosed Super Group's trade secrets to a third party, including the details of Super Group's profit margin percentages."*

[28] The alleged facts in support of the foregoing were apparently learnt from a Jacqui le Sar Fourie who conducts business through Inperspective Research Consultancy (Pty) Ltd (Inperspective).

[29] The basis of the alleged breach in respect of the trade secrets to Ms Fourie is limited to what is contained in two e-mails from the respondent whilst in the employ of Inperspective. These e-mails are attached to the founding affidavit marked respectively as FA3 and FA4.

[30] The following is stated in FA3:

> *"Hi Jax,*
>
> *So I could sleep and put this presentation together which would help our proposal.*
>
> *All the slides are relevant and the financial process of managing nett revenue is imperative, as your mix may change which may influence the profitability, together with channel contribution,*

*normally the mix of products sold in RTM/informal markets are not profitable.*

*Let me know what you think, as I feel we could lead this project and manage the shopper and sales process."*

[31] The subject of the aforementioned e-mail is recorded: Premier Route to market Proposal. It is not determinable from FA3 whether any attachment was attached thereto. In the papers filed, a number of documents are filed following on from FA3. I am told from the bar that those documents were apparently attached to FA3. FA3 comprises two e-mails, one from the respondent to Ms Fourie and one from Ms Fourie to presumably the applicant's attorneys. To which of those e-mails the documents were attached, is not clear. Some of those documents contain information that has been redacted. The redaction appears under the heading "Super Group". It is not clear from the documents in what context there is reference to "Super Group".

[32] FA4 similarly comprises a number of e-mails. One is addressed to Ms Fourie and a certain Tracey from the respondent; another is addressed to the respondent from Ms Fourie; a further one is addressed to Ms Fourie from the respondent; and the fourth e-mail is preumably addressed to the applicant's attorneys from Ms Fourie. The subject in respect of the first three e-mails referred to, reads: Snackworks feedback.

[33] Counsel on behalf of the applicant relied only on the third e-mail and in particular only in respect of the concluding paragraph thereof. That paragraph reads as follows:

"*Just for reference purposes they* (Snackworks) *are currently simultaneously meeting with SuperGroup* (sic) *for a RTM which has been proposed as a percentage based cost to serve. I mention our focus is ensuring we have the strategic pplans* (sic)

*with traders and how to unlock what shoppers are looking for. Supergroup* (sic) *are proposing 16% cost to serve for 18 000 stores with sales and distribution."*

[34] The aforesaid two e-mails are the high water mark of the applicant's case on the divulging of trade secrets to third parties, more specifically to Ms Fourie.

[35] Counsel for the applicant conceded that the applicant held no rights in and to what is termed a Route to Market proposal. The rights that are sought to be protected would lie in some of the information contained in such proposal. That information is to be considered in determining whether a breach of the court order in respect of trade secrets has occured. In that regard, the applicant inevitably seeks inferences to be drawn against the respondent and was at pains to show that the credibility of the respondent was doubtful, to say the least. In view of the undisputed fact that the disputes raised in the main application, and for that matter repeated in this application, have not been decided, does not assist in making any conclusive finding on the respondent's credibility.

[36] The respondent explains that his employment with Inperspective was for the purpose of marketing Inperspective's products and services and to formulate shopper-marketing strategies and to provide guidance on how to improve in-store sales activations. The respondent further explains that Inperspective's core business is the provision of consumer and shopper research services via various software-based research tools. A core business that is evidently different from that of the applicant.

[37] In respect of the documents allegedly attached to FA3, the respondent states that those documents formed part of a Decision Criteria document prepared by him for Nando's while in Nando's employment. That document was thereafter sent to the applicant shortly after the

respondent taking up employment with the applicant, i.e. on or about 21 April 2015. That document was prepared well before the respondent took up employment with the applicant and before he was entrusted to any of the applicant's trade secrets. The respondent further states that those documents following on FA3 are at least two years old and thus contains outdated information.

[38] The respondent states with reference to FA4 that he addressed his proposal to Snackworks in respect of a route to market relating to the informal market with the pertinent announcement that he was *not in transport distribution as* he *was under restraint with super group* (sic). In a further e-mail to Snackworks, the respondent makes specific reference to the shopper-research component.

[39] The information contained in the documents following on FA3 clearly fell within the knowledge of the respondent prior to his joining the applicant. It cannot be found that he had gained that information from the applicant. That information forms part of his knowledge and experience gained prior to his employment with the applicant. Furthermore, when the information contained in the Nando's document came to the attention of the applicant, no objection appears to have been raised on the part of the applicant. Only when Ms Fourie raises the issue, the applicant appears to take umbrage.

[40] In my view, it cannot be found that the respondent had dissipated any trade secrets of the applicant that the respondent had learned whilst in the employ of the applicant. FA3 accordingly does not assist the applicant in showing any breach of prayer 3.2 of the court order of 24 November 2015.

[41] In respect of FA4, in the particular context, it is clear that the information with reference to "Super Group" was learned from Snackworks who at that stage ran a concurrent enquiry with "Super Group". This document clearly does not support the applicant's

contention of a breach of prayer 3.2 of the court order of 24 November 2015.

[42] Furthermore, the proposal referred to in FA4 related to research, sales and marketing in the informal market and *inter alia* to the sales and merchandizing of Snackworks' products in the township market, all of which Ms Fourie was acutely aware.

[43] It follows that none of the alleged trade secrets referred to in FA3 and FA4 were entrusted to the respondent whilst in the employ of the applicant.

[44] In respect of the terms of prayer 3.1 of the court order of 24 November 2015, the respondent states the following:

(a) But for Coca Cola, none of the other entities on "T" have any association with the applicant, i.e. SG Gateway Services. Those are customers of other entities within the greater Super Group.

(b) The entity identified as Coca Cola/Wave Side is a separate and distinct entity from Coca Cola *per se*, it being a subsidiary of Coca Cola.

(c) The e-mail relied upon by the applicant in respect of Coca Cola *per se* is to be read with a further e-mail attached to the answering affidavit. In that context, the contact with Coca Cola was based on shopper research for a technology-based route to market offered to the informal market.

(d) That proposal related to improving sales through research and technology-based sales and marketing initiatives.

(e) The proposals to the other entities that the applicant complains of are variations of the Snackworks proposal.

(f) The respondent deals comprehensively with the allegations that he inappropriately utilised "confidential information" of other previous employers. I do not intend dealing with each of those allegations, suffice to say that it is primarily premised upon the applicant's incorrect interpretation of the court order of 24 November 2015.

[45] In view of the clear disputes, including who the clients of SG Gateway Services are, the version of the respondent is to be accepted. It follows that the applicant has not shown a breach of the court order of 24 November 2015.

[46] Furthermore, it cannot be found beyond reasonable doubt that the respondent wilfully breached the order of 24 November 2015 and acted in a *mala fide* manner.

[47] Opportunistically, counsel for the applicant attempted to rely on an alleged agreement in respect of the status of the order of 24 November 2015. There is no merit in any of the submissions. The applicant clearly did not consider that a written agreement in that regard had come into being between the parties, particularly in view of the stance taken in the founding affidavit. The facts raised in the replying affidavit in that respect clearly do not support a finding of an agreement having been concluded as alleged.

[48] It follows that the applicant has not proven the requirements referred to in paragraph 17(c) and (d) above. Accordingly, the application stands to be dismissed.

I grant the following order:

The application is dismissed with costs.

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant: W H Pock
Instructed by: Fluxmans Inc.

On behalf of Respondent: D L Williams
Instructed by: Eamonn David Quin Attorney