REPUBLIC OF SOUTH AFRICA

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

CASE NO: **40433/18**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
26/11/2018 [signature]
DATE SIGNATURE

In the matter between:

APPLIED COATING TECHNOLOGIES SA (PTY) LTD Applicant

and

RAYMOND VINCENT WILFORD First Respondent
COATING TECHNOLOGIES SA (PTY) LTD Second Respondent

JUDGMENT

KEIGHTLEY J

1. The applicant in this matter, Applied Coating Technologies SA (Pty) Ltd ("ACT"), designs, manufactures and supplies custom-built powder coating systems. It also has an exclusive distributor agreement for Norsden spray guns, pumps and control systems, which it markets throughout sub-Saharan Africa. It uses Norsden equipment and parts to manufacture custom-built powder coating booths to meet its clients'

requirements. The first respondents (Mr Wilford) was employed by ACT for many years, and held shares in the company. He resigned at the end of July 2016, and is currently a director of the second respondent, Coating Techniques SA (Pty) Ltd ("CTSA"). It is a competitor of ACT in the powder-coating market, and is a supplier of Electron equipment and parts.

2. On 29 September 2016 ACT filed an urgent application against both respondents, on the basis that they were engaging in unlawful competition with it. ACT averred that Mr Wilford was using ACT's designs, costing sheets, customer lists and other confidential information and using them to compete unlawfully with ACT. These averments were (and remain) vehemently denied by Mr Wilford. After the respondents filed an answering affidavit in the urgent application, the parties agreed to an order that was endorsed by the court ("the Order").

3. The pertinent terms of the Order for present purposes are as the following:

"*1. The first and second respondents shall not, directly or indirectly-*

1.1 interfere with the applicant's existing or maturing business opportunities which the first respondent became aware of by virtue of his employment with the applicant;

1.2 ...

1.3 pass off:

1.3.1 electron built or other products as ACT and/or Norsden products .... ."

4. ACT contends that the respondents breached these terms of the order and is in contempt of court. It applied for an order declaring them to be in contempt, and further for a committal of Mr Wilford to prison for six months or such other sanction deemed appropriate by the court. In essence, this is the application that serves before me. Once again, the respondents vehemently dispute that they are in contempt, with Mr Wilford filing an answering affidavit setting out their defence.

5. When the parties filed their heads of argument, ACT included therein a request that the matter be referred to trial on the basis that there were material disputes of fact that rendered the matter incapable of determination on the papers. ACT accepts that if I refuse this request, and decide that the matter can be determined on the papers, then the respondents' version on factual disputes must prevail. In effect, it accepts that in this event the application should be dismissed.

6. Under uniform rule 6(5)(g), in cases where a material dispute of fact arises in motion court proceedings the court has a discretion as to how the matter should proceed. It may refer the matter to trial or oral evidence, or it may even, at the outset, dismiss the matter. It is a well-established principle in our law that an applicant who proceeds by way of motion proceedings runs the risk that serious disputes of fact may be shown to exist, and that a court may, for this reason, dismiss the application. This risk exists particularly in circumstances where, at the time proceedings were instituted, the applicant had knowledge of the probability that the matter should be subjected to ordinary trial proceedings because a serious dispute of fact was bound to develop.[1] In

[1] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162; Gounder v Top Spec Investments (Pty) Ltd 2008 (5) SA 151 (SCA) at 154

those circumstances, the reprehensibility of the applicant's conduct, and its abuse of motion court proceedings, justifies the dismissal of the application. However, in the absence of reprehensibility, the appropriate alternative is to refer the matter to trial.[2] The court will be guided by the prospect of *viva vice* evidence bringing the balance of probabilities in favour of the applicant.[3]

7. The respondents contend that ACT must have known when it instituted its contempt application that material disputes of fact were bound to arise, and that for this reason, the court should refuse to entertain its request to have the matter referred to trial, and should dismiss the application at the outset. ACT disputes this. It points out that contempt proceedings are usually initiated by way of a notice of motion.[4] Furthermore, it points to correspondence between the parties that was exchanged in the period after the granting of the Order and before the contempt application was launched. In the first letter of relevance, the respondents' attorneys wrote that: "*Our clients are entitled and intend to compete for the custom of your client's so-called clients.*" ACT's attorneys responded that this appeared to be in violation of clause 1.1 of the Order, and that ACT reserved its rights to institute contempt proceedings. On 21 October 2016, in response to this, the respondents' attorneys replied that:

> "*Paragraph 4.1.4 of our letter records our clients' position, as it has been at all times, and confirms that they are entitled and intend to compete for the custom of your client's so-called customers: ... this paragraph does not mean and cannot be constructed to mean that our clients are entitled and intend to compete for the*

[2] *Standard Bank of SA Ltd v Neugarten and Others* 1987 (3) SA 695 (W) at 699A-C
[3] *Hansa Silver (Pty) Ltd v Obifon (Pty) Ltd t/a The High Street Auction Co* 2015 (4) SA 15 (SCA) at 26D-F
[4] *Laubscher v Laubscher* 2004 (4) SA 350 (T) at para [10]

custom of your client's existing and maturing business opportunities as contemplated in paragraph 1.1 of of the court order." (my emphasis)

8. ACT submits that this paragraph can be understood to mean that the respondents were confirming that they would not compete with customers that ACT could show were its actual, existing customers, or with those with whom it was currently engaged in developing business opportunities. I should add that there had been an ongoing dispute between the parties as to whether a customer list prepared by ACT and presented to the respondents was an accurate list of its current customers. The respondents disputed the list, contending that it was overly wide. This would explain the reference to "so-called customers" in the first part of the paragraph.

9. What happened after this exchange of correspondence was that ACT says it found out that, contrary to its assurance in its previous letter, the respondents were indeed interfering with its actual current customers. It says further that given what the respondents had stated in their letter of 21 October 2016, ACT did not anticipate that the respondents would seriously dispute ACT's averments and evidence to this effect when it instituted its contempt proceedings.

10. In addition, on 2 November 2016 ACT's attorneys wrote to the respondents' attorneys and referred to an invoice from the respondents which indicated that the respondents were using Norsden parts numbers to quote for products the respondents were supplying to ACT's customers. ACT indicated that this was passing off, in breach of clause 1.3.1 of the Order. The respondents were asked to confirm that they were not using Norsden parts numbers to quote to ACT's existing customers. Despite a follow

up letter by ACT's attorneys, no response was forthcoming from the respondents. In the absence of a response to its allegations, ACT again did not anticipate that its averments would be seriously challenged by the respondents.

11. Of course, as we now know, the respondents have placed all of these averments from ACT (relating to the alleged interference with existing customers, and passing off) in dispute.

12. I am of the view that in light of the developments preceding the present litigation, ACT should not be disqualified at the outset from the opportunity to have the matter referred to trial simply because it elected to follow the normal route of instituting contempt proceedings by way of a notice of motion with supporting affidavits. The respondents' 21 October 2016 letter can reasonably be understood to mean that while they might dispute whether ACT's alleged customers were in fact customers, they accepted that they would not interfere with those who could be established to be customers. From this response, ACT could reasonably have anticipated that the respondents might have disputed whether the customers it referred to in its founding affidavit were indeed existing customers. However, this was not necessarily a dispute that should have required testing by way of oral evidence and cross-examination: it would have been possible for ACT, if the respondents disputed the averments that the clients referred to in the body of the founding affidavit were ACT's current or existing clients, to provide invoices, email, quotations and the like to establish that they were indeed existing clients.

13. In addition, it is now apparent that the parties interpret the provisions of the Order differently: on ACT's version, it prohibits the respondents from interfering with (by soliciting custom from, doing business with etc) any of its existing customers with whom it is doing business, as well and those with whom it is developing a business relationship. The respondent does not interpret the Order in the same way. I will discuss in more detail later what the respondents' position is in this regard, but for present purposes it is safe to say that the difference in interpretation forms a major part of the respondents' opposition to the contempt application. The difference in interpretation, and in particular the stance the respondents adopt, has factual ramifications that I am not persuaded ACT should have foreseen as giving rise to the probability of the existence of material factual disputes when it launched the contempt application.

14. The respondents also submitted that the matter should be dismissed on ACT's founding affidavit alone, without even the necessity of considering whether it warrants a referral to trial. The respondents say that none of the averments by ACT in its founding affidavit establish a case of breach, and that ACT should thus be prevented from having another bite at the cherry so that it can beef up a non-existing case in a trial.

15. I do not agree with this submission. In the founding affidavit ACT makes out a case for the respondents to answer at least in the following respects:

    (a) The respondents' invoice submitted to ACT's long-standing customer, Tool Room Services (Pty) Ltd ("Tool Room") on 12 October 2016 indicating that the respondents had supplied and invoiced Tool Room with parts identified

by Norsden parts numbers. ACT obtained confirmation of this from Tool Room in March 2017. This relates to the issue of whether the respondents have breached the passing-off component contained in paragraph 1.3.1 of the Order. ACT did not obtain a confirmatory affidavit from Tool Room. However, it indicated that Tool Room had not wanted to get involved in the matter.

(b) Allegations that ACT believed that the respondents had sourced business from three businesses that were existing clients of ACT at the time the Order was granted. ACT's belief was based on the fact that Mr Wilford had serviced all of these customers when he was employed by ACT, and that these three companies (Modrac, Kyler-Mech and Palian) had all stopped purchasing from ACT after Mr Wilford left. While ACT did not have proof to establish this belief, in my view, given the respondents' clear stance in the earlier correspondence that they did not believe that they were prohibited from approaching everyone on ACT's original customer list for business, ACT's belief cannot be dismissed as being without any foundation: the co-incidences cited, and Mr Wilford's declared intent that he would solicit business from companies that ACT claimed from its list to be its customers, at least called for some explanation from the respondents to dispel the belief.

(c) The incident with Tandem Lawn Industries that occurred in April 2017. ACT averred that Mr Wilford knew full well that Tandem Lawn was its customer. The managing director of Tandem Lawn reported to ACT that Mr Wilford had appeared at their plant and, under the pretext that he had a meeting with the

supervisor and that he was there to take photos and measurements for a quote for a new plant, he had accessed the premises. The managing director, Mr Morrison, told ACT no-one at Tandem Lawn had contacted Mr Wilford. He indicated that they viewed his conduct to be verging on the criminal.

16. There are other allegations made in the founding affidavit which, if the matter is referred to trial, may be explored in more detail at that stage. The above examples are sufficient, in my view, to dispel the conclusion that ACT made out no case in its founding affidavit. The coincidence that it lost three clients after Mr Wilford resigned and started trading through CTSA is not fanciful, particularly in view of the other evidence that the respondents have, indeed, done business with companies who ACT claims are its customers. The incident regarding the invoice in which the respondents quote specific Norsden part's numbers speaks for itself as providing *prima facie* evidence that the respondents may have conducted themselves in breach of the Order. The same goes for the Tandem Lawn incident. It is also important to underline that these incidents should not be viewed in isolation. I am satisfied that on a conspectus of all the allegations made in the founding affidavit viewed together, ACT's case was not speculative or without foundation, warranting an outright dismissal of the application as argued by the respondents.

17. For these reasons, I am disinclined to dismiss the application without considering ACT's request that the matter be referred to trial.

18. I turn then to consider whether a referral to trial is warranted.

19. In respect of the allegations under paragraph (b) above: the Modrac, Kyler-Mech and Palian incidents, the respondents provide a generalised answer. Significantly, Mr Wilford admits that the respondents have done business with these companies "*at various times*" by supplying products and related services to them. However, he says that this did not occur in a manner that breached any term of the Order. He does not give his reasons for this conclusion.

20. As regards the Tool Room incident, Mr Wilford says that the Norsden serial numbers were inserted for the customer's purposes, to enable the customer to identify what Norsden parts had been replaced. He denies he supplied Norsden parts, or passed off the non-Norsden parts as Norsden parts. He says that the customers knew that they were receiving non-Norsden parts and requested them. Although he criticizes ACT for not providing a confirmatory affidavit from Tool Room, the respondents also do not provide any confirmation from Tool Room, or from any of their other clients whom they claim knew and requested non-Norsden parts.

21. As regards the Tandem Lawn incident, he claims that he had no knowledge of this company from his employment with ACT. He says that the whole incident was orchestrated by ACT, but does not explain what the basis is for his belief.

22. The main foundation of the respondents' defence to the contempt allegations is that on a proper interpretation of the Order, they have not acted in breach. For this reason, they also say that the case for contempt is still-born because provided there is a dispute about the proper interpretation of the Order, a court will never find that the respondents had the requisite *mens rea* to commit contempt.

23. In principle this stance makes some sense. However, questions arise when one tries to fathom exactly what the respondents say the proper meaning is of the Order, and why they contend that they were not in breach. What the respondents say clearly (in both their answering affidavit and in argument before me) is that just because a business was once a client of ACT, this does not mean that they fall into the category of "*existing or developing business opportunities*". In other words, the Order, properly interpreted does not prohibit the respondents from soliciting and doing business with any company that was ever a client of ACT.

24. The respondents also say that just because ACT did business with a company does not mean that those customers are obliged, or bound, from then onwards, to do business for maintenance, parts, new plant etc only from ACT. Companies that have done business with ACT are free, say the respondents, to shop around for new suppliers. This is all clear insofar as it goes.

25. What is not clear, though, is what the respondent says the Order means in relation to companies that ACT can show were existing clients at the time the Order was granted, and on what basis the respondents claim they have not committed a breach of the Order in relation to those clients. Counsel for the respondents seemed to accept at the hearing that his client couldn't interfere in existing business relationships ACT had at the time the order was granted (and in respect of whom Mr Wilford had gained knowledge through his employment with ACT) but insisted that ACT's case was that the Order meant that it could not do business even with past customers.

26. From the affidavits filed by ACT this does not appear to me to be its case. It does not aver that the respondents are prohibited under the order from soliciting business from all the businesses listed on its original list (to which the respondents took objection). Its averments in the founding affidavit are more limited than this and the incidents of breach it alleges refer to specific companies it says are long-standing, or existing customers, or those who provide ongoing future business opportunities through ACT's maintenance of their systems.

27. Once the interpretive issues in dispute between the parties are delineated on these lines, it seems to me that material disputes of fact arise. ACT has claimed certain companies as existing clients at the time the order was granted, of whom Mr Wilford had knowledge. It will be essential for purposes of determining whether there was a breach of the Order to determine factually which companies referred to in the founding affidavit actually do fall into the category of existing or maturing business opportunities. As I have already indicated, this issue does not, in and of itself, necessarily require oral evidence and cross-examination. Critically, however, it will be important to establish the factual basis on which Mr Wilford says that despite them being existing customers, he did not act in breach of the order, either because he did not do business with them, or, if he did, why he did not breach the order in doing so. This is not simply a question of a legal interpretation of the Order, as even the respondents seem to accept to some degree that they cannot interfere with existing clients. This is a factual dispute that, it seems to me, would be proper to refer to trial. As Mr Wilford has not made it clear what the factual basis is for his stance that he did not breach the order as regards such customers, his evidence and cross-examination of it will be valuable to the court.

28. Mr Wilford admits the respondents did business with Modrac, Kyler-Mech and Palian, but says that it was not in breach of the Order. Why not? Is it because he disputes that they were in fact existing business opportunities? Or is it because he disputes that he solicited business from them? Did these customers approach him out of the blue, despite his previous interactions with them while he represented ACT? Mr Wilford denies that he knew of Tandem Lawn as a customer of ACT. He does so by way of a bald denial. He provides an explanation regarding the Tool Room invoice that raises questions, rather than provides answers: usually the item number of an invoice refers to the item that was supplied, rather than the item that was replaced. This seems to me to be an issue to be explored by oral evidence and cross-examination. Did the customers he supplied with Electron parts (as he claims) know that they were not Norsden parts as Mr Wilford claims? There are no confirmatory affidavits from any of them to confirm his averment that this was the case.

29. All of these questions relate directly and materially to the allegations of breach and the denials made by the respondents. In my view, the respondents' denials, and its version, are not such that they warrant acceptance simply on the papers. The court in determining whether there was a breach of the Order will undoubtedly be assisted by the leading of oral evidence and cross-examination of all parties concerned. This will include companies whom either party may wish to subpoena to give evidence. Judging from the general absence of confirmatory affidavits by both parties (although I note that Mr Morrison provided a confirmatory in reply), the power to subpoena will be a valuable tool for both sides if the matter is referred to trial. It seems to me from a consideration of all of these issues that there will be considerable value in the matter being referred to trial, in respect of both the issue of whether a breach has been

established, and if so, whether Mr Wilford had the necessary *mens rea* to be held in contempt.

30. I accordingly find, in the exercise of my discretion, that the matter be referred to trial.

31. I make the following order:

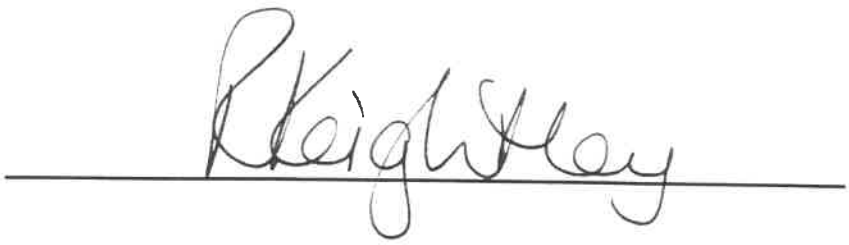
31.1. The matter is referred to trial;

31.2. The notice of motion and founding affidavit are to stand as a simple summons;

31.3. The answering affidavit is to stand as the notice of intention to defend;

31.4. The applicant will deliver its declaration within 20 days of this order;

31.5. The costs of the application are costs in the action.



R M, KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG