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

CASE NO: 10305/21

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
23/3/2021

In the matter between:

AUCTION OPERATION (PTY) LTD	**APPLICANT**
and	
IAN FAIR	**FIRST RESPONDENT**
TIRHANI AUCTIONEERS GAUTENG CC	**SECOND RESPONDENT**

JUDGMENT

WINDELL J:

INTRODUCTION

[1] This is an urgent application for an interdict enforcing a written restraint of trade and confidentiality agreement entered into between the applicant, as employer, and the first respondent, as employee. I am satisfied that the matter is urgent.

[2] The applicant carries on business as, in the main, an auctioneer facilitating the auctioning of salvaged, stolen and recovered, as well as repossessed motor vehicles. It conducts such services, *inter alia*, for short-term insurance and financial institutions such as Absa Bank Limited (Absa), Wesbank and BMW Finance. The

applicant is not only involved in the auctioning of the vehicles, but also in preparing the vehicles for the auction and preparing the auction itself. In the preparation of the vehicles the applicant will often employ service providers (cleaning and valet services and specialised repair services) for the vehicles. In preparation of the auction the applicant also markets the vehicles, utilising its data base of clients and purchasers to ensure that the product is marketed to all interested parties.

[3] The first respondent was employed at the applicant for a period of 9 years. On 23 February 2021, the first respondent informed the applicant that he is leaving the employ of the applicant and taking up employment with the second respondent. The applicant and the second respondent are competitors in the auctioneering business.

[4] It is common cause that the first respondent signed a written employment agreement that contained a confidentiality and restraint clause. In the agreement the first respondent acknowledged that he will:

> *"in the ordinary course of his or her employment under this agreement, and specifically in respect of his or her duties as specified in terms of this contract, the employee will continue to be exposed to information about the business of the employer and that of its suppliers, customers and clients which amounts to a trade secret, is confidential or is commercially sensitive and which may not be readily available to others engaged in a similar business to that of the employer or to the general public and/or which if disclosed would be liable to cause significant harm to the employer."*

[5] The first respondent furthermore agreed that he would not, for a period of 12 months after termination of his employment, be directly or indirectly interested, engaged, concerned with, associated or be employed by a competitor within South Africa. He further acknowledged that the restraint was fair and reasonable.

[6] The applicant seeks an order against the first and second respondents in the following terms:

> *"Interdicting and restraining:*

2.1 The first respondent, for a period of twelve (12) months, commencing from the 22 February 2021, from, anywhere in South Africa, being directly or indirectly interested, engaged, concerned, associated with or employed, whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, principal, agent, representative, assistant, advisor, administrator or otherwise, in any company, close corporation, firm, business undertaking, concern or other association of any nature which directly or indirectly carries on any business or activity which is the same or similar to that of the applicant;

2.2 The first respondent, from, at any time soliciting, interfering with or enticing away from the applicant any person, firm, association, partnership, business undertaking, company, close corporation or other legal person or association of persons who is a customer of the applicant at the termination date or was a customer of the applicant at any time during the 6 (six) month's preceding the termination date; or attempt to do so;

2.3 The first respondent, from, at any time, soliciting, interfering or enticing away from the applicant any employee of the applicant or attempt to do so.

2.4 The first respondent, for whatever reason, from using, communicating or revealing to any person, for the first respondent's own or another's benefit, any secret or confidential information concerning the business, finances or organisation of the applicant, its suppliers, customers or clients which shall have come to his knowledge during the course of the first respondent's employment with the applicant; such confidential information shall include, but not be limited to, any information or other data, whether written, oral or graphic which the applicant or a client of the applicant (hereinafter "the disclosing party") may disclose or provide to, or which otherwise comes to the knowledge of the first respondent, by whatsoever means and shall include:

> *2.4.1 information relating to the disclosing party's strategic objectives and planning for both its own operations and any proposed business transaction;*

2.4.2 information relating to the disclosing party's business activities, business relationships, products, services, customers and clients;

2.4.3 information contained in the disclosing party's software and associated material documentation;

2.4.4 technical, scientific, commercial, financial and market information, know-how and trade secrets;

2.4.5 data concerning business relationships, demonstrations, processes and products;

2.4.6 plans, designs, drawings, functional and technical requirements and specifications; information in respect of or supplied by clients of the employer, including details of their particular requirements; and

2.4.8 all other information in whatever form, whether or not subject to, or protected by, common law or statute related to copyright, patent, trademarks or otherwise, which is disclosed or communicated by the disclosing party to or otherwise comes to the knowledge of the employee;

2.5 The second respondent from directly or indirectly employing or utilising the services of the first respondent for a period of 12 months commencing from the 22 February 2021.

2.6 The second respondent from utilising any confidential information of or concerning the applicant obtained from the first respondent which confidential information is set out in prayer 2.3 supra, in the conduct of its business relations."

[7] The applicant alleges that the restraint of trade and confidentiality clause in the employment agreement are reasonable and necessary for the legitimate protection of its confidential information which includes, but not limited to the applicant's customer lists and software program.

[8] This application is opposed by the first and second respondent. They allege that the applicant has failed to establish the requirements for an interdict. They specifically dispute that the applicant has a protectable interest and contend that the restraint of trade is unreasonable and unenforceable.

[9] The application is one for final relief. It is trite that, being motion proceedings, disputes of fact are to be dealt with in accordance with the principles laid down in *Plascon Evans Paints Ltd v Van Riebeeck Paints Ltd.*[1] A final interdict may therefore only be granted if the facts stated by the respondents' answering affidavits together with the admitted facts in the applicant's founding affidavit justify such an order. In *Basson v Chilwane*[2]*,* the Appellate Division (as it then was) stated that the incidence of the *onus* in a case concerning the enforceability of a contractual provision in restraint of trade does not entail any greater or more significant consequences than in any other civil case in general. Botha JA stated that "*the effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade."*

[10] In *Basson supra* the court further held that to determine the reasonableness or otherwise of a restraint of trade provision, the following questions should be asked:

a. Is there an interest of the one party, which is deserving of protection at the termination of the agreement?
b. Is such interest being prejudiced by the other party?
c. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?

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[1] 1984 (3) SA 623 (A) at 634 E-I.
[2] *Basson v Chilwan* 1993 (3) SA 742 (A).

d. Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

BACKGROUND FACTS

[11] It is common cause that the applicant and the second respondent were both providing auctioneering services for Absa at a site belonging to Absa situated at Boksburg ("the Boksburg site"). The auctions at the Boksburg site was managed by the first respondent on behalf of the applicant. Absa terminated its services with the applicant in respect of the Boksburg site with effect from the end of February 2021. As a result, the primary auctioneer at the Boksburg site from the end of February 2021 is the second respondent.

[12] Pursuant to the cancellation of the contract, Mr Bezuidenhout, chairman of the applicant, advised the staff of the termination of the contract and told them that they would be accommodated at other branches of the applicant. The first respondent indicated that he was not sure whether he could continue working for applicant and disclosed that he had been approached by the second respondent to continue managing the Absa contract on behalf of the second respondent at the Boksburg site.

[13] On 18 February 2021, Mr Bernard DeCombes, a manager at second respondent, approached Mr Bezuidenhout to purchase certain of the applicant's equipment at the Boksburg site, and also enquired whether some of applicant's staff would be available to the second respondent. Mr Bezuidenhout informed Mr DeCombes that the staff would be redeployed on other contracts and were therefore unavailable. On 19 February 2021, the applicant discovered that the second respondent had approached and employed almost all the staff the applicant had utilized at the site, namely, Mr Molefe a forklift driver, Mr Mbongeleni, a wash bay supervisor, six casual general workers, and the first respondent. The said staff members, save for first respondent, are not considered "key staff members" and only the first respondent had concluded a restraint agreement with the applicant.

PROTECTABLE INTEREST

[14] It is common cause that the first respondent, whilst employed at the applicant, was tasked to manage the preparation of auctions, the execution thereof and administering the entire process. In his capacity as manager he also oversaw the staff and sourced vehicles for the auctions.

[15] The applicant alleges that the first respondent had access to its confidential data base (which contained all the information in connection with each and every transaction effected by the client/buyer/service provider ("transactional history"), as well as client, customer and purchaser details), was introduced to the applicant's clients, service providers and purchasers and has built up a relationship with their key personnel. As a result of the long history with its customers, pricing discounts and commissions have been agreed upon which is to the financial advantage of both the applicant and its customers. It is alleged that the database is confidential to the applicant; that only a few selected staff had access to it; and is not available to the public.

[16] The applicant states that in order to compete in the modern business environment, and in particular to address the trend towards doing business remotely (having regard to, *inter alia*, Covid 19) the applicant has utilised it extensive experience in the industry to instruct software developers to develop software which it utilises in its business. This software, so the applicant contends, is unique to the applicant and offers the applicant a significant competitive advantage in the industry. Such software includes a stock control and reporting system also known as the "One Stop System". It keeps control and reports on a product/car from receipt of the product to the sale thereof.

[17] The applicant contends that it has trained its staff, and the staff of its clients, in its auctioneering methods and software systems thereby enabling its clients and the applicant to work efficiently together. Even though the software programs such as the virtual auction system, the controlling and logistics system and the timed online auction system are exposed to use by the public, the operating of the system, the uploading of information to the system and the maintenance of the systems are confidential — this information is restrained to the software developers and the applicant. The applicant submits that the second respondent has not developed

digital systems such as a virtual auction, a controlling and logistics or timed online auctioning system as sophisticated and encompassing as the applicant's.

[18] The applicant avers that when it employed the first respondent at the beginning of 2012, he was unemployed and had no experience as an auctioneer. He was trained by, *inter alia*, Mr Bezuidenhout and his son, and they have imparted to him the necessary skills to be a successful auctioneer manager. In addition, he was trained to operate all applicant's operating systems, which included, *inter alia,* the “Timed Online Auction System”, the ”Virtual Auction” and the “One Stop System”.

[19] The applicant alleges that the first respondent was intimately acquainted with the details of all contracts concluded between the applicant and its clients/purchasers and service providers and has obtained considerable goodwill with such service providers/clients and purchasers. The applicant fears that the first respondent will utilise such goodwill to try and persuade clients of applicant to move their business to the second respondent. The applicant fears further that first respondent will impart information concerning the pricing and commission structures with second respondent and that second respondent will utilise such information to undercut the applicant, thereby taking business away from applicant. This information not only includes the expertise imparted by the applicant to operate as an auction manager, but access to applicant's data base and software programmes. If this information is imparted to second respondent by the first respondent, this will provide a huge competitive advantage to the second respondent, by giving it access to key personal knowledge of clients/service providers/purchasers of the applicant, which knowledge will facilitate the second respondent's introduction to such clients/service providers and purchasers and the obtaining by the second respondent of the business of such clients. The knowledge that the first respondent has of the operation, maintenance and programming/uploading of information onto/of the software systems of applicant, including knowledge of who developed such systems for applicant, will enable the second respondent to adopt such systems, thereby negating this competitive advantage of the applicant. It is alleged that the first respondent also has knowledge of the software developers who have developed the systems and can therefore impart this information to the second respondent, thereby enabling the second respondent to develop such systems. It is alleged that because

Absa is already trained to operate on the software systems, the second respondent can only enhance its business relationship with Absa by adopting such systems. The applicant contends that it is therefore essential that the applicant invokes the terms and conditions of the employment agreement to protect itself against such competition.

[20] The first respondent denies the allegations. He states that he had extensive auctioneering experience by the time he joined the applicant and that he did not receive any specialised training from the applicant. He states that when he started working for the applicant as a General Manager, he was responsible for the following: overseeing an administrative department of approximately 15 staff members; ensuring that all eight branches nationwide were operating efficiently; worked as a Human Resources Manager drawing up new contracts for new employees; was responsible for the dismissal of staff; and the opening of new branches in places like Polokwane, Bloemfontein, and Port Elizabeth. He also oversaw the opening of the Boksburg branch. His duties at the Boksburg branch entailed maintaining the efficient operation of the Boksburg branch; overseeing the welfare of 12 staff members; preparing auctions for Wesbank vehicles bi-monthly (between 80 and 120 lots) and Absa auctions once a month at the Boksburg site; sourcing additional vehicles for auctions and assisting with furniture auctions.

[21] The first respondent alleges that he was generally functioning at mid-management level at the Boksburg branch and his functions generally entailed the execution of administrative tasks and the management of the applicant's human resources. He states that he did not have access to any of the applicant's strategic meetings at an executive or board level and had no access to confidential information or software data, whether written, oral or graphic. He had no access to any secret or confidential information concerning the business, finances or organisation of the applicant, its suppliers, customers or clients. He contends that the applicant has therefore failed to allege and establish that there is a protectable interest at the termination of the agreement and also failed to establish that the interest (if there is one) is being prejudiced.

[22] The second respondent contends that there is nothing confidential about the information the applicant has classified as confidential in its application, particularly

as the confidential information relates to the non-strategic position held by the first respondent in the applicant's organisation and the responsibilities attached thereto. The second respondent's contends that the information the applicant has classified as confidential in its application is either already in the public domain, or in the possession of the applicant's competitors in varying formats.

[23] The second respondent's denies the applicant's claim that its software is unique. It states that most professional auction houses of the scale of the applicant and the second respondent have digital software infrastructure, facilities, and capabilities of varying styles and efficiencies, albeit competitive. By means of illustration, by following four easy steps from the Auction Operation website/ online system one can ascertain who the online auction service provider is. The second respondent states that the software functionality outlined by the applicant in its founding affidavit are not unique to the applicant and some of the claims by the applicant are exaggerated. It contends that the applicant's online system is not as sophisticated or unique as the applicant wants this court to believe. The second respondent also has a bespoke stock control and reporting system like the applicant's "One Stop System". The applicant's claim that *"presently, no other auction house virtual auction which can be said to be the same or of similar standard to applicant's*" is also denied. The second respondent contends that as early as 2009, and long before Covid 19, it was amongst the first auction houses in South Africa to have online auction capabilities in association with its American partners. It contends that contrary to the false claims of the applicant, the second respondent had access to a real time auction system called "Live Webcast Online Auction" like the applicant's "Virtual Online Auction" from 2009. It further disputes the applicant's insinuation that the second respondent has no capabilities to prepare assets for auction. It is contended that for obvious logistical reasons, Absa deemed it fit to have only one of its two auctioneers on its panel to do asset preparations at its trade centres. The applicant was chosen to do this because their company was on board at the time the second respondent joined Absa's panel. As it is now, "Park Village Auctions", an auctioneering house far bigger than the businesses of both the applicant and the second respondent, has now joined Absa's panel. Absa has, however, given the second respondent the "opportunity and honour" to do the work which the applicant was doing all along on behalf of its own auctions and Park Village's auctions as well. Surely, so it is

submitted, this should put all the applicant's claims about its "*anointment and importance to rest"*.

[24] The second respondent submits that the first respondent dealt with what could be described as 'front end work" and had none to very little knowledge of the "back end work". In fact, the only client first respondent dealt with was Absa at the Boksburg site. The purchasers who attended the auctions went there on the understanding that it is an Absa site administered by the second respondent and the applicant. Neither the applicant nor the second respondent could claim exclusivity to those purchasers as "*they weren't ours but rather Absa's*." The second respondent submits that the Consumer Protection Act[3] in any event requires all auctioneers to disclose all the costs associated with its auctions such as the administration fees and commission structure. This information is public knowledge and the applicant can't claim exclusive rights to it.

CONCLUSION

[25] Whether information can be classified as confidential is a factual question and can only be determined on a case to case basis. Ordinary general information about a business is not confidential simply because the proprietor defines it as such. In *Alum-Phos (Pty) Ltd v Spatz*[4]*,* the court held that in order to qualify as confidential information, such information must comply with the following three requirements:

> (a) It must involve and be capable of application in trade or industry; that is it must be useful.
>
> (b) It must not be public knowledge and public property, that is objectively determined, it must be known only to a restricted number of people or to a closed circle of persons.[5]
>
> (c) The information objectively determined must be of economic value to the person seeking to protect it.[6]

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[3] Act 68 of 2008
[4] [1997] 1 All SA 616 (W).
[5] See also *Telefund Raisers CC v Isaacs* 1998 (1) SA 521 (C) at 528E.
[6] *At* 632F-624A.

[26] General knowledge and skills acquired by the employee during employment with a particular employer may be used once they leave the employment, even if the new employer will benefit from such knowledge and skills. A distinction must therefore be made between what can be classified as confidential information and what is classified as employee's general stock of knowledge. In the matter of *Northern Office Micro Computers (Pty) Ltd v Rosenstein,*[7] the court held as follows, drawing this distinction:

> *"The dividing line between the use by an employee of his own skill, knowledge and experience, and the use by him of his employer's trade secrets is notoriously difficult to draw. An employer's trade secret may be no more than the result of the application by an employee of his own skill, knowledge and experience. But, if the employee was engaged to evolve the secret, it remains the employer's trade secret for all that. The employee may not simply copy it if, by copy, one means that literally. For example, if he has conducted a confidential market survey for his erstwhile employer to establish what demand, if any, exists in a particular area for a particular type of product, he cannot simply copy the survey and hand it to his new employer. But non constat that the employee may never again set out to establish the market demand for that particular type of product in the same area. Generally speaking, he cannot be prevented from using his own skill and experience to attain a particular result, merely because it is a result which he has achieved before for a previous employer. I say, generally speaking, because one can conceive of cases where the result sought to be achieved is so elusive that only a solution of the kind which legend has it prompted Archimedes to say "Eureka" will do, and the employee has been engaged specifically to find it. In such a case, it may well be that the employee who has evolved the solution may have to refrain from solving it in the same way for a future employer."*

[27] It is generally accepted that a restraint will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some legally recognisable interest of the employer, but merely seeks to exclude or

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[7] 1981 (4) SA 123 (C).

eliminate competition.[8] In essence, the determination centres on the fact that there must be an interest of the employer which is deserving of protection, and were such interest to come into the hands of a competitor, this would give the competitor an unfair advantage over the employer. Information sought to be protected that does not qualify as such can only serve one purpose, that being the elimination of competitors.[9]

[28] The applicant proved that there was a valid agreement containing the restraint clause and that the first respondent acted in conflict therewith. The question is whether there is an interest which must be protected at the termination of the agreement.

[29] Although the contract between the applicant and the first respondent makes mention of "trade secrets" the applicant does not allege that it seeks to protect any "trade secrets". The confidential information it seeks to protect is the applicant's data base which contains transaction history and details of customers and service providers and its software programme. It is not clear from the applicant's founding affidavit why this information is confidential. The software program the applicant utilizes is available to all its customers and is not unique to the applicant. There are also no allegations that the first respondent has intimate knowledge of the design of the software program. Although it is not in dispute that the applicant and the second respondent are competitors in the auctioneering business , it is difficult to comprehend under which circumstances the details of service providers and purchasers of an auctioneering business could be confidential.The applicant failed to explain why, in the context of the auctioneering business, the applicant's data base, which contains the details of customers, service providers and purchasers is confidential and worthy of protection. The applicant merely contends that the "*key to its success is, inter alia, its employees and their expertise, its business model, the business relationship it has built up with its clients, service providers and purchasers and its knowledge of its trade, and product".* This is an overly broad and general statement to make. It does not explain why, if this information ends up in the hands of the second respondent, it would give the second respondent an unfair advantage.

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[8] *Automotive Tooling Systems (Pty) Ltd v Wilkins* 2007 (2) SA 271 (SCA) at [8]. Also see Neethling *Unlawful Competition* above fn 29 at 20 fn 46.
[9] *Basson v Chilwan* 1993 (3) SA 742 (A) 767D.

It further does not explain why a purchaser would follow the first respondent to participate in the second respondent's auctions and not, for example, participate in both. The first respondent is not a salesperson that only sells to a selected group of people. The applicant is in the business of auctioneering.

[30] A protectable interest in the form of customer connections does not come into being by simply having contact with an employer's customers. The existence or otherwise of such relationships is a question of fact and depends on the nature of the employees' duties; the frequency and duration of the contact with customers; where such contact takes place; what knowledge he or she gains of their requirements and business; the general nature of their relationship; how competitive the rival businesses are; and whether there is evidence that customers were lost after the employee left. In *Bridgestone Firestone Maxiprest Ltd v Taylor*[10] it was accepted that:

> *"[o]nce it is established that there is an agreement, the contract must be enforced, unless the party sought to be restrained shows that the party seeking to enforce the restraint has no protectable interest, which protectable interest may take the form of trade secrets or confidential information, or goodwill or trade connections, i.e. he must discharge onus of proving that at the time the enforcement is sought, the restraint is directed solely to the restriction of first respondent competition with the ex-employer (the covenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee's protectable interests, being his goodwill in the form of trade connections and his trade secrets".*

[31] The goodwill the first respondent has generated is only mentioned by the applicant in general terms. It is trite that "goodwill" is not something which is easy to define. It has many different connotations depending upon the context in which it is used.[11] The applicant further failed to explain why the particular relationships the first respondent has built with its clients would induce the customers to follow him to a

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[10] 2003 JDR 0203 (N) at p6.
[11] See *Protea Holdings Ltd and Another v Herzberg and Another* 1982 (4) SA 773 (K) at 786G-787E

new business. It is not clear from the papers what is meant by goodwill and why it should be protected under the specific circumstances.

[32] Sweeping generalisations and exaggerations permeate the applicant's papers. The proprietary interest the applicant seeks to protect and which were enumerated in the founding affidavit, is not unique to the applicant. In any event, there are factual disputes in regard thereto. The applicant lost its contract with Absa, whilst the second respondent's contract with Absa is still in place. The applicant is clearly disappointed with the situation and bemoans the fact that the second respondent took over the site as well as some of its employees. I am satisfied that it is more probable that the applicant's enforcement of the restraint is intended to stifle competition and not a legitimate protection of a proprietary right. In the light of the applicant's denials, and applying the principles enunciated in *Plascon Evans*, I accept that there is no protectable interest.

[33] In the result the following order is made:

1. The application is dismissed with costs.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for the hand-down is deemed to be 23 March 2021.

APPEARANCES

Counsel for applicant:	Advocate M. Smit
Instructed by:	Sarlie & Ismail Inc.
Counsel for respondents:	Advocate A. Stoto
Instructed by:	Victor Nkhwashu Attorneys

Date matter heard:	9 March 2021
Judgment date:	23 March 2021