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

CASE NO: **2020/34871**

Reportable: No

Of Interest to other Judges: No

Revised: Yes

12/08/2021

In the matter between:

H.V. TEST (PTY) LTD

(Registration Number: 2004/035038/07)

Applicant

and

LEAD HV (PTY) LTD

(Registration Number: 2015/361131/07)

First Respondent

LEDWABA, MELOSI EZEKIEL

(ID [....])

Second Respondent

SHEIK, AMEERA

(ID [....])

Third Respondent

LOMBAARD, BARRY

(ID [....])

Fourth Respondent

JUDGMENT

TERNENT, AJ:

INTRODUCTION AND COURT ORDER

[1] This case came before me on 14 April 2021, when the applicant (“H.V. Test”) sought to pursue its interdictory relief against the first respondent, Lead HV (Pty) Limited (“Lead HV”) and the fourth respondent, its General Manager, Barry Lombaard (“Lombaard”). The application had been brought on 13 November 2021, on an urgent basis, against Lead HV, Lombaard, the second respondent, Melosi Ezekiel Ledwaba (“Ledwaba”) and the third respondent, Ameera Sheik (“Sheik”), the latter being erstwhile employees of H.V. Test. Ledwaba had been employed by H.V. Test as an internal sales and telesales consultant and Sheik as a sales consultant. The application was found not to be urgent in regard to Lead HV and Lombaard.

[2] As such, Bam AJ granted an order interdicting and restraining Ledwaba and Sheik, who did not oppose the application, from:

2.1 utilising, communicating or publicising any of the applicant’s Confidential information;

2.2 utilising or publicising customer contact details of persons with whom the applicant deals;

2.3 utilising the applicant’s Confidential information regarding contracts for which it has tendered, bid or was negotiating at any time up to the date hereof;

2.4 utilising or publicising the applicant’s Confidential information regarding the internal operations of the applicant’s business including its business and financial relationships with any of the applicant’s suppliers or sub-contractors;

2.5approaching directly or indirectly (or assisting any other person in approaching directly or indirectly) any client, customer or principal of the applicant in order to unlawfully compete with the applicant for their benefit or the benefit of any other person in respect of any contract which the applicant has tendered, bid or was negotiating at any time up to the date hereof;

2.6taking advantage to the applicant's prejudice of any relationship involving the use of the applicant's pricing information or customer contact details in respect of any contract for which the respondents have quoted, tendered, bid or was negotiating at any time up to and including the date hereof, for their own benefit or the benefit of any other person;

2.7accessing or utilising or any/all Confidential information which have come into the possession of in consequence of the employment of the second and third respondents with the first respondent;

2.8from taking up employment with the first respondent and/or fourth respondent and/or any close corporation, partnership or company in contravention of their restraints of trade.

2.9The second and third respondents were compelled to:

2.9.1disclose with sufficient particularity the details of any person, close corporation, partnership or company to whom they have disclosed any of the applicant's trade secrets or Confidential information;

2.9.2disclose with whom they have conducted business or with whom they have attempted to conduct business utilising the Confidential information;

2.9.3 dispose/delete/destroy the applicant's confidential information and allow the applicant's nominated IT professional access to inspect its telephones, computers, devices, tablets, memory sticks and/or hard drives to ensure that they have done so.

2.10The second and third respondents were ordered to pay the costs of the application on the attorney and client scale.

[3]In the face of the interdict which was granted against Ledwaba and Sheik, I can accept that confidential information had been filched by both Ledwaba and Sheik and that in so doing, they had wrongfully appropriated the confidential information, which was acquired during their employment with H.V. Test, and used such information to approach and induce H.V. Test's customers, to move their business to Lead HV, which it is common cause is a direct competitor of H.V. Test.

[4]As such, I am enjoined to consider that application and the relief sought for a final interdict as against Lead HV and Lombaard. Neither of the parties sought to supplement their papers or had done so. I was, accordingly, not informed as to whether Ledwaba and Sheik had complied with the Court order and cannot deal further with the order, as granted.

AMENDED RELIEF

[5]That said, during the course of argument it became apparent that the relief sought as against Lead HV and Lombaard was broad and untenable in the face of the affidavits. This was raised by Mr Labuschagne, and I was inclined to agree with him. As a consequence, Ms Lombard, in reply, submitted that the confidential information which H.V. Test sought to protect would be defined and the remaining relief sought would be tailored, accordingly. Mr Labuschagne did not oppose the amendment of the relief. A draft order was forwarded to me, subsequent the hearing.

[6]The relief now sought as against Lead HV and Lombaard is as follows:

6.1To interdict and/or restrain the first and fourth respondents from:

6.1.1utilising, communicating or publicising any of the applicant's confidential information comprising of the applicant's (a) customer lists; (b) training lists; (c) follow up quotes lists ("the confidential information");

6.1.2utilising or publicising customer contact details of persons with whom the applicant deals;

6.1.3approaching directly or indirectly (or assisting any other person in approaching directly or indirectly, any client, customer or employee of the applicant in order to unlawfully compete with the applicant, for their benefit or the benefit of any other person in respect of any contract for which the applicant has tendered, bid or was negotiating at any time up to the date hereof;

6.1.4accessing or utilising any/all confidential information which has come into their possession in consequence of the employment of the second and third respondents with the first respondent;

6.2To compel the first and fourth respondents to disclose with sufficient particularity the details of any person, close corporation, partnership or company:

6.2.1to whom they have disclosed any of the applicant's confidential information; and

6.2.2with whom they have conducted business or with whom they have attempted to conduct business utilising the confidential information;

6.3To compel the first and fourth respondents to dispose or delete or destroy the applicant's confidential information and allow the applicant's nominated IT professional access to inspect its telephones, computers, devices, tablets, memory sticks and/or hard drives to ensure that they have done so;

6.4Costs of this application on the attorney and client scale.

[7]As the amended draft order seeks to tailor and narrow the relief and does not add thereto, there is and can be no prejudice to Lead HV and Lombaard. I was not notified of any objection or prejudice to the draft order received.

H. V. TEST'S CASE

[8]H.V. Test was established in 1985 and is a major supplier of goods and services in the Medium Voltage, High Voltage and Extra High Voltage electrical engineering field. This involves, at a high level, the sale of electrical test equipment/instruments, the repair and calibration thereof, training courses in high voltage electrics and commissioning and maintenance services in this field. H.V.Test is also the appointed service and calibration centre for its branded electrical equipment manufactured by Baker, T&R, DV Power, Baur, to name but a few. It operates countrywide and it competes for new business in both the public and private sectors and is involved in tender processes in the public sector.

[9]Lead H.V, its direct competitor, was established by a Mr Mathibe Edward Moela ("Moela") who remains its sole shareholder and director. Lead HV also provides electrical test instrumentation for the power utility high voltage industry and electrical contractors' market. Moela was an erstwhile employee of H.V. Test. He resigned from its employ on 28 February 2015. He, like Ledwaba and Sheik had signed a written contract of employment which included restraint of trade and non-disclosure obligations. Lombaard was an erstwhile employee too, employed by H.V. Test as a repair technician and metrologist. He was so employed from 4 June 2012 until 3 February 2014. Lombaard also was required in his H.V. Test employment contract to accept non-disclosure and restraint obligations. He resigned from its employ for personal reasons.

[10]Ledwaba was summarily dismissed from H.V. Test's employ, on 15 May 2020, as there was a breakdown of the trust relationship. Sheik resigned from the employ of H.V. Test on 30 June 2020, allegedly due to ill health.

[11]Lead HV disputes that it ever employed Ledwaba stating that he was simply a consultant and that he earned commission. H.V. Test counters this by demonstrating that Lombaard, in an email, arranged for LEAD HV business cards to be printed for himself, Moela and importantly Ledwaba whose job description was to be that of sales representative. Furthermore, in a further email dated 6 August 2020, Lombaard instructs the IT person to create a new email account for Ledwaba, namely melosi@leadhv.co.za. No plausible explanation explains these actions away and so it appears on the probabilities that Ledwaba was an employee. Even if I am wrong, in

the light of my findings below, nothing turns on whether or not Ledwaba was a consultant or an employee of Lead HV. This is because Sheik was an employee of Lead HV and some two weeks later, i.e. in mid-July 2020, having resigned from H.V. Test on 30 June 2020, commenced employment with Lead HV. Early in this employment she commenced sending email correspondence to Lombaard and, as canvassed below, discloses confidential information concerning the client base of H.V. Test to Lombaard and Lead HV in breach of her non-disclosure and restraint obligations.

[12]The confidential information which H.V. Test seeks to protect is its customer lists, training lists and follow up quote lists. This information, was stored on digital databases which H.V. Test had expended substantial effort, time and costs in creating. These databases were easily accessed, reproduced and extracted by H.V. Test's employees, on a daily basis, and were essential to its efficient operation and ability to compete for continued and/or new work.

[13]The lists, in digital format, provided information with regard to sales opportunities both past, current and future and contained the following information:

13.1Clients names/identities with contact details comprising an email address and cell phone number for key contact persons at the clients;

13.2Setting out what products and services including repairs, training, calibration and site work had been supplied to the clients and the timing of future deliverables including products and services to its clients; and

13.3Setting out clients' service and upgrade requirements in regard to equipment/ instruments that had been supplied or may need to be supplied and setting out the specificity of such equipment and service requirements also recording equipment supplied that was due for calibration, based on historical sales.

THE ANTON PILLER ORDER

[14]The genesis of the urgent relief that was sought against Ledwaba and Sheik, Lead HV and Lombaard stemmed from an Anton Piller order that was granted by Molahlehi J on 10 September 2020.¹ The order was granted by way of a rule nisi and made final, on 28 September 2020 before Madiba J, permitting H.V. Test to make copies of the items identified and allowing it to take possession of copies of hard drives or documents which were placed in the custody of the Sheriff of the High Court.

[15]It was, as a consequence of the evidence that was obtained under the Anton Piller order, that it was established that Ledwaba and Sheik had, in the course of their employment, filched the confidential information which they had used in the course of their employment with Lead HV to unlawfully compete to H.V. Test's prejudice.

[16]The Anton Piller order was sought when it became evident that a company phone which had been given to Ledwaba and returned by him together with his laptop computer, (as also required from Sheik), on the termination of their employ, contained a g-mail application with a logged in g-mail account which belonged to Ledwaba. The g-mail account was his personal account, namely meledwaba@gmail.com. It was this g-mail account that allowed H.V. Test to learn that Ledwaba and Sheik were employed by Lead HV, that business cards had been printed, and an email address furnished to Ledwaba. Importantly, it disclosed email communications between Lombaard and Sheik and that Sheik had been employed as an internal sales representative – the words “Internal Sales” appearing after her name Ameera Sheik in the signature block at the foot of her email.

[17]Having assembled a team comprising the deponent to the founding affidavit, Sean Goodwin, a director and shareholder of H.V. Test, and Haley Breda, also a director and shareholder, and other staff members including Johan Jacobs, Lizette Kloppers (“Kloppers”), Lize-Mari Sarakis and Adarsh Maharaj they sifted through the

¹ Annexure “**FA41**”, pages 002-24 to 002-32

voluminous readable data which had been processed by various internal and external IT experts, on behalf of H.V. Test, to find conclusive evidence of the conduct of Ledwaba and Sheik and furthermore the role played by Lead HV and Lombaard, in employing them, in the light of their access to the confidential information.

[18]In this regard, H.V. Test avers that in employing Ledwaba and Sheik, Moela and Lombaard, as erstwhile employees of H.V. Test, knew full well that they would have been bound by restraint and non-disclosure obligations, as they were, and furthermore that the confidential information would be disclosed to Lombaard and Lead HV thereby permitting it to compete unfairly and unlawfully with H.V. Test which it knew to be a direct competitor.

[19]Insofar as relief is sought against Lombaard, it is important to emphasise that Lombaard had left H.V. Test's employ in 2014 and was no longer bound by his restraint or non-disclosure obligations. As such, the claims founded against Lead HV and Lombaard are based on unlawful competition.

LEAD HV'S CASE

[20]Lead HV, in the face of the Anton Piller and its execution, states that it "dawned upon the fourth respondent [Lombaard] that the third respondent [Sheik] had information in her possession" and her employment was terminated, on or about 29 September 2020, after she had furnished an affidavit to Lead HV, which is dated 27 September 2020. In this affidavit, she confirms that the Anton Piller Court order was served on her, on 14 September 2020, and that she handed over all electronic devices, paperwork or any documents that were linked to H.V. Test. She also confirmed that she took up employment with Lead HV, which she knew to be a competitor, and that she at all times worked from home due to the fact that the country was in lockdown as a consequence of the Covid-19 pandemic. Notably, she sought to confirm that she commenced employment with Lead HV and brought in her own leads and/or clients and that Lombaard assisted her with existing potential clients instructing her to follow up with them – an allegation to which I will return later.

[21]In the affidavit deposed to by Lombaard, which is confirmed by Moela, in a confirmatory affidavit on behalf of Lead HV, they immediately aver that as the companies are direct competitors, there will, as anticipated, be an overlap of clients. To that extent, any mutual clients that have been approached by it and Lombaard, are existing clients and the inferences which are sought to be drawn from the contact made with these clients is unsubstantiated and do not assist H.V. Test's case. Attached to the answering affidavit are customer quote reports from 1 June 2016 to 28 February 2021 which do reflect an overlap of clients. This is not unexpected given that the two companies compete for the same work.

[22]The law is trite that companies are entitled to compete freely and that these rights are protected. That said, there is a body of common law and protections in the Constitution which protect the wrongful and unlawful interference with a trader's rights.²

[23]Lombaard and Lead HV characterise the application as a "witch hunt" to prevent and limit lawful competition. Lombaard says that Lead HV's turnover in the 2018/2019 year was R7 million and in the 2019/2020 year was R13 million. He contends that this ostensible confidential information is not required by it to establish its presence in the market. Importantly, Lombaard emphasises that he and, consequently, Lead HV had no knowledge of what Ledwaba and Sheik had with them or received from H.V. Test, that their customers overlap and that it was only when it dawned on them, as stated aforesaid, that Sheik had information in her possession – a concession, I believe, that they recognised that the information which she brought to them was confidential information deserving of protection, they terminated her employ.

UNLAWFUL COMPETITION

[24]In seeking final interdictory relief, H.V. Test has to show that:

24.1it has a clear right and that there has been an interference with such right;

² **Schultz v Butt** 1985 (3) SA 667 (A) at 678G and 678H-679E

24.2it has as a consequence suffered an injury or it reasonably apprehends that an injury will be committed; and

24.3there is no other satisfactory remedy available to it other than an interdict.

THE CLEAR RIGHT

[25]In this regard, the right which H.V. Test seeks to protect is its goodwill. It says that it has a prestigious reputation and significant goodwill grown over the years by virtue of insights gleaned through experience in amassing its client base formulated into contact lists, its ability to assess service and equipment requirements and its knowledge of its clients' needs and product specifications formulated into follow up and training lists. The common law affirms that this is a right worthy of protection.

[26]As set out in **Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others**:³

“It is important to note that the reference by the Court to the plaintiff’s ‘right to attract custom’ as being the right it has as a trader which is protected from wrongful interference by a competitor, is the same as the ‘reg op die werfgrag’ which is the rights H J O Van Heerden seeks to protect in Grondslae van die Mededingingsreg (supra). Sometimes this is referred to as the trader’s goodwill, which is defined by Lord MacNaughten in Commissioners of Inland Revenue v Muller and Co Margarine Ltd 1901 AC 217 at 224 as ‘the attractive force that brings in custom’.”

[27]In **Commissioners of Inland Revenue v Muller and Co Margarine Ltd** (supra) Lord MacNaughten described goodwill at 217 as follows:

“It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes

³ 1981 (2) SA 173 (T) at 182D-E

an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. ... For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again. No doubt, where the reputation of a business is very widely spread, or where it is the article produced rather than the producer of the article that has won popular favour, it may be difficult to localise goodwill.”

[28]Lord Lindley then said:

“Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own.”

[29]Furthermore, in **Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd**⁴ Corbett J dealing with a case where the business had utilised confidential information compiled by its competitor said at 221C-222A:

⁴ 1968 (1) SA 209 (C)

“Reverting to the position in our law, and without attempting to define generally the limits of lawful competition, it seems to me that where, as in this case, a trader has by the exercise of his skill and labour compiled information which he distributes to his clients upon a confidential basis (i.e. upon the basis that the information should not be disclosed to others), a rival trader who is not a client but in some manner obtains this information and, well knowing its nature and the basis upon which it was distributed, uses it in his competing business and thereby injures the first mentioned trader in his business, commits a wrongful act vis-à-vis the latter and will be liable to him in damages. In an appropriate case the plaintiff trader would also be entitled to claim an interdict against the continuation of such wrongful conduct. Although there is no precise precedent in our law for this proposition, I am of the opinion that it is a well-founded development of our law relating to unlawful competition in trade and is in accordance with trends of legal fact that the information is distributed upon a confidential basis to a limited class of persons prevents it, in my view, from becoming public property capable of being used or imitated by rival traders. In such circumstances, the conduct of a rival trader who obtains and, well knowing the position, uses the information to advance his own business interests and activities amounts to a deliberate misappropriation and filching of the product of another's skill and labour. Such conduct must, in my view, be regarded as dishonest and as constituting a fraud upon the compiler of the information. I consider that, as in the case of false misrepresentations concerning one's own wares or of passing-off, our Courts should treat this as constituting unlawful competition and as being actionable at the suit of the trader damnified thereby. As in those cases, the conduct of the trader misappropriating the information would amount to an infringement of the rights of the compiler thereof to carry on his trade and attract custom without unlawful interference from competitors; and the damage suffered would normally consist of the loss of customers or potential customers who have been induced by such conduct to deal with his competitor rather than with the compiler himself. Bearing in mind the Aquilian character of a claim based upon such conduct, it seems to me that the suffering of damage in this form and its causal connection with the acts of

unlawful competition are essential ingredients of the claimant's cause of action.”

[30] On the evidence before me, Lead HV and Lombaard do not dispute that on execution of the order, on 14 September 2020, the confidential information was found in computer readable form stored inter alia on Lead HV's, Ledwaba's, Sheik's and Lombaard's computers, laptops, external hard drives, servers, mobile phones, handheld palm devices and related equipment. No effort is made to deal with this allegation.

[31] It certainly was not common cause, as submitted to me by Mr Labuschagne, that none of this information made its way on to Lead HV and Lombaard's electronic devices, as gleaned from the execution of the Anton Piller order.

[32] Once the H.V. Test team analysed all of the documentation obtained it became clear that both Ledwaba and Sheik had unlawfully copied and pasted information and data from H.V. Test's databases into what is termed "*extracted regional customer lists*", i.e. lists for the regions of Gauteng, KwaZulu-Natal, Free State, Limpopo, Mpumalanga and Cape Town. This was also evident from the manner in which they copied and pasted these lists which resemble the identical format of the lists created by H.V. Test and stored on its database.

[33] Having done so, it is averred that they shared this and related information with Lead HV and Lombaard so they too had possession and access to these extracted regional customer lists.

[34] As a consequence, it is averred that Lead H.V and Lombaard, himself and/or with the aid of Ledwaba and Sheik, have:

34.1 persuaded certain of H.V. Test's clients to switch their business to Lead HV;

34.2 quoted for new business in competition with H.V. Test;

34.3entered into negotiations with H.V. Test's customers; and

34.4actively solicited business from H.V. Test, using the confidential information that was unlawfully obtained.

[35]In substantiation of these averments:

35.1H.V. Test attaches a number of email communications between Lombaard, Sheik and Ledwaba in which they deal with H.V. Test's clients, as reflected on their confidential customer lists, and requests to Lombaard to quote these clients. The glaring problem is that Sheik, in so doing, cuts and pastes the information relating to the client in the identical format that it appears in H.V. Test's client lists to Lombaard and, also, in instances to Liz Wood ("Wood"), an employee of Lead HV.

35.2H.V Test provides a schedule that reveals that by using information in the follow up quotes lists, Lead HV, via the conduit provided by Sheik to Lombaard, in the main, and Ledwaba, to a lesser extent, was able to access and follow up and quote H.V. Test's clients which involved similar or identical product types, albeit that most of the quotes post-dated those of H.V. Test. The schedule titled the "follow up quotes list" exposes, as an example, 23 of the 115 quotes uncovered by the H.V. Test team, prepared and sent by Lead HV and Lombaard to demonstrate that, using the regional lists and accessing the follow up quote lists, clients were induced to move their business to Lead HV and new business was enabled.

35.3H.V. Test attaches a number of email communications between Sheik, Lombaard and Wood, which by their express content and the attachments shared by Sheik including the regional customer lists, training lists inter alia, reveal incontrovertibly, it is averred, the unlawful competition contended for.

[36]At the outset of the argument for H.V Test, I was enjoined to find that Lombaard's credibility had been impugned in his affidavit. It was submitted that Lombaard avers that Lead HV was incorporated on 13 October 2015 and did not commence trading

until 1 May 2017. However, one of the very quotes used by Lombaard demonstrates that Lead HV was in business and servicing clients, in this instance, Re Dira Mmogo Contractors in June 2016 already. The email is dated 24 June 2016 and sent at 13:38 pm and evidences a request for a quotation from Lombaard and Lead HV. Furthermore, it was submitted to me, this demonstrated that Moela who had signed a restraint undertaking with H.V. Test had commenced the business in direct competition with H.V. Test, in breach of his undertaking. As a consequence, from its inception Lead HV's conduct was tainted as it was competing unlawfully.

[37]This may be so, but of greater concern is Lombaard's abject failure to furnish relevant and transparent information to the Court. He makes no effort from the outset to explain and thereby disabuse the Court of the adverse inferences which must be drawn. He fails to explain how Ledwaba and Sheik came to be employed by Lead H.V, plucked as they were from its direct competitor. He is silent about whether he interviewed them, what reasons were furnished for the termination of their employ with its direct competitor, whether he enquired as to whether Ledwaba and/or Sheik were bound by restraint or non-disclosure obligations, and if there were any impediments to their employment. It is highly improbable that *bona fide* employers would not canvass this essential information with them or call H.V. Test to make sure that their employment was lawful. Here, more so because of Lombaard's erstwhile relationship with H.V. Test, as set out above. Yet, he did not do so.

[38]The targeting and inducement of customers from H.V. Test began almost immediately after the employment of Ledwaba and Sheik, as appears below.

THE CLIENT LISTS

[39]In a Lead HV quote, on 23 July 2020, Ledwaba sends a quotation for a circuit breaker to Re Dira Mmogo Contractors. H.V. Test had quoted this very client for a circuit breaker on 19 July 2019. Lombaard states that this client has a "*history*" with Lead HV. He attaches the email, emanating from Welma Rossouw of Re Dira Mmogo Contractors to him, dated 24 June 2016, and referred to above. The 2016 email records that Lombaard had discussed equipment requirements with Andrew Molamu, and a quote is sought. This is the identical client contact contained in H.V.

Test's customer list and reflected in Ledwaba's call list of 2019, including details of Molamu's personal cell-phone number, email address and product specification. Although a year has elapsed since Lead HV's quote, there is no explanation provided by Lombaard as to the expiration period of three years prior its quote of 23 July 2020. Having last quoted this client in 2016, Lombaard wants the court to accept that Molamu has ostensibly moved the business back to Lead HV. An affidavit from Molamu is not proffered. To my mind, the timing of the quote, Ledwaba's involvement, and the pilfering of confidential information revealing that the client is in the market for a circuit braker sways the probabilities against such a finding.

[40]In an email, on 22 July 2021 at 14:40, Lombaard quotes Lobhen. The email is addressed to Henry, refers to Ledwaba and attaches a quote for three different models of instruments. In a training environment list of 2019, provided to Ledwaba by H.V Test, Lobhen is reflected as one of Lead HV's clients. The contact is Henry Lobhen whose personal cell phone number and email address are reflected as well. In response, Lombaard says that Ledwaba had Lobhen's cell phone number, and he was contacted by Lobhen who requested the quote and that there is nothing untoward in this conduct. Neither Ledwaba nor Lobhen file confirmatory affidavits. As such, this allegation has no probative value, and is hearsay. Again, the timing of the quote, Ledwaba's involvement, and the pilfering of confidential information renders this finding improbable.

[41]In an email sent by Lombaard to gladwin@ ____co.za, into which Ledwaba is copied, dated 5 August 2020 at 18:01, he prepares and attaches a quote for equipment. The email is titled "*22 KV VLF Pressure Tester for commissioning and 22 KV Cable Fault Locator, Listening Set and Scope*". This client, Mbatini, is also listed in an H.V. Test call list which was furnished to Ledwaba in 2019, whilst he was employed at H.V.Test. Gladwin is the contact, his personal contact email address and cell phone number are reflected, so too that this client is a privately owned contractor in Gauteng. Lombaard implausibly states that because Ledwaba is not an employee he had no knowledge of his database nor the information that he solicited. Again, this superficial response does not explain why Lombaard, knowing what he does about Ledwaba's prior employment, having been employed at H.V. Test himself, does not explain why he never discussed Ledwaba's ostensible client base

with him and whether or not this was a client he had solicited away from H.V. Test.

[42]On 5 August 2020 at 18:10, Lombaard sends an email to Rabbo Multi Solutions, into which Ledwaba is copied. The email, authored by Lombaard, is addressed to “Sam”. A quotation is sent based on a discussion that Sam had with Ledwaba. Once again, Ledwaba’s 2019 call list provides that the contact at Rabbo Multi Solutions is Sam Marota whose personal cell number and email address are reflected and that the business is privately owned. Again, Lombaard says because Ledwaba is not an employee, he has no basis or knowledge of his customer base. This answer begs the question because time and time again, emails are sent to identical customers via identical confidential contact persons. The link is Ledwaba. As such, the only probable inference is that Lombaard was well aware that Rabbo Multi Solutions was a client of H.V. Test and this confidential contact information was obtained for unlawful ends.

[43]In an email sent by Lombaard to a client, Ampcor, titled “*Test Equipment*”, on 6 August 2020 at 10:57, and into which Ledwaba is copied, he attaches a quotation for instruments and the email is addressed to Dirk Neervoort, who is the identical client contact on Ledwaba’s 2019 call list. Lead HV avers that this is an established client. The Lead HV quote list discloses only one expired quote having been furnished on 31 March 2020. An email reflecting a website query dated 2 March 2020 is proffered. Notably, the website query stems from a Renata Olivier and, yet, on 6 August 2020 the quotation is sent to Neervoort, the confidential contact person reflected in the H.V. Test’s client list. No explanation is furnished as to how and why Neervoort became the contact person and not Olivier.

[44]On 6 August 2020, at 02:33 pm, Sheik sends an email to Lombaard in which she records that a client needs a personal visit and that “Daphney” has called for a representative to come through and personally discuss their requirements. Her suggestion is that Ledwaba pay a visit. Pasted into the email is a rectangular block, an extract of the client’s details, which I am informed is an identical replica of the client’s details contained in the customer lists in H.V. Test’s database. Extracts of H.V. Test’s database were attached to the founding affidavit so that a comparison could be made. The client list records that the client is Siyanda Bakgatla Platinum

Mine, the contact person is Daphney Rangaka and her personal email address and cell phone number are reflected. Having received the email, Lombaard responds in an email to Sheik and Ledwaba at 14:44 pm. His email confirms to Sheik that Ledwaba can speak to this client i.e. Daphney but he thinks that Ledwaba has already done so that morning because he had already mentioned "*Siyanda*" to him. In the email he references Ledwaba and asks him if this is the client that he was talking about. This alone demonstrates that this client is unknown to Lombaard and Lead HV. Lombaard cannot and does not say that Siyanda Bakgatla Platinum Mine is an existing client, or even explain how Sheik or Ledwaba had Daphney's contact details. The contact person earmarked in the email is the very person that appears from the confidential client listing belonging to H.V. Test, namely Daphney. Instead, he baldly avers that the inference that is sought to be drawn, is uncertain. I disagree. Lombaard fails to explain whether the client approached Ledwaba or Sheik or they solicited her. His version remains that he did not know what the source of Ledwaba and Sheik's clients were. I have already stated this is highly improbable, in the face of their prior employment. Belatedly, he says that he furnished them with existing clients to approach. Yet he does not say that this was one of those clients on the evidence before me.

[45]A further example is a quote, dated 12 August 2020, to L H Marthinusen, a division of Actom (Pty) Ltd by Lead HV sourced through Ledwaba, and which was found by the team in his g-mail account. The quote is stipulated to be for the calibration of a Baur DPA 75. The follow up quotes listing prepared by H.V Test, which is part of its confidential information, reveals that it was to quote this very client on upcoming calibrations, information which had been uploaded in May 2018. In response, Lombaard says that L H Marthinusen is an existing client of Lead HV as they quoted and provided on - site calibration services to it on 1 April 2019. He furthermore says that if one has regard to Lead HV's customer quotes report it shows that the relationship commenced on 1 April 2019 and continued so that on 26 August 2020 it repaired the Baur DPA 75 and did the calibration. It's list reflects that a quote for calibration raised on 6 March 2020 expired. It last invoiced this client in September 2019 and in December 2019. Unfortunately, Lombaard provides no information as to how this quote arose i.e. who made first contact, and how Lead HV

knew that the calibration was necessary – not a shred of relevant evidence is placed before this Court. The timing of the quote coincides with the employment of Sheik and Ledwaba and the fact that it was sourced by Ledwaba is glossed over. Furthermore, the confirmatory affidavit which Lombaard said was to be furnished by L.H Marthinusen was not forthcoming. The failure to produce this affidavit after the lapse of some 5 months since the urgent application calls for a negative inference to be drawn.

[46]It was submitted to me by Ms Lombard that it is improbable, when one has regard to the fact that SOE's, Municipalities and Mines have thousands of employees that both Lead HV and H.V. Test, who are direct competitors, co-incidentally have a customer relationship contact with the same person. I am inclined to agree with her. The snowball effect is my finding that Lombaard was well aware of the fact that Ledwaba and Sheik was accessing confidential client lists which were the property of H.V. Test, and Lombaard was content for them to do so.

[47]These are not the only examples set out in the affidavits before the Court but it is unnecessary to canvass each one, as this evidence with that dealt below suffices to assess the probabilities.

THE FOLLOW UP QUOTES LIST

[48]H.V. Test contends that during Sheik's employment with Lead HV, 445 quotes were generated. Of those 445 quotes some 115 quotes were specifically generated by Sheik, on instructions from Lombaard. In so doing she utilised the follow up quote lists which comprise part of its confidential information. A schedule was prepared by H.V. Test in respect of 23 of these quotes, by way of example, to provide evidence that the follow up quotes in their list were also quoted upon by Lead HV.

[49]As submitted to me by Ms Lombard, Lombaard is silent as to how 7 out of 22 of H.V. Test's existing clients, in this sample, clients which he does not aver are existing clients, received quotes from Lead HV after H.V Test had provided quotes to them. These include Electrical Substation Services on 1 September 2020 (two quotes for a circuit breaker and cables generated 10 months and 5 months

afterwards), MMM Consulting Engineers and Trading Investments on 7 August 2020 (a quote generated 3 months afterwards), Power of 8 on 18 August 2020 (a quote generated 2 months afterwards), Bhendogu Technologies on 28 August 2020 (a quote generated 2.5 months afterwards) and a further quote on 30 August 2020, MGC Electrical Works on 29 July 2020 (two quotes generated 1.5 months afterwards), Beam Electrical Wholesalers on 16 July 2020 (a quote generated 3 weeks afterwards) and Matuma Electrical and Projects on 16 July 2020 (a quote generated 3 weeks afterwards). No explanation is given as to how these clients came to contract with Lead HV. Instead, Lombard says the delay in the quotes means that they are independent. To my mind, the so called delay in the generation of the quotes by Lead H.V does not assist it, precisely because the timing of these quotes coincides with the employment of Ledwaba and Sheik, who knew and had access to the lists which contained a record of the quotes that had been furnished by H.V. Test.

[50]A quote is furnished to CBI Electrical African Cables by H.V. Test on 23 June 2020. Lead HV then quotes on 15 July 2020. Lombaard says that this company was an existing client from 29 March 2019, referring to a single quote over this time period, which expired. He says that the current quote emanated from a website query. In this regard one Charlie van Dyk made the enquiry. Yet, when the quote is furnished, by Lombaard, it is furnished to Alwyn van Wyngaard. This is a customer contact contained in H.V.Test's confidential customer list.

[51]So too, the quote to ARB Electrical Wholesalers, a client of H.V. Test, who quoted it on 23 June 2020. Lombaard's response is that it's quote was sent on 15 July 2020 and that ARB is an existing client. This quote was sent 2 days after Sheik commenced her employ. Lead HV first invoiced them on 23 July 2018. The Lead HV quotes list shows a number of unsuccessful quotes on 1 August 2018, two on 11 October 2018, one on 4 September 2019 and, finally one on 15 July 2019. He further contends that because ARB is an electrical wholesaler they shop around for the best prices. Lombaard is again untruthful, as his version directly contradicts an email which was sent by Sheik to Lombaard on 15 July 2020, where she is soliciting business from ARB. The email is sent to Lombaard and Wood at 8:13 am. In that email titled "*15th of July 2020 – Plan of action for today*" Sheik records the following:

“NB: Barry if you need those contacts for calibration, please let me know. I will work on that list. NB: Liz are we a vendor of ABB, if we are please kindly let me know, I have spoken to a contact of mine at ABB yesterday and if we are a vendor he will have no issues giving us the business in future.”

[52]This is further embroidered upon when Sheik sends a second email on the same day, at 08:44 am, to Wood and Lombaard. Quoting from that email she says:

“I will inform the client. He had just purchased a unit recently (CAT35).

Should he need more test equipment moving forward, he will definitely consider us.”

[53]The contact knowledge and product knowledge, i.e. that ARB had purchased a CAT from H.V. Test emanated from Sheik’s knowledge that a CAT35 had been sold by H.V.Test to ARB, on 13 May 2020, as reflected in an invoice furnished to the Court. Lombaard glosses over this. The only inference to be drawn is that Lombaard and Wood knew full well that Sheik obtained this knowledge whilst in H.V. Test’s employ. In this regard this client is interchangeable referred to as ABB and ARB but from the submissions made it is the same client.

[54]Lombaard says that the quote given to MMM Consulting Engineers and Trading Investments resulted because the customer approached Lead HV directly i.e. Rumani Nekhumbe of the client. H.V. Test’s quote is dated 5 May 2020. Yet, there is no explanation why on 6 August 2020, the quote is furnished to Manas Maponkola, accompanied by an email from Lombaard addressed to him, and who is the client contact in H.V. Test’s confidential client list.

[55]On 11 May 2020 H.V. Test quoted Power of 8. In defence of the quote given to Power of 8 on 18 August 2020 by Lead HV, Lombaard says that the inference sought to be drawn is improper because its quote was higher and it had no knowledge of the H.V. Test quote and no business resulted. This is not completely true. In an email from Sheik to Lombaard about this client, on 18 August 2020 at 4:35 pm, she informs Lombaard as follows:

“FYI – H.V. Test also quoted him but he did not have the quote in front of him to tell me the amount quoted and he could not remember because I did ask him.”

[56]The email is titled “*Quotation – Cable Fault Location System*”. Lombaard then proceeds to quote and addresses the quote to kennedy@_.co.za, the contact person referred to in H.V. Test’s confidential client lists. This transaction unequivocally demonstrates that Lombaard was aware that Sheik was contacting H.V.Test’s clients and trying to ascertain from them what prices had been quoted in an effort to solicit their clients, undercut the prices and in so doing compete unlawfully. The business did not eventuate simply because, without the pricing information, Lombaard was unable to offer a competitive quote. It also demonstrates that Lombaard is untruthful in his explanation. He had no knowledge of the H.V. Test quote because Sheik could not solicit this information for him from the potential client.

[57]I have not dealt with all the examples, in the schedule. Again, it is unnecessary for me to do so as set out above.

[58]As submitted to me, the follow up quotes list was “*the proverbial low hanging fruit*” targeted by Lead HV immediately upon the employment of Ledwaba and Sheik and the responses furnished by Lombaard to the assertions made lack substance and are implausible. The evidence exposes the truth that Lombaard and Lead HV were well aware that the follow up quotes list existed and they instructed Sheik to target the clients on that list to benefit Lead HV permitting Lombaard to quote and, in so doing, dishonestly and unlawfully compete with H.V. Test.

THE EMAIL EVIDENCE OF THE SHARING OF THE CONFIDENTIAL INFORMATION

[59]Ms Lombard in her argument sought to highlight what she contended was direct and incontrovertible evidence of the unlawful activity displayed and conducted between Lead HV, Lombaard, Wood and Sheik.

[60]An email reflects that the customer list for KZN 2020 is sent to Lombaard, on 13

July 2020 already, by Sheik with an undertaking that other area lists will be emailed to him the following day. The KZN customer list 2020 contains 97 customers all of which are customers of H.V. Test. It is in the context of preparing the KZN list that the email referred to above titled “*15th July 2020 – Plan of action for today*” is sent to Lombaard. In a further email sent to Lombaard and Wood by Sheik, on 17 July 2020 at 8:12, and titled “*Plan for today – 17th of July 2020*”, Sheik confirms that a few quotes and enquiries were received from those customers on the KZN customer list and furthermore that she will now follow up on quotes that went out that week. In addition, she says she is working on her next target area which is Cape Town.

[61]In an email to Wood and Lombaard, on 22 July 2020, titled “*Plan for today – 22nd of July 2020*”, Sheik confirms to them that she will continue making calls using the Cape Town listing, her main focus being contact with municipalities, whereafter she will try and work through the list systematically. She attaches her current working list saying that there are still a lot of calls that need to be made but that she is hoping to complete the list by the next day whereupon she will then focus on her next target area. She then furnishes the completed customer list for Cape Town and her updated “*follow up list*” which is sent as an attachment to Wood and Lombaard in an email, dated 24 July 2020 at 1:16 pm, the subject-matter being “Weekly report update on customer and quote follow up”.

[62]The Mpumalanga list is sent to Lombaard, on 29 July 2020 at 4:05 pm, in an email titled “*List for Mpumalanga*”. In this email she informs Lombaard that she has pulled these contacts from various different spreadsheets and requests authorisation that she can start working on it. She furthermore states:

“I do have a few more contacts, I just need to find them in my diary and my other spreadsheets.”

Lombaard responds to the email at 8:43 am, on 30 July 2020, wherein he confirms that she can work on the lists.

[63]There is an email containing the Limpopo list, which is forwarded by Sheik to Lombaard, on 4 August 2020 at 12:06 pm. She wants authorisation to now work on

the Gauteng listing. Lombaard responds in the affirmative, that she may continue.

[64]In an email titled “*Working list for Gauteng*”, dated 4 August 2020 at 2:38 pm, the list is shared by Sheik with Lombaard. She informs him that it took her a bit more time but that she has “so many other leads I need to compile on a spreadsheet”. She asks for the go ahead in respect of the attached list. In response, Lombaard on 5 August 2020 at 8 am says:

“There are a lot we are currently servicing but you can still make contact from a sales angle. I see Aldorette from H.V. Test is on there ... please leave that one out. ...”

[65]This email exposes Lombaard who clearly knows that this list is from H.V. Test and wants to make sure that Aldorette is not targeted with marketing material, because the “*game will be up*”. In addition, this emphatically reveals that although there was an overlap of clients, not all clients were in Lead HV’s stable.

[66]In an email, dated 19 August 2020 and sent at 4:08 pm, by Sheik to Lombaard. The subject-matter is training list contacts and to which Sheik attached a training list of contacts, a list which she has copied from H.V. Test’s database. She records in the email that the list may have a few duplicates from other area listings she has completed but that there is no harm in making contact with these clients again. Importantly, she tells Lombaard that she has another training list that consists of over 1500 clients that she needs to go through before she sends it to him. Lombaard lamely contends that he had no knowledge where Sheik got these leads and at the end of the day the email was simply a progress report. He further suggests, without any proof, that he assumed that she was cold calling. This is completely untenable. Sheik’s email suggests that she has contacted these clients previously. Furthermore, in a competitive market, it appears that she has clients at her fingertips and yet Lombaard wants this Court to ignore his failure to question where these clients were sourced. Ineluctably, the only possible inference is that he knew full well that these client lists and training lists were obtained by Sheik from H.V. Test. He was careless as to the consequences of using these lists in the furtherance of unlawful ends.

[67]On 21 August 2020 at 8:19 am, Sheik sends another email to Lombaard and Wood. The subject of the email is “*Plan for today – 21 August 2020*”. In the email she records that she will focus on all quote follow ups and will continue with the attached list, the training list contacts.

[68]She says this may take a bit of time to complete and that there is over 500 contacts. She confirms that once she has completed her “follow up list” she will send an update. These statements, in the context of the information disclosed in the attached lists, and the speed with which these lists were being produced together with the volume of contacts, is a further indication that Lombaard knew full well that the attached listing was not drawn from leads or cold calling, but had been filched from H.V. Test.

[69]On 28 August 2020 at 8:21 am, Sheik sends an email to Wood and Lombaard. The subject of the email is “*Plan for today – 28 August 2020*”. Attached to this email, Sheik provides a completed listing and confirms that there were a few enquiries and quote requests. What is revealing is that she records the following:

“NB: Over 375 (x 2) individual emails sent out of which 23 bounced back – will focus on getting in contact with these clients first thing on Monday.

Today I will focus on all quote follow ups and I will try and send out as many emails in terms of our promotional product – MD9880 TRMS Thermal Multimeter.”

That Lead HV, Lombaard and Sheik are targeting H.V. Test’s clients is incontrovertible.

[70]As promised, in the email of 28 August 2020 sent at 8:21 am, Sheik then proceeds to send out the promotional products email. This email includes a generic budget quote for Lead HV’s thermal multimeter, of which five units are held in stock, together with a description of the multimeter and its specifications, which H.V. Test discovers were sent to 750 contacts. All of these 750 contacts emanated from the KZN training list contacts file, which was the property of H.V. Test, and which had

been filched by Sheik and used by her in furtherance of the business of Lead HV.

[71]In a further email from Sheik to Wood and Lombaard, on 14 September 2020 at 8:27 am, the subject-matter of which is “*Plan for today – 14 September 2020*” she records the following:

“I will continue with the “training” listing making calls and marketing our multimeter ... I have attached the listing for you to view my progress thus far.”

to which is attached the training list of contacts.

[72]To suggest, in the face of the volume of clients Sheik was targeting that Lombaard innocently assumed that she was cold calling or had her own ostensible client base is patently improbable. It is also implausible that Sheik could remember all of these clients from memory together with their personal contact information, training and other information, without having obtained lists nefariously from H.V. Test. Lombaard, at the very least would have been suspicious, yet he fails to address this and sweepingly contends that he did not know. In truth, on the probabilities he was well aware of the source of Sheik’s client base and was happy to accede to her unlawful conduct, in which he too participated.

[73]This training list of contacts that Sheik created is from a file named KZNCRM 31.10.2019.xls (the training contacts file) which the Court is informed is part of H.V. Test’s database and specifically includes a file named data/Ameera/documents/copy of KZNCRM 31.10.2019 training.xls which was found on the laptop issued to her by Lead HV. The training list file had been given to Sheik by her fellow employee, Kloppers, on 18 November 2019, whilst in H.V.Test’s employ.

[74]In an email sent, on 18 November 2019 at 4:09 pm, by Kloppers to Sheik, the subject-matter is recorded as “*KZN CRM 31.10.2019.xlsx*”. The email attaches the KZN training list file. Kloppers informs Sheik that there are a lot of columns that she does not require and that a few have been hidden. Sheik is required to verify the details on the list and to update where it is incomplete or inaccurate. She is further required to use the list with a training focus. These lists in a comments column set

out the calls made to set up the training, the training requirements and the training quotes *inter alia*. All of this information is clearly of a confidential nature which Sheik pilfered and openly shared with Lombaard and Wood.

[75]To the extent that Lombaard variously contends that Sheik was cold calling, yet at the same time had her own leads, or that he had given her potential clients to follow up, he fails to substantiate these conclusions.

THE LOMBAARD QUOTES AND EMAILS

[76]Materially, there are a number of further emails exchanged between Lombaard and Sheik which incontrovertibly disclose that he was a party to the unlawful enterprise. These emails were disclosed as evidence of Lombaard's complicity in the unlawful enterprise. I deal with certain of them.

[77]In an email, on 12 August 2020 at 3:28 pm, Sheik informs Lombaard:

"As per telecom, kindly contact 'Speedy' tomorrow at 10 am. His[sic] not happy currently with H.V. Test – has a Test Van at H.V. Test and is very upset with Sean at present."

[78]The reference to Sean is clearly to the deponent to the founding affidavit. This email includes the pasted extract of the client contact, which is the property of H.V. Test.

[79]On 7 September 2020 at 12:22 pm, Sheik sends a follow up email to Lombaard for a prospective client, F&J Electrical. In this email which is titled "*Feedback from Speedy – F&J Electrical*" she records:

"I called Speedy. This was his feedback: Giving H.V. TEST until this Wednesday to sort out his trailer and if nothing is done, the business will come our way. He also mentioned he needs another trailer in the near future. Will support us."

[80]Copied into the email is the client's details in the format in which it is kept in H.V. Test's client list database. It refers to the name of the client, the contact person, his nickname, his private cell phone number and email details.

[81] In response, Lombaard weakly asserts again that he does not know where Sheik got her leads, he did not encourage her to draw information from H.V. Test, that the correspondence is simply a progress report and that he assumed she was cold calling. This response completely contradicts and spins the contents of the email exchange and does not support such an interpretation. The exchange unequivocally shows that the client was not Lead HV's, that using the customer contact list it had access to the responsible person, and that an attempt had been made to solicit this clients business and divert it away from H.V. Test.

[82]In a further email, dated 12 August 2020 at 10:50 am, and titled "Future potential clients" Sheik informs Lombaard:

"Please could you kindly try and contact Theo tomorrow at around 9 am. This client did have a small budget when I last spoke to him at H.V. Test. He is currently in a financial situation and had to let his staff go.

He is interested in test equipment for Cable Faults. If we can assist him with a quote at the best possible price and give him guidance as to what test equipment he needs, I am certain when his finances improve he will give us the business."

Sheik pasted into the email the client information, the contact, his personal email address and cell phone number – information which she had sourced from H.V. Test's client list. Once again, the probabilities point to Lead HV soliciting clients from H.V. Test using confidential information obtained during Sheik's erstwhile employment.

[83]All of these emails indicate that in employing Sheik and Ledwaba, Lombaard and Lead HV unequivocally knew that they had access to confidential information in the form of client lists, follow up quotes and training lists, which had been unlawfully

obtained. These lists would be shared with Lead HV who would then utilise these lists to target and induce customers which it did not or used to have, and were placing their business with H.V Test, and in so doing unlawfully competed with H.V. Test.

[84]In the face of these email exchanges and comprehensive sharing of confidential information in the lists shared with Lombaard and Wood, on occasion, it is unsurprising that Lombaard makes sweeping statements and provides no detail or assistance to the court to counter the inferences made against him and Lead HV. He receives the lists and then actions Sheik's unlawful activities by allowing her to make contact with the clients sourced from the lists simultaneously engaging with them by sending quotes to them.

THE LAW

[85]In considering the evidence placed before me and in view of the fact that the order that is sought is final in nature, such an order can only be granted on the basis set out in **Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd**⁵ and **National Director of Public Prosecutions v Zuma**.⁶ Furthermore as set out in **Fakie NO v CCII Systems (Pty) Ltd**⁷ Cameron JA, set out the test for resolving genuine or bona fide factual disputes. He said as follows:

“Motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse or oral evidence.”

[86]To my mind there are no material disputes of fact, it was certainly not raised in

⁵ 1984 (3) SA 623 (AD)

⁶ 2009 (2) SA 277 (SCA) at paragraph 20

⁷ 2006 (4) SA 326 (SCA)

argument before me, which would not justify a final interdict.

[87]As set out in **Van Castricum v Theunissen**:⁸

“The essential elements to be proved to protect confidential information by way of an interdict are:

(i)the applicant must have an interest in the confidential information;

(ii)the information must be of a confidential nature;

(iii)the relationship must exist between the parties which imposes a duty on the respondents to preserve the confidentiality;

(iv)the respondents must have knowledge of the confidentiality of the information and its value; and

(v)improper use must not be made of the information concerned.”

[88]Furthermore, in that judgment it was held that:

“To be confidential, the information must have the necessary quality of confidence about it, namely it must not be something which is public policy or public knowledge.” See Atlas Organic Fertilizer (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others 1981 (2) SA 173 (T) at 185. In Saltman Engineering Co Ltd v Campbell Engineering Co Ltd [1948] 65 RPC 203 (CA) at 211 Lord Green MR also said the following: ‘What is clear from the aforesaid, is that someone who saves himself the trouble of going through the process of compilation of the document, even where it is compiled from information which is available to anybody, such a person would be interdicted if that information has been obtained in confidence. The reason is simply that the confidential information may not be used as a springboard for activities detrimental to the person who made the confidential information available. It would remain a springboard even

⁸ 1993 (2) SA 7251 at 732

when all the features have been published or can be ascertained by actual inspection by any member of the public.’ See Cranleigh Precision Engineering Ltd v Bryant [1965] 1 WLR 1293 (QB) at 1317-8 [1964] 3 ALL ER 289), quoted in the Harvey Tiling case supra at 324B-D. It is sometimes difficult to draw a dividing line between information which constitutes general knowledge and information which is confidential or constitutes a trade secret. It seems that the four principles enunciated in the following English authority are of great assistance in discerning whether information constitutes confidential information or a trade secret worthy of protection: ...

First, I think that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think that the owner must believe that the information is confidential or secret, i.e. that it is not already in the public domain. It may be that some or all of his rivals already have the information: but as long as the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner’s belief under the two previous heads must be reasonable. Fourth, I think that the information must be judged in the light of the usage and practices of the particular industry or trade concerned. It may be that information which does not satisfy all these requirements may be entitled to protection as confidential information or trade secrets: but I think that any information which does satisfy them must be of a type which is entitled to protection.”

[89] The evidence before me demonstrates that:

89.1H.V. Test clearly had an interest in the confidential information which they had built up over many years and which they sought to protect by having Ledwaba and Sheik, sign their necessary restraints and non-disclosure agreements and ensuring that all of the electronic equipment on which the lists were stored were returned to them on the termination of their employ;

89.2Ledwaba and Sheik were immediately employed by Lead H.V, a direct competitor, and in breach of their agreements, in circumstances where Lombaard permitted and aided the use of the confidential information,

irrespective of the consequences;

89.3The information in respect of the client lists which included the clients names, personal contact details including cell phone numbers and telephone numbers, and email addresses, the training lists and the follow up quote lists are all integral to H.V. Test's business and gave them a clear advantage when competing in this industry, and is information which is worthy of protection as confidential information. In **Aercrete South Africa (Pty) Ltd and Another v Skema Engineering Co (Pty) Ltd and Others**⁹ it unequivocally provides that it is unlawful for an employee to take his employer's confidential information or documents and use them to compete with his employer. This also applies to former employees.

[90]This information was obtained by Lombaard and Lead HV, in circumstances where they were direct competitors and which was obviously confidential. Knowing its true nature, and value, they exploited the information and used it "as a springboard" to pilfer clients, sell instruments, quote, undercut prices and provide follow up services and calibrations, thereby nefariously and unlawfully competing with H.V. Test. I am of the view that they should be restrained from continuing with this unlawful conduct.¹⁰

ONGOING HARM

[91]Mr Labuschagne, correctly in my view, did not seek to dispute and downplay the conduct of Lombaard and Lead HV, which is palpably dishonest.

[92]He instead raised two legal points. The first was that H.V. Test had not demonstrated that the harm was ongoing and that the interdict was necessary in the absence of such harm.

[93]Prior to the institution of these proceedings, an undertaking was sought from

⁹ 1984 (4) SA 814 (D) at 822E-G

¹⁰ **Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd** 1968 (1) SA 209 (C)

Lead HV. It chose not to give any undertaking, in the face of what was viewed as the wide and unjustifiable undertaking sought. It pressed H.V. Test to stipulate the exact terms of the undertaking. H.V. Test, at that point in time, did not have all of the information at its disposal, which Lead HV and Lombaard must have appreciated. They were not bona fide, as is evidenced by the conduct which has been exposed in the application. H.V. Test had no other alternative but to pursue their legal avenues.

[94]In the face of the Anton Piller order and its execution, Lead HV and Lombaard sought to distance themselves from Sheik and terminated her employ. This appears to be strategic. The Anton Piller relief and the documents obtained, disclosed that the confidential information was found on Lead HV's computer systems and was in their possession. There is direct evidence that this information was forwarded to them by Sheik. Yet, they still chose not to give any undertakings and delete the information, in their unlawful possession. I am not told that this information has ever been deleted.

[95]It is clear that Lombaard and Lead HV demonstrated a disregard for H.V. Test's rights by using confidential information, and unfairly and wrongfully took advantage of information that was protectible. There is no suggestion that this has stopped. Lombaard has the lists and he personally made contact with the filched clients and provided quotes to them. I can see no reason why the interdictory relief sought is not as necessary now as when it was sought urgently. To suggest that because no evidence of unlawful competition has been produced, since the granting of the urgent interdict, does not carry weight with this Court. It is extremely difficult for H.V. Test to determine whether or not its confidential information is still being used to its detriment. Clients are unlikely to disclose that they were approached by Lead HV and diverted their business to it, a competitor. The information is usually stumbled upon. H.V. Test was only able to glean this information, which is uniquely in the hands of Lead HV, by way of the Anton Piller order. Unless a client freely approaches it with information, it cannot be expected to comb its marketplace and pester its clients. In these circumstances, my view is that the harm is ongoing and an interdict is the only remedy to stem potential harm. Without an interdict, Lead HV is permitted to continue with its unlawful conduct and this cannot be allowed.

THE INFORMATION HAS LOST ITS CONFIDENTIALITY

[96]Mr Labuschagne's second point was that the information has lost its confidentiality. He referred me to a decision *South African Airways SOC v BDFM Publishers and Others*¹¹ in which Sutherland J was seized with an interdict sought against the distribution of privileged information which had found its way into a number of media outlets. He found that it had, as a consequence, lost its confidentiality, more particularly because the information was digitally stored, and interdictory relief would not be effective.

[97]I am of the view that this matter is distinguishable on the facts. Here, the confidential information, stored digitally, was solicited and acquired by Lead HV through its employment of two erstwhile employees of H.V. Test. This information has not been distributed and disclosed widely into the marketplace. H.V. Test immediately acted and launched the Anton Piller relief. Having done so, Ledwaba and Sheik did not oppose the interdictory relief sought, which also required them to hand over any information, however stored, within their control. This only leaves Lead HV and Lombaard in the picture. In the face of the relief sought Lead HV and Lombaard are required to delete this information which they uniquely acquired in order to compete unlawfully. If they do so, as they must do, the information and its confidentiality are preserved. The interdictory relief will prevent them from acting on the information. This is not a situation where "humpty dumpty cannot be put back together again".

NO OTHER REMEDY

[98]In the light of my findings, I am of the view that there is no alternative remedy to protect H.V. Test's goodwill and that the interdictory relief is the only manner in which to do so, as set out above.

¹¹ 2016 (2) SA 561 (GJ)

COSTS ON THE ATTORNEY CLIENT SCALE

[99]Costs are sought on the attorney client scale. Such an order is granted in circumstances where the Court seeks to mark its disapproval at the conduct of the losing party. Special grounds have to be present, one of which is the element of dishonesty or fraud and motives to that end. A punitive costs order was granted against Ledwaba and Sheik. In my view, the affidavits disclose that Lombaard and Lead HV acted in concert with Ledwaba and Sheik. Lombaard's affidavit exposes that he has been dishonest, despite his oath and that his and Lead HV's actions were unscrupulous. The incidents of unlawful competition are not isolated in nature and it has been demonstrated that a comprehensive attack against H.V. Test's client base and services was planned and carried out and at the centre of this was Lombaard and Lead HV.

[100]In all of the circumstances, the Court cannot condone such unlawful conduct and it is fitting that costs be awarded jointly and severally against Lead HV and Lombaard on an attorney client scale.

CONSIDERING THE AMENDED RELIEF SOUGHT

[101]I have considered the draft order. I am not inclined to grant the relief:

101.1compelling Lead H.V and Lombaard to disclose the details of any person, close corporation, partnership or company to whom they have disclosed the applicant's confidential information. There is no evidence that they have done so. It is clear that Ledwaba and Sheik unlawfully obtained the confidential information and disclosed it to them.

101.2permitting nominated IT professionals to access electronic devices, memory sticks and hard drives, as this would constitute an unwarranted invasion of Lead HV's privacy in circumstances where it is a direct competitor and also has confidential information. If the unlawful competition continues in breach of the order, they will face contempt proceedings and a sanction will follow.

[102]In the circumstances, I make an order as follows:

102.1The first and fourth respondents are interdicted and/or restrained from:

102.1.1utilising, communicating or publicising any of the applicant's confidential information comprising of the applicant's:

(a)customer lists;

(b) training lists; and

(c) follow quotes lists,

("the confidential information");

102.1.2utilising or publicising customer contact details of persons with whom the applicant deals;

102.1.3approaching directly or indirectly (or assisting any other person in approaching directly or indirectly, any customer or employee of the applicant in order to unlawfully compete with the applicant, for their benefit or the benefit of any other person in respect of any contract with which the applicant has tendered, bid or was negotiating at any time up to and including 13 November 2020;

102.1.4accessing or utilising the confidential information which has come into their possession in consequence of their employment of the second and third respondents.

102.2Ordering Lead HV to disclose, with sufficient particularity, the details of any person, close corporation, company or partnership with whom they have attempted or have conducted business utilising the confidential information.

102.3Ordering the first and fourth respondents to dispose, delete and destroy the applicant's confidential information, however stored, and to inform the applicant that

they have done so within 10 (ten) days of this order.

102.4 Ordering the first and fourth respondents to pay the costs of this application on the attorney and client scale, jointly and severally, the one paying the other to be absolved.

P V TERNENT

Acting Judge of the High Court of South Africa

DATE OF JUDGMENT: 12 August 2021 handed down electronically uploaded to CaseLines and emailed to the parties

DATE OF HEARING: 14 April 2020 (heard on the virtual Teams platform)

APPEARANCES:

For Applicant: Ms N Lombard

Instructed by C Van Zyl Johnson Attorneys

C Johnson

For Respondents: Mr F J Labuschagne

Instructed by E Y Stuart Inc.

Mr L A Stuart