IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 34871/2020

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

1/2/2022 .....
DATE SIGNATURE

In the matter between:

LEAD HV (PTY) LIMITED	First Applicant/First Respondent
BARRY LOMBARD	Second Applicant/Fourth Respondent
and	
HV TEST (PTY) LIMITED	Respondent/Applicant

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

TERNENT, AJ:

[1] This is an application brought by the applicants, the first and fourth respondents in the main application, for leave to appeal the whole of my judgment and order made on 12 August 2021 with leave being sought to

the Supreme Court of Appeal. I gave a very detailed judgment and do not intend to repeat my findings again.

[2] I will refer to the parties as they are cited in the main application.

[3] The first and fourth respondents' counsel informed me at the outset that he was not pursuing the grounds set out in paragraphs 1 and 8 of the respondents' notice of application for leave to appeal dated 2 September 2021. As such, those grounds were abandoned by the respondents.

[4] Respondents' counsel did not place in issue that the applicant had established a clear right to protect its confidential information which had been pilfered by the respondents. He also did not seriously pursue the finding that this confidential information was found in the possession of the first and fourth respondents. In this regard, I do not intend to repeat what is stated in my judgment in relation to the respondent's goodwill and the protection of its confidential information which was unlawfully pilfered by all of the respondents and found in their possession.

[5] In essence the respondents' counsel sought to submit, again, that I had erred in finding that the interdictory requirement of ongoing harm had been established after the granting of the urgent interdictory order against the poached employees, Sheikh and Ledwaba. The submission is that the applicant had not demonstrated that the unlawful competition was ongoing or that there was a reasonable apprehension that it was ongoing, in the ordinary course, and at the time of the hearing. As such, the applicant was not entitled to interdictory relief, inter alia because the respondents immediately terminated Sheikh and Ledwaba's employ, and all possible harm had been averted.

[6] I do not agree with these submissions. My judgment makes it clear that Lombard, in his capacity as General Manager of the first respondent was a material cog in facilitating the direct unlawful competition with the applicant. This was initiated when the second and third respondents were enticed by him to work for the first respondent. My judgment details the failure by him to explain their employment with the first respondent, a direct competitor and details numerous and damning details of confidential information that was shared with him, and which I do not intend to repeat here. Lombard, having intentionally obtained this confidential information personally made contact with the applicant's customer base in circumstances where he well knew, that without this information, his approaches and those of the two poached employees, would never have eventuated let alone produced results. I remain of the view that the malfeasance and conduct of Lombard and the first respondent, who having secured the confidential information, used it unlawfully, failed to provide their co-operation when the applicant requested them to do so, or give *bona fide* undertakings in relation to the protection of the confidential information received, and/or agree to disclose and hand it over, could have easily continued to trade and solicit custom undeterred and, unlawfully, in the ordinary course. The applicant, accordingly, established on the probabilities that there was a well-grounded and reasonable apprehension that the harm was ongoing and that an interdict was the only appropriate relief.

[7] The second ground which was raised, again, by the respondents' counsel was that I was bound by the legal principles in ***SAA SOC v BDFM Publishers and Others***[1] and had not properly considered the judgment in finding that it was distinguishable on the facts. The application for leave

[1] 2016(2)SA561(GJ) at paragraph 30 – the futility of the relief sought

to appeal pointedly focuses my attention on my failure to apply the law. I do not accept that this case sets out an inflexible legal principle. It is clearly evident that the principles applied by Sutherland J are shaped by the facts/ evidence at hand, and policy considerations, all of which must be weighed up in the exercise of my discretion. In this regard, it was submitted to me that this case is authority for the principle that, unless immediately interdicted, once confidential information in an electronic format is distributed it loses its confidentiality and an interdict is futile and ineffective. This proposition appears to me to be absurd. An interdict would then to my mind never serve any purpose because at the moment of distribution via electronic methods, the information loses its confidentiality. I remain of the view that the ambit of the distribution remains crucial in determining this issue. There was no suggestion that other than having found its way into the hands of the perpetrators in this application, it had made its way into the public domain, or "*strangers*" and could not be protected. Sutherland J's decision was underpinned by the evidence that the information found its way into various news publications, and as a consequence the imposition of an interdict would be futile. I reiterate my findings in my judgment and remain of the view that the interdict was necessary and useful to the applicant in the circumstances.

[8] In all of the circumstances, and having regard to the more stringent test now applied in applications for leave to appeal, which was common cause between the parties,[2] I am of the view that another Court would not come to a different decision on either of these grounds or at all. I make the following order:

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[2] ***Mont Cheveaux Trust (IT2012/28) v Tina Goosen and 18 Others and the Acting National Director of Public Prosecutions and 3 Others v The Democratic Alliance***, Case No. 19577/09 (24 June 2016)

8.1 The application for leave to appeal by the applicants/first and fourth respondents in the main application is dismissed.

8.2 The applicants are ordered to pay the costs 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: 1 February 2022 handed down electronically and uploaded to CaseLines and e-mailed to the parties.

DATE OF HEARING: 14 October 2021.

APPEARANCES:

For Applicants/First and Fourth Respondents:	Mr F J Labuschagne Instructed by E Y Stuart Inc. Mr L A Stuart
For Respondent/Applicant:	Ms N Lombard Instructed by C Van Zyl Johnson Attorneys C Johnson