

**REPUBLIC OF SOUTH AFRICA**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION JOHANESBURG**

Case No.: 20/39009

REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED.  
**17 January 2022**

In the matter between:

**AFRICA PARTS GROUP HOLDINGS (PTY) LTD**  
**(REGISTRATION NO.: 2019/022824/07)**

First Applicant

**AFRICA PARTS GROUP (PTY) LTD**  
**(REGISTRATION NO.: 2005/022801/07)**

Second Applicant

**AFRICA PARTS GROUP TRADING (PTY) LTD**  
**(PREVIOUSLY PARTSWORLD (PTY) LTD)**  
**(REGISTRATION NO.: 1995/0043114/07)**

Third Applicant

and

**TITAN AUTO PARTS (PTY) LTD**  
**(REGISTRATION NO.: 2006/003214/07)**

Respondent

**TITAN PNEUMATICS (PTY) LTD**  
**(REGISTRATION NO.: 2019/588786/07)**

Second Respondent

**CECILIA VAN DER VYFER**  
**(IDENTITY NO.: [....])**

Third Respondent

**EUGENE VAN DER LITH**  
**(IDENTITY NO.: [....])**

Fourth Respondent

**RUTHRAKUMARAN (RAJAN) GOVINDEN**  
**(IDENTITY NO.: [....])**

Fifth Respondent

**TANJA VAN JAARSVELD**  
**(IDENTITY NO.: [....])**

Sixth Respondent

**KAREN TIMMS**  
**(IDENTITY NO.: [....])**

Seventh Respondent

**TURBO ENVIRONMENTAL CONTROLS (PTY) LTD**  
**(REGISTRATION NO.: 2012/018405/07)**

Eighth Respondent

**DAVID WILLIAMS**  
**(IDENTITY NO.: [....])**

Ninth Respondent

**JONATHAN WILLIAMS**  
**(IDENTITY NO.: [....])**

Tenth Respondent

**JUDGMENT**

## **SK HASSIM AJ**

### **Introduction**

1. The papers in this case are not only voluminous, but they are very confusing. This has greatly contributed to the delay in finalising the judgment. Unfortunately, I have found the applicants' case to lack lucidity and have found it to be ambiguous in many respects. It has not always been clear what is being alleged. The applicants' case has at times been difficult to understand.

2. A case must be pleaded with precision regardless of whether it is brought on motion or by action. The founding affidavit contains general and sweeping statements that have tended to obfuscate and obscure issues. The applicants seek orders which have no factual foundation or legal foundation and at least in the case of prayers 1.1 and 1.4, neither. A methodical presentation of the case would have gone a long way to understanding the applicants' case. With this prelude, I turn to consider the application.

3. The interdictory relief which the applicants seek in this application is of two kinds: Prohibitory and mandatory. The main relief in the notice of motion is based in delict and the alternative relief is based on a breach of contract. Both are aimed at the cessation of alleged unlawful competition by (i) former employees (i.e., the second to seventh and tenth<sup>1</sup> respondents); (ii) the employer of the former employees (i.e., the first and second respondents); and (iii) a former customer of the applicants (i.e., the eighth respondent).

4. As against the former employees, save for the tenth respondent, the claim is for specific performance of contractual obligations assumed in contracts of employment in terms of which they undertook amongst others to preserve the confidentiality of confidential information received during their employment, not to solicit or entice customers and employees for a period of three years from the termination of employment, not to remove any information relating to the employer and to return

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<sup>1</sup> There is a dispute whether the tenth respondent was an employee.

company information/documentation or related items that may be in their possession at the termination of employment. The relief in this regard is set out in prayer 2 of the notice of motion<sup>2</sup>. Therefore, the applicants must prove the existence of the contract, the term sought to be enforced as well as the breach thereof.

5. The claim for the cessation of the delict of unlawful competition is directed against all the respondents. The relief in this regard is set out in prayer 1 of the notice of motion. To sustain a cause of action for unlawful competition, an applicant must prove that the competition is wrongful. Competition is not wrongful *per se*. However, in certain instances the law does not countenance competition and renders it unlawful. There is however no closed list of such instances. A well-known one, and one relied upon by the applicants is the misuse of their confidential information. The applicants must therefore amongst others prove the improper use of the information whether as a springboard or otherwise.

6. Additionally, in both the claim based in contract and that based in delict, the applicants must prove the requisites for interdictory relief. The applicants therefore bear the burden amongst others not only to demonstrate that the respondents have actually committed an injury, or an injury is reasonably apprehended by the applicants,<sup>3</sup> but also that the injury is a continuing one.<sup>4</sup>

7. Apart from having the burden to satisfy these requirements, the applicants in this case face a further hurdle because of the disputes of fact concerning the relief claimed in prayer 1 of the notice of motion. The applicants have to show that the disputes of fact were not foreseeable when the application was instituted. For the reasons discussed later, I find that the dispute of fact/s was foreseeable and for that reason alone the application for the relief in prayer 1 falls to be dismissed. Nevertheless, in addition to the

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<sup>2</sup> At the hearing, an amendment to the notice of motion was moved and an order was sought by the applicants in terms of a draft order.

<sup>3</sup> Cf. Setlogelo v Setlogelo 1914 AD 221 at 227.

<sup>4</sup> Philip Morris Inc and Another v Marlboro Shirt Co SA Ltd and Another 1991 (2) SA 720 (A)

foregoing, I am of the view that the applicants have failed to make out a case for any of the relief sought, not that sought in prayer 1 or 2 of the notice of motion or in the draft order.

### **The dramatis personae and their relationships**

8. During 2005, the second applicant purchased from Torre Parts and Components (Pty) Ltd (**"Torre"**) a business which supplied medium technology fluid handling equipment and service backup to the petrochemical mining and general industries in Southern Africa. On the version advanced in the founding affidavit, the applicants provide, supply, market and distribute automotive, commercial, pneumatics and industrial parts and components in Africa. The second and third applicants are subsidiaries of the first applicant and on the applicants' version they operate as a group.

9. The third, fourth, fifth, sixth and seventh respondents are former employees (**"the former employees"**) of the second applicant. The ninth respondent is the director of the eighth respondent, the father of the tenth respondent and a former director of Pneumax Southern Africa (Pty) Ltd (**"Pneumax SA"**), whose business operations were intertwined with that of Torre and loosely referred to in the founding affidavit as a division of Flowmax.

10. The applicants describe the tenth applicant as having been employed by them as a *"commissioned representative"*, brought in and managed by the fourth respondent during the former's employment with the applicants. While the employment contracts with the third, fourth, fifth, sixth and seventh respondents are attached to the founding affidavit, none with the tenth respondent is attached.

11. The tenth respondent denies that he was employed by any of the applicants and avers that he was a freelance agent for the third applicant, *"brought business to the two*

*APG companies* <sup>5</sup> and earned a commission from the third applicant on orders generated by him. According to him, he sourced products from whichever supplier had stock. And whether an order was placed with a supplier depended on stock availability, how quickly the supplier was able to deliver the product and the price thereof.

12. It is however common cause that the tenth respondent's relationship with the second applicant ended during April 2020. And since then, he has been involved with the first and/or second respondents; the applicants aver that he is employed by the first and/or second respondent. According to the tenth respondent he operates as an independent contractor and a consultant to the first and second respondents.

13. The former employees left the second applicant's employ over the period 30 September 2019—31 March 2020 and took up employment with the first and second respondents<sup>6</sup>. The third respondent was appointed a director of the first respondent on 3 September 2019 and of the second respondent on 19 November 2019.

14. The applicants contend that the first and second respondents' businesses are the same as that of the applicants and involve the provision, supply, marketing, and distribution of automotive, commercial, pneumatics and industrial parts and components into Africa. According to them, the respondents, are in the same market as the applicants and they sell and market the identical products sold and marketed by the applicants.

15. Broadly, the applicants allege that the first to seventh respondents (i.e., the former employees) and the tenth respondent are unlawfully competing with them in that:

15.1. These respondents:

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<sup>5</sup> The two APG companies is a reference to the second and third applicant collectively.

<sup>6</sup> The fourth respondent denies that he is an employee of the first and second respondents. He avers that he is a consultant to them.

15.1.1. have attempted to solicit employees and customers for the first and/or second respondents' benefit;

15.1.2. have misappropriated intellectual property, confidential information, and trade secrets to springboard the first and second respondents into direct competition with the applicants and thereby obtain an unfair and unlawful advantage;

15.1.3. have breached the terms of their employment contracts;

15.2. the fourth respondent additionally:

15.2.1. attempted to persuade suppliers not to award exclusive distributorship to the applicants;

15.2.2. attempted to persuade suppliers to award exclusive distributorship agreements to the first and second respondents and to divert to the first and second respondents, orders placed with the applicants;

15.2.3. while in the second applicants' employ, authorised credit facilities and discounts for the first and second respondents as well as the eighth respondent which resulted in them receiving discounts which allowed them to undercut the prices offered by the second applicant to its customers.

16. The second applicant furthermore alleges that the former employees, or at least the fourth respondent, has "*misappropriated*" the distributorship agreement between the second applicant and its supplier Pneumax-SPA.

17. As far as the eighth respondent and ninth respondents are concerned:

17.1. the applicants aver that the eighth respondent has been acquiring products at fraudulently discounted prices from the applicants. They allege that this enabled the eighth respondent to undercut the applicants' prices and unfairly compete with them on the same basis as the first and second respondent. There are also allegations of collaboration with the fourth respondent.

17.2. It is alleged that the ninth respondent is using the applicants' confidential information to solicit the second and third applicant's customers for the benefit of the first and second respondents.

18. Based on the misappropriation of confidential information, the applicants seek in some cases vague and wide relief for which there exists no factual foundation. And effectively seek to prohibit the respondents in perpetuity from lawfully trading with the applicants.

### **Relevant historical facts**

#### *Purchase of business by the second applicant*

19. Flowmax (SA) Limited ("**Flomax**") was established in 1991 and conducted the business of supplying medium technology fluid handling equipment and service backup to the petrochemical mining and general industries in Southern Africa. Flowmax had four key subsidiaries of which only one is relevant to this application, namely Pneumax Southern Africa (Pty) Ltd ("**Pneumax SA**"). During 2002 Flowmax sold its business to Setpoint Group Limited ("**Setpoint**"). During 2015 Setpoint sold the business to Torre.

20. In May 2019, the second applicants purchased from Torre the business which was described in the sale agreement as "*the distribution of quality branded parts and components into African markets*" as a going concern.



21. The assets which the second applicant purchased included amongst others, contracts relating to the business which were listed in Schedule 5<sup>7</sup> to the sale agreement. These included contracts with sixty-four (64) suppliers<sup>8</sup> including contracts with the following five suppliers:

21.1. ACL Sri Società Unipersonale (ACL);

21.2. Ningbo Intel-Isaiah;

21.3. Pneumax SPA-Italy (Pneumax-SPA);

21.4. Ningbo Xinchao Automization Component Co Ltd (XCPX) and

21.5. XMC Pneumatic Co Ltd (XMC) and Taiwan Pu Corporation Ltd (TPUCO).

22. The second applicant alleges that it held exclusive<sup>9</sup> distribution agreements with (i) ACL Sri Società Unipersonale (ACL); (ii) Ningbo Intel-Isaiah; and (iii) Pneumax-SPA. According to the applicants, the Schedule 5 contracts were very valuable to the second applicant and their transfer from Torre to the second applicant was one of the conditions precedent to the sale agreement.

23. The second applicant alleges furthermore that Pneumax-SPA accounted for approximately 45% of the applicants' annual sales in its industrial division and was vital to their business, that Pneumax-SPA awarded distributorship agreements for twelve months at a time, that the second applicant's distributorship agreement with Pneumax-SPA was valid until December 2019, that Flowmax, Setpoint and Torre had held exclusive distributorship agreements with Pneumax-SPA for repeated twelve-month

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<sup>7</sup> The contracts which were listed in schedule 5 included exclusive and non-exclusive distributorship agreement and supplier agreements.

<sup>8</sup> The applicants specifically use the word "*suppliers*" and not the word "distributors"

<sup>9</sup> None were attached to the papers to support the averment notwithstanding the respondents' denial of the existence of not only exclusive distributorship agreement but any distributorship agreement.

periods stretching over thirty-two years and but for the fourth respondent's failure to renew the distributorship agreement, the second applicant would have continued to be an exclusive distributor.

### *The employment of the former employees*

24. The second applicant substituted Torre as employer in terms of section 197 of the Labour Relations Act, Act 66 of 1995 and consequently the employment contracts entered into by the previous owners of the business (i.e., amongst others Flowmax and Torre) were transferred to the second applicant.

25. Save for the fourth respondent, who was employed by Flowmax, the former employees had been employed by Torre in terms of written contracts of employment.

26. The third respondent, Ms Van der Vyver commenced employment with Torre on 1 December 2017 as Category Specialist Clutch and reported to the fifth respondent. She resigned on 30 September 2019, having given notice of her intention to do so on 29 August 2019.

27. The fourth respondent commenced employment with Flowmax in terms of a written agreement concluded on or about 25 September 2001. He initially held the position Product Manager - Automation and Fluid Handling, and later the position of Head of Sales – Industrial General Manager – Industrial. The fourth respondent resigned on 31 March 2020, having given notice of his intention to do so on 22 February 2020.

28. The fifth respondent, Mr Govinden, commenced employment with Torre on 1 December 2017 as Category Manager: Brake and Transmission. He was later appointed as General Manager. He resigned on 30 September 2019, having given notice of his intention to do so on or about 1 September 2019.

29. The sixth respondent, Ms Van Jaarsveld, commenced employment with Torre on 6 March 2017 as Internal Sales Team Leader for Pneumax as well as office manager. She reported to the fourth respondent. She resigned on 13 January 2020 having given notice of her intention to do so on 13 December 2019.

30. The seventh respondent, Ms Timms, commenced employment with Torre on 20 October 2017 as Sales Representative-Industrial and reported to the fourth respondent. She resigned on 13 March 2020 having given notice of her intention to do so on 14 February 2020.

31. The ninth respondent, Mr David Williams, was previously a director of Pneumax SA, referred to in the papers as a division of Flowmax. He is the sole director of Turbo Environmental Control, the eighth respondent, a former customer of the applicants<sup>10</sup> (or the second applicant).

32. The tenth respondent, Mr Jonathan Williams, is the son of Mr David Williams. According to the applicants, he was employed as “*a commissioned representative*” at the instance of the fourth respondent. The applicants allege that Mr Jonathan Williams left the applicants’ employ in April 2020. He however claims that he was an independent contractor and not an employee. According to the applicants he is a member of the first and second respondents’ development team.

33. Clause 14 of the employment contracts concluded with the third, fifth, sixth and seventh respondents provided:

*“Confidentiality and enticement*

*The employee shall not either during or after the termination of this employment contract or any other employment contract with the employer,*

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<sup>10</sup> The applicants view themselves as one group and do not differentiate between the various applicants.

*divulge or communicate any of its secrets or other confidential information which the employee may receive or obtain in relation to the company's affairs, to any third person or party.*

*The employee shall not for a period of three years after the termination of this or any other employment contract with the employer solicit or entice any of the company's employees or persuade them to leave the company's employ. The employee shall not entice or attempt to entice any of the company's customers for three years after the termination of this or any other employment contract with the employer.*

*On termination of employment the employee will not, remove any information related to the company in any media format. The employee will return any company information/documentation/ and or any other related items that he/she may have in his/her possession."*

34. It is common cause that the former employees are employed by the first and/or second respondents and have been in the first and/or second respondents' employ since they terminated their employment with the second applicant.

### **The applicants' case**

35. According to the applicants, the first and second respondent carry on the same business as that of the applicants, and they sell and market the identical products.

36. None of the former employees are bound to a covenant in restraint of trade. The relief against the third, fifth, sixth and seventh respondent is based firstly on clause 14 of their employment contract and secondly, on the delict of unlawful competition due to the misuse of confidential information. The latter is also the basis of the claims against the remaining respondents.

37. The applicants sought to rely on similar provisions in the written contract of employment entered into by the fourth respondent on 25 September 2001. However, that employment agreement was superseded by an agreement entered into on 17 October 2012 which did not contain similar restrictions. The applicants' case against the fourth respondent is based on firstly, an alleged breach of the fiduciary duties owed by an employee to an employer and secondly, unlawful competition due to the delict of the misuse of the confidential information.

### **The disputes of fact**

38. The application for the oral evidence to resolve the disputes of fact is a concession that the material facts on which the applicants rely for the relief in prayer 1 of the notice of motion are disputed and that the disputes of fact are real, genuine, and *bona fide*.

39. The applicants elected not only to proceed on motion, but did so for final relief. The election was made cognisant of the possibility of a factual dispute. This is patently evident from the following telling statement in paragraph 124 of the founding affidavit, which must be read with paragraph 123:

*"123. I submit that a case has been made out for final interdictory relief.*

*124. In the alternative, and pending the resolution of any factual dispute that may arise (none of which are presently foreseeable), the applicant will seek interim relief."*

40. The disputes of fact feared by the applicants materialised. They consequently seek a referral for the hearing of oral evidence on the following questions identified in the applicants' counsels' heads of argument (and/or the draft order):

40.1. Whether the applicants' confidential information has been used as an unlawful springboard,<sup>11</sup> whether the distributorship agreement with Pneumax-SPA was misappropriated,<sup>12</sup> and whether the first and second respondents transacted with the applicants at excessively reduced rates.<sup>13</sup> (The questions for referral for the hearing of oral evidence are set out in paragraph 4 of the draft order.)

40.2. Whether the fourth respondent breached his fiduciary duties to the second applicant by processing transactions for the first and second respondents at excessive discounts.<sup>14</sup>

40.3. Whether to their knowledge the eighth and ninth respondents purchased goods at unjustifiably low rates to the detriment of the applicants.<sup>15</sup>

41. It appears from paragraph 4 of the draft order that the relationship between the first and second respondents and a supplier, Pneumax-SPA (a supplier to the second applicant under an alleged distributorship agreement), is a matter which the applicants wish to interrogate in cross-examination. The reason being that *"[w]hile [the fourth respondent] is said not to be employed by the [first] or [second respondent], it is clear that they have secured the benefit of this distributorship agreement (formerly de facto an exclusive arrangement) to the detriment of the Second Applicant. How it is that this agreement came to fall into their laps, is not explained. Cross examination of the respondents and evidence of Pneumax-SPA- Italy (under subpoena if need be) will resolve the dispute of fact..."*<sup>16</sup>

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<sup>11</sup> Applicants' HoA: para 22.2

<sup>12</sup> Applicants' HoA: para 28.1

<sup>13</sup> Cf. Applicants' HoA: para 28.1.

<sup>14</sup> Applicants' HoA: para 22.4

<sup>15</sup> Draft order: para 5

<sup>16</sup> Applicants' HoA: para 22.3.

42. Paragraph 5 of the draft order identifies the questions to be referred for the hearing of oral evidence regarding the claims against the eighth and ninth respondents.

43. Looking at the disputes of facts and the questions which the second applicant wishes to interrogate at a hearing of oral evidence, it is difficult to understand how a dispute of fact was not foreseen. If a dispute of fact was not foreseen when the application was launched, there was no need for the statement in paragraph 124 of the founding affidavit. The statement might have been the proverbial Freudian slip; especially considering that the applicants accuse the fourth respondent and the ninth respondent of fraud. The alleged fraud is one of the pillars, if not the fundamental pillar of the relief claimed against the ninth respondent. How the applicants could not have foreseen a dispute of fact when fraud is alleged, is startling. This procedural lapse is sufficient reason to dismiss the application. There is another reason as well, namely that the founding papers do not make out a case for the relief sought.

### **The terms of the relief sought**

44. The applicants seek the following orders in the notice of motion:

*“1. Interdicting, restraining and prohibiting, for a period of 5 (five) years, calculated from such date as this... Court may determine, within the Republic of South Africa, any or all of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Respondents (hereinafter collectively referred to as “the Respondents”):*

*1.1 From conducting or engaging in any similar or competing business operation as a business operation conducted by any or all the Applicants;*

*1.2 From using any intellectual property and/or trade secrets and/or know-how and/or technical information of any or all of the Applicants, in any manner whatsoever, including without limitation, disclosing such matters to any person, firm or company;*

*1.3 From using any information on suppliers, customers, products, product listing and categorisation, pricing schedules, discount structures, costings and profit margins (hereinafter referred to as “confidential information”), including, without limitation, disclosing such confidential information to any person, firm or company;*

*1.4 From directly or indirectly approaching, contacting, or communicating with any of the Applicants’ suppliers, with which any one or all of them have or had distributor agreements, including, but not limited to, ACL Sire Società Unipersonale (ACL), Ningbo Intel –Isaiah, Pneumax-SPA – Italy (Pneumax-SPA), Ningbo Xinchao Optimization Component Co Ltd (XCPX), X M C Pneumatic Co Ltd (X, M. C) and Taiwan PU Corporation Ltd (TPUCO);*

*1.5 From directly or indirectly approaching, contacting, or communicating with any present or past customer of any or of all the applicants;*

*1.6 From directly or indirectly approaching, contacting, or communicating with any employee of any or of all the Applicants and/or attempting to solicit or entice any of the Applicants’ employees to leave the employ of the Applicants and/or to join the First, Second or Eighth Respondent or any other competitor of any or all the Applicants;*

**2. Alternative to paragraph 1:**

**2.1 With regard to the Third Respondent:**

*2.1.1 Directing the Third Respondent to return any confidential information related to the Second Applicant in any media format that she may have in her possession;*



*2.1.2 Interdicting, restraining and prohibiting the Third Respondent from divulging or communicating any of the Second Applicant's confidential information which the Third Respondent may have received or obtained in relation to the Second Applicant's affairs, to any third person or party;*

*2.1.3 Interdicting, restraining and prohibiting the Third Respondent from soliciting or enticing any of the Second Applicant's employees or persuading them to leave the Second Applicant employ for a period of 3 (three) years from 31 [sic] September 2019;*

*2.1.4 Interdicting, restraining and prohibiting the Third Respondent from enticing or attempting to entice any of the Second Applicant's employees for a period of 3 (three) years from 31 [sic] September 2019.*

*2.2 With regard to the Fourth Respondent:*

*2.2.1 Directing the Fourth Respondent to return all confidential information of the Second Applicant (including books of account, records and correspondence concerning or containing any reference to the affairs or business, lists of customers, and all other documents papers [sic] and records which may have been prepared by him or which came into his possession in the course of his employment with Second Applicant;*

*2.2.2 Directing the Fourth Respondent to return any copies of the Second Applicant's documentation whatsoever;*

*2.2.3 Interdicting, restraining and prohibiting the Fourth Respondent from using for his own benefit, or any other person, or*

*divulging or communicating to any other person or persons, any of the secrets of the Second Applicant or other confidential information which he may have received or obtained in relation to the affairs of the Second Applicant or its customers;*

*2.2.4 Interdicting, restraining and prohibiting the Fourth Respondent from, directly or indirectly, and whether as proprietor, partner, member of a syndicate, or otherwise, for a period of 2 (two) years from 31 March 2020:*

*2.2.4.1 engaging the services of any person who is an employee of the Second Applicant; and/or*

*2.2.4.2 recommend to any company and/or corporate entity and/or business, of which he may be an employee, director or shareholder, or with which she may have any form of association whatsoever, that such company offer employment to any person who is an employee of the Second Applicant and/or in any way impart to any company, and/or corporate entity and/or business such as is referred to in the previous subparagraph, any knowledge acquired by him, with reference to the qualifications, ability or character of any person who is an employee of the Second Applicant;*

*2.2.5 Interdicting, restraining and prohibiting the Fourth Respondent from, directly or indirectly, for a period of 2 (two) years from 31 March 2020, communicating with, soliciting or conducting negotiations with or concluding transactions with any entity in relation to whose products and/or services the Second Applicant possess distribution rights;*

*2.3 With regard to the Fifth Respondent:*

*2.3.1 Directing the Fifth Respondent to return any confidential information related to the Second Applicant in any media format that he may have in his possession*

*2.3.2 Interdicting, restraining and prohibiting the Fifth Respondent from divulging or communicating any of the Second Applicant's secrets or other confidential information which the Fifth Respondent may have received or obtained in relation to the Second Applicant's affairs, to any third person or party;*

*2.3.3 Interdicting, restraining and prohibiting the Fifth Respondent from soliciting or enticing any of the Second Applicant's employees or persuading them to leave the Second Applicant's employ for a period of 3 (three) years from 30 September 2019;*

*2.3.4 Interdicting, restraining and prohibiting the Fifth Respondent from enticing or attempting to entice any of the Second Applicant's customers for a period of 3 (three) years from 30 September 2019*

**2.4 With regard to the Sixth Respondent:**

*2.4.1 Directing the Sixth Respondent to return any confidential information related to the Second Applicant in any media format that she may have in her possession;*

*2.4.2 Interdicting, restraining and prohibiting the Sixth Respondent from divulging or communicating any of the Second Applicant's secrets or other confidential information which the Sixth Respondent may have received or obtained in relation to the Second Applicant's affairs, to any third person or party;*

*2.4.3 Interdicting, restraining and prohibiting the sixth Respondent from soliciting or enticing any of the Second Applicant's employees or persuading them to leave the Second Applicant's employ for a period of 3 (three) years from 13 January 2020;*

*2.4.4 Interdicting, restraining and prohibiting the sixth Respondent from enticing or attempting to entice any of the Second Applicant's customers for a period of 3 (three) years from 13 January 2020.*

*2.5 With regard to the Seventh Respondent:*

*2.5.1 Directing the Seventh Respondent to return any confidential information related to the Second Applicant in any media format that she may have in her possession;*

*2.5.2 Interdicting, restraining and prohibiting the Seventh Respondent from divulging or communicating any of the Second Applicant's secrets or other confidential information which the Seventh Respondent may have received or obtained in relation to the Second Applicant's affairs, to any third person or party;*

*2.5.3 Interdicting, restraining and prohibiting the Seventh Respondent from soliciting or enticing any of the Second Applicant's employees or persuading them to leave the Second Applicant's employ for a period of 3 (three) years from 13 March 2020;*

*2.5.4 Interdicting, restraining and prohibiting the Seventh Respondent from enticing or attempting to entice any of the Second Applicant's customers for a period of 3 (three) years from 13 March 2020."*

45. The relief against the former employees (“**the alternative relief**”) is claimed in the alternative to the interdict against all the parties (“**the main relief**”) and not in addition thereto; nor is it sought conditionally. The relief which the applicants intended seeking at the hearing, foreshadowed in the applicants’ counsels’ heads of argument, was not the relief claimed in the notice of motion. It was intimated in the heads of argument that the applicants would seek, at the hearing, an amendment to the relief claimed against the former employees in that the relief against them would no longer be sought in the alternative to the relief claimed against all the respondents (i.e., the main relief in prayer 1), but in addition thereto.

46. Faced with the dispute/s of fact the applicants were constrained to reconsider the relief claimed in the notice of motion.

47. At the hearing they applied for the relief set out in a draft order which reads as follows:

*“1. Paragraph 2 of the Notice of Motion is amended by the deletion of the word “alternative” and the substitution thereof of the words “In addition”.*

*2. The First to Seventh and Tenth Respondents are interdicted, pendente lite, from competing unlawfully with the Applicants by utilising the Applicants’ confidential information.*

*3. The Third, Fifth, Sixth and Seventh Respondents are interdicted and restrained from:*

*3.1 divulging or communicating any of the Second Applicant’s confidential information which they may have received or obtained in relation to the Second Applicant’s business to any third party,*

*3.2 soliciting or enticing any of the Second Applicant’s employees or persuading them to leave the Second Applicant’s employ for a period of 3*

*(three) years from 31 September 2019, 30 September 2019, 13 January 2020 and 13 March 2020, respectively,*

*3.3 enticing or attempting to entice any of the Second Applicant's customers for a period of 3 (three) years from 31 September 2019, 30 September 2019, 13 January 2020 and 13 March 2020 respectively.*

*4. The questions whether the First to Seventh and Tenth Respondents have competed unlawfully with the Applicants by making use of the Applicants' confidential information and/or misappropriating its distributorship agreement with Pneumatics SPA – Italy and/or transacting with the Applicants at excessively reduced rates are referred to oral evidence in accordance with the provisions of Uniform Rule 6(5)(g).*

*5. The question whether the Eighth and Ninth Respondents, knowingly and in collaboration with the Fourth Respondent, bought goods from the Applicants at excessively reduced prices is referred to oral evidence in accordance with the provisions of Uniform Rule 6(5)(g)."*

48. The consequence of the amendment is that:

48.1. the final relief based on an employment contract between the second applicant and the third, fifth, sixth and seventh respondents is claimed in addition to that based on delict, which is claimed against all the respondents; and

48.2. interim relief is claimed against the first to seventh respondents (i.e., the former employees) and the tenth respondent interdicting them from competing unlawfully with the applicants by utilising the applicants' confidential information (this is the claim based in delict) pending the hearing of oral evidence on the issues identified in paragraphs 4 and 5 of the draft order.

49. No interim relief is claimed against the eighth and ninth respondents.

50. Not surprisingly, the respondents object to the amendment. I was not addressed on the issue, but the amendment does raise in my mind the principle that where separate claims arise from common facts, the litigant must choose which of the available options it wishes to pursue.<sup>17</sup> This question arose in the famous case of Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd where the plaintiff sought to enforce a contractual as well as a delictual claim.

51. The relief the applicants claimed in the notice of motion was not objectionable because it was being claimed in the alternative. However, the amended relief seeks to enforce a contractual, as well as a delictual, claim. In view of the order which I intend making, it is not necessary for me to decide the informal <sup>18</sup> application for the amended relief. I therefore determine this application as if the relief in prayer 2 of the notice of motion was claimed in addition to that in prayer 1. Because I was not addressed on the issue, assuming in favour of the second applicant that a contractual claim as well as a delictual claim arising from common facts can be enforced and that therefore the second applicant does not have to elect whether to pursue the contractual claim against the former employees or the delictual claim, the issues in my view that fall to be resolved are set out below.

## **The issues**

52. A finding against an applicant on the trite issue whether *locus standi* is established, is dispositive of any application.

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<sup>17</sup> Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Another 2019 (4) SA 406 (CC) para 38; Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A).

<sup>18</sup> The applicants ought to have invoked the procedure in rule 28 of the Uniform Rules of Court. In the event of an objection to the amendment to the notice of motion, a formal application should have been made for the amendment. It is inappropriate for an amendment to be moved for in an informal manner; a court has a discretion whether to grant an amendment and in the absence of a proper application, in the event of opposition to the amendment, the application has to be determined in a vacuum. This is highly undesirable.

53. The issues which arise are:

53.1. The first and third applicants' *locus standi*;

53.2. Has a case for interdictory relief for unlawful competition, whether founded in contract, or delict, been made out? Two of the questions arising in this regard is whether the benefits of the springboard provided to the first and second respondents by the applicants' alleged confidential information has evaporated by the passage of time and whether any interdictory relief avails the applicants for the fourth respondent's failure to renew the agreement with Pneumax-SPA. Another issue is whether the requirement of a reasonable apprehension of harm if a final interdict is not granted, has been met. The latter raises the question whether a case for continuing or repeated harm has been established by the applicants.

53.3. Whether the disputes of fact should be referred for the hearing of oral evidence even though a case for unlawful competition based in delict has not been established by the applicants in the affidavits.

54. In order to determine whether the disputes of fact relating to the relief claimed against the eighth and ninth respondents should be referred for the hearing of oral evidence, I have to determine whether the applicants have made out a case for an interdict against these respondents. Therefore, even though the applicants do not claim interim relief against the eighth and ninth respondents at this point, I must consider in relation to them the following additional issues:

54.1. Does the first and/or second and eighth respondents' purchase of heavily discounted products from the applicants give rise to a cause of action against it for unlawful competition. The parties' intention or collaboration with the fourth respondent has become irrelevant because the agreements with these respondents has been cancelled by the deponent to the founding affidavit and



in any event the person who granted the discounts, namely the fourth respondent having left the applicants' employ is no longer able to do so;

54.2. Whether the applicants have established that the ninth respondent is using the applicants' confidential information to solicit the second and third applicants' customers for the benefit of the first and second respondents.

55. The requirements for an interdict are trite and it is therefore not necessary to repeat them. The applicants must meet all the requirements for an interim interdict and a final interdict, depending on the relief they seek.

### **The first and third applicants' locus standi**

56. The applicants' entire case against the former employees rests on the existence of an employment relationship.

57. The former employees' employment was governed by a written employment contract entered into between them and Seapoint or Torre, which contracts were transferred to the second applicant in terms of section 197 of the Labour Relations Act. The first and third applicants do not assert that they have entered into a written, or for that matter, any contract of employment with the former employees and the tenth respondent. They attempt to overcome this hurdle by claiming that the applicants operated as a group and that their affairs are "*intrinsically intertwined and interrelated*." The fact that they have invested time, labour and money and have acquired and developed information is irrelevant. In my view it is also irrelevant that the former employees may have been working, and performing functions, for each of the applicants. In order to catch the third applicant into the net of an employment relationship, it is alleged that the third applicant processes and paid the former employees' salaries. The payment of a salary alone, is not an indication of an employment relationship. The applicants are silent on which of the applicants exercised control over the employees; and/or their time. This is an essential element of an employment relationship. In the absence of the first and second applicants having

demonstrated an employment relationship with the former employees, I am not persuaded that these two applicants have *locus standi*.

58. The averment that the former employees were *de facto* employees of all the applicants in my view is of no consequence; the applicants rely on an employment contract, and they bear the onus of proving the contract and its terms. The first and third applicants have not done so.

59. As far as the relief claimed in prayer 1 of the notice of motion is concerned (the case for unlawful competition based in delict), each of the applicants has to demonstrate that a wrong has been committed by the respondents vis-à-vis each of them. The second applicant purchased the business from Torre as a going concern and it is this business that is operating. Therefore, the proprietary interest in the alleged confidential information and trade secrets rests with the second applicant. The misappropriation of confidential information or trade secrets is actionable at the instance of the second applicant, not the applicants. The founding papers in my view do not contain sufficient facts from which it can be inferred or concluded that the first and third applicants have a protectable interest and in any event, they do not make out a case which of the respondents specifically have threatened that interest.

60. I am not satisfied that the first and third applicants are entitled to any relief and their claims against the respondents therefore fall to be dismissed. In view of this finding I will assume that the applicant seeking the relief is the second applicant and will refer to only it, unless there is a need to refer to the other applicants alone or collectively with the second applicant.

#### **Has a case been made out for any relief?**

61. The second applicant seeks final relief against the third, fifth, sixth, and seventh respondents on the basis of the alleged breach of clause 14 of their respective employment contracts. In this regard it seeks to interdict the former employees from

utilising confidential information and soliciting employees and customers of the second applicant.

62. It seeks interim relief against the first to seventh and the tenth respondents pending the finalisation of the hearing of oral evidence on factual disputes relating to the claim for unlawful competition based in delict<sup>19</sup> against these respondents and the eighth and ninth respondents. The wrongful conduct upon which the delictual claim is based is the use by the respondents of the second applicant's confidential information, intellectual property and trade secrets as a springboard for the first and second respondent's business and the "*misappropriation*" of the distributorship agreement with Pneumax-SPA. It also seeks to protect its trade secrets and intellectual property, however the founding papers do not contain sufficient facts from which these trade secrets or intellectual property can be identified, and their misuse inferred. The second applicant has therefore not made out a case for the protection of trade secrets or intellectual property.

63. At the heart of the relief based in contract as well as that based in delict is the question whether the second applicant is entitled to protect its confidential information by way of interdictory relief. If the second applicant is not entitled to protection of the confidential information, be it on the second applicant's contractual claim or its delictual claim, then the only other issue will be whether the second applicant is entitled to interdict the solicitation of its employees and customers.

64. The confidential information which the second applicant seeks to protect is supplier and customer lists, product listing and categorisation, pricing schedules, price lists, discount structures, costings, and profit margins, some of which appear to me to be stored on an electronic database called the Customer Relationship Management System ("CRM System") and the Enterprise Resource System ("ERM System"). It is assumed in favour of the applicants that the information that the second applicant seeks

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<sup>19</sup> i.e., prayer 1 of the notice of motion.

to protect is confidential, that the second applicant has a protectable interest, that the confidential information which the second applicant seeks to protect is information which provides a springboard to a competitor and that the confidential information has been misused.

65. The object of the law in affording protection for confidential information is to protect the information being misused as a springboard in the case of trade rivals. An interdict against the misuse of confidential information is to provide to the person with the protectable interest fair protection for the period for which the unfair advantage may reasonably be expected to continue. The rationale for the protection was discussed by Broome J in Multi Tube Systems (Pty) Ltd v Ponting and Others:<sup>20</sup>

*“The applicant’s complaint is that the respondents are abusing information which the first respondent obtained in confidence and it is this abuse of confidentiality which has given the respondent an unfair and improper headstart in their competition with the applicant. In the case of Terrapin Ltd v Builders’ Supply Co (Hayes) Ltd 1960 RPC 128 ROXBURGH J said in a passage quoted with approval in the Harvey Tiling and Atlas cases:*

*‘As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public. Therefore, the possessor of the confidential information still has a long start over any member of the public.’*

*As observed by Turner in The Law of Trade Secrets (1962), what has to be prevented is the recipient of the confidential information enjoying an advantage*

*over the general public, and it is this initial impetus that constitutes the advantage and that he will be deprived of by way of interdict.*

*On the facts of this case, I take the view that the benefit of the springboard or headstart conferred by the confidential information has probably abated, if not completely disappeared...*

*...*

*Following the South African cases which I have quoted above, I take the view that the unfair advantage of the headstart or springboard is usually of limited duration and that there must come a time when the matters in question are no longer secret and that an interdict would not then be warranted.*

*I agree, with respect, with the remarks of DENNING MR in the case of Potters-Ballotini Ltd v Weston-Baker and Others 1977 RPC 202:*

*'... there is the problem, which has been discussed, and much discussed of late, of what is called the 'springboard' doctrine, whereby it is said that a servant of any other person who has got confidential information ought not to save himself the time of working it out for himself or getting it from some other people without paying for it.*

*... Although a man must not use such information as a springboard to get a start over others, nevertheless that springboard does not last for ever. If he does use it, a time may come when so much has happened that he can no longer be restrained.'*

*I am unable to decide on these papers whether that time has definitely arrived. It seems from what I have said that it probably has. That being so, interdict would not be an appropriate remedy at this stage.*

*Having regard then to the springboard or headstart principle, I would be disinclined to issue an interdict at this late stage."*

66. The court in Knox D'Arcy Ltd and Others v Jamieson and Others<sup>21</sup> recognised that the effectiveness of information which provides a springboard "*diminishes with the passage of time, and ultimately evaporates entirely*". If the effectiveness of the

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<sup>21</sup> 1992 (3) SA 520 (W) at 528I.

confidential information which the second applicant seeks to protect has diminished or has evaporated, then an interdict, interim or final, is not the appropriate remedy.<sup>22</sup>

67. On the second applicant's own version its "*product and price-lists contain a full and current catalogue of all the applicants' product offerings and prices.*" The former employees had left the second applicant's employ by the end of March 2020. The product and price lists that the former employees may have, is no longer a "*current*" catalogue of products and prices. Additionally, the information on the CRM and ERM Systems on the second applicant's own version is updated continuously. Any confidential information that the former employees had access to, and may still have in their possession, has lost its usefulness to competitors because it has become outdated by the passage of time. Outdated information in the hands of a competitor is not useful to the competitor and therefore cannot cause injury. In the circumstances interdictory relief is not appropriate.

68. There is a further reason the second applicant is not entitled to interdictory relief, final or interim. Interdictory relief is not aimed at addressing past wrongs<sup>23</sup>; but to prevent future harm reasonably apprehended. Even if for the sake of argument I were to accept that the second applicant has established an actual injury committed in the past, which I am prepared to do, this does not entitle it to an interdict. The fact that the former employees in breach of their contractual obligations divulged confidential information, or any or all of the respondents misused the second applicant's confidential information giving rise to a claim in delict, is not proof that they will do so in the future; it is merely evidence from which to imply an intention to continue doing so. In Stauffer Chemicals Chemical Products Division of Chesebrough-Ponds (Pty) Ltd v Monsanto Company<sup>24</sup> in the context of the infringement of a patent, Harms J (as he then was) stated the following:

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<sup>22</sup> Cf. Multi Tube Systems (Pty) Ltd v Ponting and Others.

<sup>23</sup> Philip Morris Inc at 735B.

<sup>24</sup> 1988 (1) SA 805 (T) at 809F-G.

*“As far as interdicts are concerned, the ordinary rules relating to interdicts apply. Terrell on The Law of Patents 13th ed at 41 correctly points out that the basis of an interdict is the threat, actual or implied, on the part of a defendant that he is about to do an act which is in violation of the plaintiff's right and that actual infringement is merely evidence upon which the Court implies an intention to continue in the same course. I would have thought it axiomatic that an interdict is not a remedy for past invasions of rights.”*

69. The founding papers in my view do not contain sufficient facts from which I can conclude an intention on the part of any of the respondents to repeat or continue to misuse the second applicant's confidential information. The second applicant is accordingly not entitled to an interdict to protect what it claims is confidential information.

70. I turn to the final interdict restraining the former employees from soliciting employees and customers of the second applicant in breach of the terms of their employment contracts.

71. The second applicant identifies three individuals<sup>25</sup> who were approached to take up employment with the first and second respondents. However, on the second applicant's version the approach was made by the fourth respondent and the fifth respondent; not the third, sixth or seventh respondents. In the absence of the second applicant having proven the breach, the second applicant is not entitled to an interdict against these respondents.

72. The former employees who allegedly enticed or solicited customers (or attempted to do so), apart from the fourth respondent, are the fifth, sixth and seventh respondents. The second applicant has not demonstrated that the third respondent has breached the contractual obligation not to entice or attempt to entice any of the second

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<sup>25</sup> Johan Mathee, the acting general manager; Rowland Dixon, employed in internal sales; and Leigh Ann Rogers, the procurement manager.

applicant's customers. Accordingly, the relief in this regard against the third respondent must fail.

73. Regarding the alleged attempted solicitation of employees by the fifth respondent, and the alleged solicitation of customers by the fifth, sixth and seventh respondent in breach of their respective contracts of employment, I have assumed in favour of the second applicant that the fifth, sixth and seventh respondents have breached the terms of their employment contracts. However, this alone is not sufficient for interdictory relief. The second applicant must show a reasonable apprehension of injury. The second applicant cannot overcome the hurdle of establishing a reasonable apprehension of harm if it is unable to show a continuing breach or a reasonable apprehension of the respondents repeating the breaches. I consider hereunder the applicants' averments regarding the breach of the former employees' contracts of employment.

73.1. It is not clear precisely when the fifth respondent approached an employee of the second applicant with a job offer. It may have been in January 2020 when he told the employee that the "*business was going under*".

73.2. the fifth respondent attempted to solicit a customer on 2 December 2019,

73.3. the breach, if any by the sixth respondent, occurred in February 2020,

73.4. the seventh respondent is alleged to have breached her obligation not to solicit customers with reference to invoices sent by her to a customer of the second applicant on 1 June 2020, 4 June 2020, 22 June 2020, 7 July 2020 and 1 October 2020.



74. These past breaches are “*merely evidence upon which the Court implies an intention to continue in the same course*”<sup>26</sup>. Again, the founding papers in my view do not contain sufficient facts from which I can conclude an intention on the part of the fifth, sixth and seventh respondents to repeat or continue to breach the undertakings in their contracts of employment. An interdict in these circumstances will have no practical effect. There is also not a sufficient basis for concluding a well-founded and reasonable apprehension of injury if an interdict is not granted.

75. In my view, the second applicant has not established continuing wrongful conduct nor that it reasonably apprehends future breaches. I am therefore not able to find in the circumstances that there exists a reasonable apprehension of injury.

76. A complaint against the eighth respondent, apart from the misuse of confidential information and the suggested misappropriation of the Pneumax-SPA distributorship agreement, is that it purchased goods from the second applicant at excessively discounted prices. This complaint is levelled against the first and second respondents as well. However, the second applicant does not disclose its discounting structure nor provide any information from which it can be determined that the discount was excessive. I would have expected the second applicant at the very least to have revealed the percentage by which the discount exceeded the norm. I find that no case for excessive discounts has been made out.

77. I have found no facts to support a case that either the eighth or ninth respondents are using the applicants’ confidential information, nor have I found facts which demonstrate that either of them have solicited the second applicant’s customers whether for the benefit of the first and second respondents or not.

78. Apart from this, the purchase of products from a supplier at excessively discounted prices does not give rise to a cause of action for unlawful competition. If a

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<sup>26</sup> Stauffer Chemicals Chemical Products Division of Chesebrough-Ponds (Pty) Ltd v Monsanto Company

purchaser succeeds in negotiating a purchase at a discount, the discount may reduce the seller's profit or even cause it to suffer a loss. However, the conduct which brings about the loss (or causes prejudice), is not wrongful. I accept that buying goods at a substantial discount is an opportunity to undercut a supplier's prices. However, the creation of the opportunity to undercut a supplier is not wrongful, nor is the sale of products at prices lower than those of the supplier wrongful. Moreover, the conduct which causes injury to the supplier is the sale at a discount; not the purchase at a discount. In my view, the loss which a supplier suffers in these circumstances is not actionable against the purchaser.

79. If the discounts negotiated with the fourth respondent ought not to have been granted, then the remedy lies against the fourth respondent for damages. Furthermore the first and second, and eighth respondents' accounts have been closed by the deponent to the founding affidavit. The conduct sought to be interdicted therefore cannot be repeated. On this basis alone no case is made out for interdictory relief against the eighth respondent. For the same reason, the second applicant has no case against the first and second respondent for purchasing goods from the second applicant at excessively reduced prices due to terms approved by the fourth respondent; the second applicant has also closed the first and/or second respondent's account. Insofar as the allegations of collaboration or fraud on the part of the eighth and/or ninth respondents and the fourth respondent are concerned, the facts in the affidavits are insufficient to lead to such conclusion.

80. The fourth respondent's failure to renew the distributorship agreement with Pneumax-SPA, according to the second applicant wrongfully, is a core complaint in this case.

81. However, the Pneumax-SPA distributorship agreement issue is fraught with problems partly caused by the manner in which it has been dealt with in the papers by the second applicant. The papers are completely wanting in specificity about the distributorship agreement. A copy of the agreement is not attached. It is wholly

unhelpful to describe an agreement as a “distributorship agreement” without referring to the terms thereof.

82. The information that is supplied about the agreement is confusing. The second applicant describes its agreement with Pneumax-SPA at places in the affidavit as an “exclusive” distributorship agreement and at others as a “*distributorship agreement*”. It avers that Pneumax-SPA awards “*distributorship agreements with a duration of twelve months at a time*”. The confusion for me is compounded by the description in paragraph 22.3 of the applicants’ counsels’ heads of argument (quoted in paragraph 41 above) of the distributorship agreement as “*de facto an exclusive arrangement*”. I do not know from the papers whether the now lapsed “*de facto exclusive arrangement*” or the exclusive distributorship agreement or a distributorship (exclusive or non-exclusive) is the basis for the order sought in paragraph 1.4 of the notice of motion.

83. One of the issues<sup>27</sup> which the second applicant wishes to interrogate in oral evidence, is whether the first to seventh and tenth respondents have competed unlawfully by misappropriating the distributorship agreement with Pneumatics SPA – Italy. I do not know what the second applicant means when it says that the distributorship agreement has been “misappropriated”. Contracts are consensual, they cannot be stolen. It puzzles me how the second applicant comes to seek an order prohibiting the eighth and ninth respondents, let alone the other respondents, from contacting or communicating with any supplier with whom the second applicant had or has distributorship agreements, which would include Pneumax-SPA, especially when no facts are averred to support such relief. It is a quantum leap to seek to interdict the eighth and ninth respondent for something done by an employee or employees of the second applicant and/or the first and second respondents.

84. The second respondent may have a claim for damages against the fourth respondent but nothing more. The second applicant is not entitled to any interdictory relief regarding the distributorship agreement.

85. I have found no facts to support a case that the eighth and ninth respondents are using the second applicant's confidential information, nor have I found facts which demonstrate that the eighth respondent and/or the ninth respondent have solicited customers, or employees, whether for the benefit of the first and second respondents or not.

86. Apart from the question as to costs, the last issue I must deal with is the second applicant's application for the referral of factual disputes for the hearing of oral evidence. The respondents oppose the application for the referral of the disputes for the hearing of oral evidence.

87. Oral evidence is not an opportunity to an applicant to supplement a defective case nor is it an opportunity to embark on a fishing expedition. If this is the litigant's aim, it constitutes an abuse of the court process and must not be ordered.

88. In my view the second applicant is on a fishing expedition for facts to support its theory of collusion and the misappropriation of confidential information and the Pneumax-SPA agreement. The following statement in the applicants' counsels' heads of argument leads me to this conclusion:

*"23.1 [The eighth respondent] denies any knowledge or collusion with the [fourth respondent, but what is not explained or addressed at all by [the eighth respondent] or its director [the ninth respondent], is why they never queried [the] significantly reduced prices that there were being offered. To their knowledge, there had been a significant reduction in prices which they happily accepted without demour [sic]. As against this background, their denial of any wrongdoing cannot simply be accepted at face value and further interrogation by means of cross examination is warranted."*

89. There is also another reason for refusing to refer the disputes for the hearing of oral evidence. If there is no case for the other party to meet, there is no point in referring a dispute of fact for the hearing of oral evidence.

90. It is trite that affidavits in motion proceedings must contain sufficient factual averments to support the cause of action on which the relief claimed is based. Therefore, where an applicant seeks a referral of disputed facts for the hearing of oral evidence, its founding papers must contain sufficient facts to sustain a cause of action. Conclusions are not facts. At the risk of stating the obvious, sufficient facts must be averred from which the conclusion of law (or fact) necessary to sustain a cause of action can be drawn. I am not satisfied that the second applicant has done so or that a cause of action avails it in law.

91. Prayer 1.1 of the notice of motion seeks to prevent, in perpetuity, all the respondents from conducting any business activity in competition with the second applicant. If granted, the respondents will be prohibited from doing what the law not only permits but encourages, namely lawful competition. The second applicant has not established a right to interdict competition by the respondents.

92. None of the employment contracts restrain the former employees from trading in competition or being employed by a competitor of the second applicant.

93. As far as the eighth respondent is concerned, the second applicant concedes in the founding affidavit that the eighth respondent's business differs from the second applicant's and that the eighth respondent does not deal directly with the same products. It however uses components sold by the second applicant in its dust and emission control systems business. In view of the concessions and having failed to prove that the eighth respondent's business is similar to the second applicant's business and also having failed to prove that the eighth respondent is a competitor there is no case made out against the eighth respondent. Nor has the second applicant shown that the ninth respondent is a competitor and has been unlawfully competing with the second applicant

94. In prayer 1.2 of the notice of motion the second applicant seeks to permanently interdict the respondents from using any intellectual property, trade secrets, know-how and/or technical information of the second applicant. The second applicant describes, but does not identify, what it seeks to protect. I therefore cannot decide whether the second applicant has a protectable interest and whether it warrants the protection of an interdict.

95. I have already discussed why the second applicant is not entitled to protection of confidential information. It has therefore not made a case for the relief claimed in prayers 1.2 and 1.3 of the notice of motion.

96. Nor has the second applicant made out a case for the relief claimed in paragraph 1.4 of the notice of motion. The second applicant seeks a final interdict restraining the respondents from “*approaching, contacting or communicating with*” any of the second applicant’s suppliers with whom distributorship agreements had been concluded on or after 1 January 2018. The second applicant seeks to prohibit all the respondents in perpetuity from approaching or communicating with suppliers with whom the second applicant had or has distributor agreements. The second applicant has not identified whence the right to permanently restrict the respondent emanates.

97. The effect of the interdict sought will be that the respondents will never be free to trade with any supplier with whom the second applicant had or has a distributorship agreement. But it may go wider than that: The second applicant took over sixty-four (64) contracts which Torre had with suppliers. Of these, three are described in the papers as exclusive distributorship agreements, but the papers are silent whether the remaining sixty-one (61) are non-exclusive distributorship agreements or simply supplier agreements.

98. The relief claimed in prayer 1.5 is to restrict all the respondents in perpetuity from approaching, contacting, or communicating with any of the second applicant’s present or past customers. The effect is that none of the respondents will ever be able to trade with the second applicant’s customers, not even those who independently decided to

terminate their trading relationship with the second applicant. The second applicant has not established a right which entitles it to restrict the respondents in this way. In any event any general, wide or indefinite prohibition in trading will fall foul of the Constitution of the Republic of South Africa, 1996.

99. The second applicant has also not established a right to prohibit the respondents in perpetuity from approaching, contacting, communicating or attempting to solicit or entice the second applicant's employees to leave its employ.

100. The submissions in paragraphs 22.3.(quoted in paragraph 41 above) and 23.1 (quoted in paragraph 88 above) of the applicants' counsels' heads of argument suggest that the second applicant wishes to use the opportunity to lead oral evidence to supplement its evidence in an effort to cure its failure to make out a case in its affidavits.

101. Rule 6(5)(g) is not a mechanism "*to enable an applicant to amplify affidavits by additional evidence where the affidavits themselves, even if accepted, do not make out a clear case, but leave the case ambiguous, uncertain, or fail to make out a cause of action at all....*".<sup>28</sup> The second applicant cannot present through oral evidence facts that should have been presented in affidavits

102. For the reasons above, I find that the second applicant has not made out a case for the final interdict sought in prayer 1 of the notice of motion and a referral of disputes of fact for the hearing of oral evidence will accordingly be pointless.

103. It follows thus that the application falls to be dismissed. As far as costs are concerned there is no reason why they should not follow the event.

## **Order**

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<sup>28</sup> Hymie Tucker Finance CO (Pty) Ltd v Alloyex Ltd 1981(4) SA 175 (N) at 179 and the authorities referred to therein; see also Reymond v Abdulnabi and Others 1985 (3) SA 348 (W)

In the result the following order is made:

The application is dismissed with costs.

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**S K HASSIM AJ**

Acting Judge: Gauteng Local Division, Johannesburg

(electronic signature appended)

17 January 2022

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 January 2022

Date of Hearing: 7 June 2021

Date of Judgment: 17 January 2022

Appearances:

For the applicants: Adv C Whitcutt SC

Adv C de Witt

For the respondents: Adv W Strobl