IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION. PRETORIA)

CASE NO: 73245/2014

DATE: 17 November 2014

Not reportable

Not of interest to other judges

In the matter between

A M V[...]	First Applicants
S[...] CC	Second Applicant
and	
J M V[...]	First Respondent
H[...]	Second Respondent
A M E W[...]	Third Respondent
A W[...] …...	Fourth Respondent

JUDGMENT

JW LOUW J, The first applicant and the first respondent are involved in a pending acrimonious divorce action. They accuse each other of adulterous relationships.

The first applicant is the sole member of the second applicant, S[...] CC (hereinafter referred to as S[...] or the second applicant) which carries on business in Middelburg in the telecommunications industry, which is

described as the installation, servicing and providing of communication equipment and systems and the providing of voice over internet protocol (VOIP).

The first respondent was the sole member of Mpumalanga Rentals CC, which also carried on business in Middelburg in the telecommunications industry. The first applicant alleges that the two close corporations functioned as a universal partnership. This is denied by the first respondent. The first applicant left the common home on 5 February 2014 and the first respondent thereafter liquidated Mpumalanga Rentals CC on 28 February 2014.

The first applicant states that the first respondent on numerous occasions, *inter alia* through social media, threatened that he would financially ruin her. This is not denied by the first respondent. He states in his answering affidavit that her allegations in this regard are irrelevant. That it is his intention to destroy the first applicant financially is very clear from the WhatsApp messages which he sent to the first applicant which are attached to the founding affidavit and which are in the crudest of terms.

The first respondent left Middelburg during March or April 2014 and moved to Pretoria where he gained employment at a company called About IT DTS (Pty) Ltd. The first respondent states that the salary which he received was insufficient for his needs and that he spent evenings and weekends trawling the Yellow Pages and the internet compiling a list of businesses and their contact details. He was able to identify approximately one thousand businesses operating in the Mpumalanga area.

In August 2014 he decided to move back to Middelburg, which he did on 4 September 2014. On the same date he caused the second respondent, H[...] T[...] (Pty) Ltd (hereinafter referred to as H[...] or the second respondent), to be registered. The first respondent and one Altus André Nel were appointed as directors. H[...] opened its doors on 15 September 2014 and immediately embarked on an aggressive advertising and marketing campaign which predominantly consisted of bulk e-mail advertising. The first respondent states that this form of advertising was decided upon mainly because of the second respondent's limited financial resources. It is common cause that H[...] is presently competing with S[...] in the telecommunications business. On 11 September 2014 the first respondent and Nel resigned as directors and the fourth respondent was appointed in their stead.

It is admitted by the first respondent in his answering affidavit that he, acting on behalf of H[...], approached employees of S[...] and offered them employment at a better remuneration than what they were earning with S[...]. One of those employees was the third respondent who worked closely with the first applicant in conducting S[...]'s business. The first applicant describes the third respondent as her right hand and *confidante* in regard to S[...]'s confidential information, more specifically the information of who S[...]'s clients were. She liaised with the clients and dealt with their contracts and their technical support. On 12

September 2014, the third respondent resigned from S[...] with immediate effect and took up employment with H[...]. When she resigned she signed an undertaking which reads as follows,

> *"1. Hiermee dien ek A[...] M[...] E[...] W[...] (ID [...]) my bedanking in met onmideflike effek op 12 September 2014.*
>
> *2. Ek onderneem om geen iniigting van weike aard met betrekking tot S[...] CC en of A[...] V[...] te openbaar aan enige derde party nie. Voormelde sal insluit onder andere maar nie beperk daartoe nie die volgende :*
>
> *2.1 Kliënte besonderhede*.
>
> *2.2 Besonderhede van S[...] CC wat insluit*
>
> *- Tegnies*
>
> *- Admin*
>
> *- Finansieel*
>
> *-Personeel besonderhede*
>
> *- Persoonlike omstandighede.*
>
> *3. Ek onderneem verder om geen verdere kontak te maak met enige kliënte van S[...] CC en of toekomstige kiiënte van S[...] CC nie.*
>
> *4. Ek onderneem ook om in geen handeling betrokke te raak waarin ek op enige gebied in kompetisie staan of meeding met S[...] CC se bedrywighede nie. ”*

The first applicant alleges that the third respondent is the only person who had access to S[...]’s list of clients and that the third respondent now misuses that information to the advantage of the first respondent and H[...]. This is denied by the first and third respondents.

Another employee who was offered employment by the first respondent is one R[...] S[...] who is employed by S[...] as a technician. He states the following in an affidavit:

> “*2.1 Op 11 September 2014 het ene M[...] V[...]* (the first respondent) *my geskakel en aan my meegedeel dat hy terug is in Middelburg.*

2.2 Op 12 September 2014 het ene A[...] W[...] (the third respondent) *bedank by S[...] CC. Dit is alombekend dat daar 'n handels beperking is wat geld op A[...] W[...] se indiensnemingskontrak en het sy ook 'n skrywe geteken wat 'n handelsbeperking bevat waarin sy geen besonderhede van S[...] CC mag openbaar en of S[...] CC kliënte mag kontak nie. Dit het tot my kennis gekom dat A[...] W[...] vir M[...] V[...] begin werk het M[...] V[...] het toe aan my meegedeel dat hy vir A[...] W[...] sal maak om S[...] CC se kliënte te kontak en dat daardie handelsbeperking van geen en nul waarde is.*

2.3 Op 13 September 2014 het M[...] V[...] my weereens geskakel en aan my 'n werksaanbod gemaak (om) *by sy firma te kom werk. Volgens my kennis is M[...] V[...] se nuwe besigheid H[...] T[...] en/of H[...] T[...]. Hy het aan my meegedeel dat dit 'n divisie is van Mid-Alarms. M[...] V[...] het aan my meegedeel dat hy aan my 'n salaris kan betaal van R9,500,00 'n maand en sal hy ook aan my 'n Bakkie, Laptop en gereedskap verskaf. Op daardie stadium het ek dit oorweeg om na M[...] V[...] toe oor te gaan omrede die werksaanbod 'n goeie aanbod was.*

2.4 Op 13 September 2014 het M[...] V[...] my ook spesifiek gevra of ek die nodige sagteware het van S[...] 3000 en S[...] 1100. Hy het ook aan my gevra of ek die kabels het om in te log in die S[...] stelseis van S[...] se kliënte. M[...] V[...] het my toe gevra of ek kabels in my besit het van S[...] om in die S[...] stelsel in te log. Ek het aan hom meegedeel dat ek dit wel het, maar dat dit aan S[...] CC behoort. M[...] V[...] het toe vir my gesê dat ek vir A[...] V[...] (the first applicant), *die eienaar van S[...] CC moet sê dat die kabels weggeraak het en dat ek die kabels vir hom moet bring.*

M[...] V[...] het toe aan my meegedeel dat ek hom moet kom sien op Maandag 15 September 2014 na werk om met hom en A[...] van Mid-Alarms (the fourth respondent) *te praat oor die werksaanbod.*

2.5 Op 15 September 2014 het ek na werk vir A[...] en M[...] V[...] gaan sien by Mid-Alarms. Met my aankoms is ek gesien deur M[...] V[...] en A[...] W[...] en was *daar ook 'n vierde persoon betrokke, welke persoon ek nie ken nie.*

2.6 Tydens die gesprek het M[...] V[...] my weereens gevra of ek 'Backups' het van die S[...] sagteware. Hy het my ook weer gevra of ek kabels het om in te log op die S[...] sisteem soos vroeër vermeld. Ek het aan hom bevestigend geantwoord. M[...] V[...] het weer aan my gesê dat ek vir hom die kabels moet bring. Tydens hierdie versoek was A[...] W[...] ook in die vertrek.

2.7 Volgens my kennis is A[...] W[...] en M[...] V[...] die twee eienaars van die besigheid naamlik H[...] T[...] en/of H[...] T[...].

2.8 M[...] V[...] het ook aan my meegedeel dat M[...] V[...] reeds skrywes uitgestuur het na kliënte

van S[...] CC om die kontrakte oor te neem van S[...] CC. ”

The first respondent admits that he approached S[...] on behalf of the second respondent and that he offered him a remuneration package which S[...] found very competitive. He however denies that he asked S[...] to steal S[...]'s software and cables and states that the second respondent received the software free of charge from U[...] (previously S[...]) when it opened its doors and that the cables to which S[...] refers was a simple cable which could be bought from any computer store for R20. The first respondent does not, however, deny S[...]'s allegation that he told S[...] that he, the first respondent, would 'make' the third respondent contact S[...]'s client and that the restraint of trade which the third respondent signed was of no value.

The fourth respondent does not deny that he was present at the meeting of 15 September 2014 as alleged by S[...] in his affidavit and also does not deny that the first respondent again asked S[...] about the backups for the S[...] software and for the cables.

The first applicant further alleges in her founding affidavit that the first and third respondents are co-operating in targeting all S[...]'s existing clients and that they are inducing those clients to cancel their contracts with S[...]. She refers in this regard to copies of e-mails which were sent to certain of the clients by H[...] and to letters which were written by certain clients to S[...] in which they cancelled or purported to cancel their agreements with S[...]. Certain of the cancellation letters were forwarded to S[...] by H[...] on behalf of the clients.

The first and second applicants then brought the present urgent application in which they seek the following relief.

"*2. That the respondents jointly and severally be prohibited to contact any of the second respondent's existing clients in order to persuade these clients to transfer their existing service agreements with the second applicant and to replace it with service agreements with the second respondent.*

3. That the respondents jointly and severally be prohibited to approach existing employees of the second applicant in order to persuade these employees to resign from the second applicant's employ in order to take up new employment with the second respondent,

4. That the respondents jointly and severally be prohibited to utilize any information regarding the second applicant's clients and employees as welt as information pertaining to the second applicant's technical, administrative and financial operation in any manner to the detriment of the second applicant.

5. That specifically the first respondent in his personal capacity as well as in any representative

capacity be prohibited in any way (directly or indirectly) and in an unlawful manner whatsoever to obtain the second applicant's equipment and assets and/or other information regarding the second applicant's business activities.

6. That the third respondent be prohibited to disclose any information pertaining to the second applicant's existing clients as well as the second applicant's technical, financial and administrative operation to any of the other respondents as well as to any third parties.

7. That the third respondent be prohibited to compete with the second applicant either directly or indirectly in the business of installation, service and providing of communication systems and equipment and providing of voice over internet protocol (VOIP).

8. That the first to third respondents pay the costs of this application on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved.

9. That the fourth respondent pay the cost of this application jointly and severally, together with the first to third respondents, on a scale as between attorney and client, the one paying the other to be absolved in the event of the fourth respondent opposing this application. "

It was submitted by counsel on behalf of the respondents that by doing what they have done the respondents have not acted unlawfully and that the second respondent is simply advancing its own legitimate economic interests. In this regard it was submitted that the fourth respondent is the sole shareholder and director of the second respondent and that he is not a party to the dispute between the first applicant and the first respondent and has no motive to prejudice the applicants.

The argument was further that although it is accepted that some of the e-mails which were sent out reached the second applicant's clients, there was nothing in the e-mails which could be regarded as unlawful as they were a mere advertisement of the second respondent's business and of the services which it offers, which, if the second respondent was able to afford it, could as well have been flighted on television.

In regard to the allegation that S[...]'s clients were being induced to cancel their contracts with S[...], it was pointed out that there was no suggestion of this in the e-mails and that the opposite was true. The last part of the e-mails reads as follows,

"How to make use of this opportunity

Firstly it is known that most companies are bound by contracts or better put, agreements. As a limited offer, H[...] T[...] (Pty) Ltd will settle any agreement with 8 (eight) or less months remaining on their

agreements with their current service providers.

All cancellations will be handled by H[...] T[...] (Pty) Ltd on your behalf, through the necessary paper work, as per legislation.

Your numbers will NOT CHANGE.

This offer is only valid until 15 December 2014. "

The quoted text is clearly an inducement by the second respondent of clients of other telecommunication businesses to cancel their existing agreements 20 with their service providers. Those e-mails which reached S[...]'s clients were therefore an inducement for those clients to cancel their contracts with S[...]. Whether an inducement of this kind is lawful or unlawful will depend on the facts of the particular case.

The argument on behalf of the first respondent was that he is merely an employee of the second respondent and that he is therefore not competing with the second applicant. It is clear however that he is the driving force behind everything which has happened. He compiled the list of one thousand businesses which was later used to send out the e-mails. He caused the second respondent to be registered. It is clear that the purpose of its registration was for it to compete with S[...] with the object of destroying S[...]'s business. The first respondent was the person who made job offers on behalf of the second respondent to Siemtech's employees. Offers were made not only to the third respondent and Swart, but also to two other technicians employed by S[...]. In the case of the offer made to S[...], the fourth respondent was present at the meeting but the negotiations on behalf of the second respondent were conducted by the first respondent, not by the fourth respondent. The first respondent's name is the first name which appears in the e-mails as a contact person for the second respondent before the names of the third and fourth respondents. No explanation was given by either the first or the fourth respondent for the fourth respondent's appointment as a director of H[...] in the place of first respondent and Nel within a week of the first respondent and Nel's appointment as directors or for the first respondent's alleged acquisition of all the shares in H[...]. It is clear that the first respondent, despite the fact that the fourth respondent is alleged to be the sole director and shareholder of H[...], is able to use and is using H[...] as the vehicle with which to financially destroy the first and second respondents.

Generally speaking, competition between rival businesses is lawful. It will, however, be unlawful if the competition is found to be unreasonable or *contra bonos mores.* Malice or improper motive may be an indication of such unreasonable conduct. In *Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd* 1991 (2) SA 455 (W) the facts, which are conveniently summarised by Van Heerden and Neethling, *Unlawful Competition,* 2nd ed. at 136, were the following: A (applicant) and B (respondent) were rival

designers, manufacturers and suppliers of furniture. The flagship of A痴 furniture痴 range was the Fendi lounge suite which had a distinctive and unusual M shape. This shape had been copied with much skill, effort and labour from a photograph of a sofa which was manufactured in the USA but was not yet available in South Africa. There was a long history of hostility between A and B. During an acrimonious confrontation between the managing directors of the two rivals, B痴 director threatened 奏o *retaliate in every way*' against A. Shortly hereafter, B indeed placed the Pisa lounge suite, which was an almost identical reproduction of the Fendi suite, on the market at a much lower price. The result was that A allegedly suffered a vast reduction in sales of the Fendi suite.

Van Dykhorst J said the following at 475H to 476A of the judgment:

> *In my view a clear line should be drawn between acts of interference with the interests of another when the object is the advancement of a person's own interest and such acts whose sole or dominant purpose is the infliction of harm for its own sake. Whereas in law the advancement of one's own economic interests is, generally speaking, a legitimate motive for action, there can be no doubt that the community would condemn as contra bonos mores the malicious destruction or jeopardising of a sound business through the marketing of identical furniture at cut-throat prices for reasons of personal vindictiveness. I have no doubt that not only by the community in general but also in the field of the ethics and morality of the furniture manufacturers such conduct is not acceptable, though copying each other's products may be the order of the clay."*

Although in the present matter the conduct of the first respondent may be said to be advancing H[...]'s interests, the facts show that the dominant purpose of his conduct is the infliction of harm to the first and second applicants with a malicious motive. In my view, the community will condemn as *contra bonos mores* the destruction of S[...]'s business through the malicious conduct of the first respondent. I find therefore that the first respondent has, through the vehicle of H[...], unlawfully competed with S[...]. It is clear that the first respondent will continue with this unlawful conduct unless restrained by an interdict.

As far as the third respondent is concerned, she admits in her confirmatory affidavit that she was privy to S[...]'s confidential information, but denies that she ever disclosed such information to H[...] or anyone else and that she has any intention to do so. Apart from submitting that the probabilities are that the third respondent has disclosed the confidential information of the second applicant to the other respondents, the applicants have not produced any proof that she has done so.

The third respondent, however, admits that she signed the written undertaking which I quoted above. She states in this regard that when she resigned, the first applicant reacted furiously, that the first applicant then prepared and presented her with the written undertaking and told her to sign the document as it would protect

her (the third respondent). She further states that the first applicant refused to allow her the opportunity to discuss before she leaves the office. She then signed the document without realising what it was she was signing.

In my view there is no merit in this defence. She is an experienced office worker who deals with contracts on a daily basis. The wording of the document is in plain and simple language. She does not say that she did not read the document. The undertakings provided for in clauses 3 and 4 are clear and unambiguous. The maxim *caveat subscriptor* in any event applies. There was no duty on the first applicant to explain the plain language to her, as she alleges. The third respondent is therefore bound to the undertaking which she gave in clause 3 of the document not to make any contact with any of the clients of S[...] or with any future clients of S[...].

The third respondent does not deny that she has, since being employed by H[...], made contact with clients of S[...]. It is clear that she must have. Her name and contact details appear on the e-mails which were sent out as one of the persons who could be contacted in respect of the invitation in the e-mail to do business with H[...]. The third respondent is therefore in breach of the undertaking given in clause 3 of the document.

The third respondent alleges that even if the document which she signed is not unenforceable, the restraint provision contained in clause 4 thereof is unreasonable and therefore unenforceable *inter alia* for the following reasons,

> "*241.1 The third respondent's skills, expertise and know-how were obtained by the third respondent through her own effort and over a period of 16 years during which she was working with various employers in the field in which she acquired the said skills, expertise and know-how.*
>
> *241.2 These skills, experience and know-how are the only tools that the third respondent possesses to generate an income and on which she can rely in order to take part in economic activity.*
>
> *241.3 The restraint clause is unreasonable and unenforceable by virtue of it being too cumbersome. The duration is unlimited, the nature all-encompassing and the restricted activities cover the entirety of all the skills, knowledge and know-how that the third respondent possesses.*
>
> *241.4 Furthermore, the area in which the restraint ostensibly operates appears to be worldwide and seeks to place an absolute prohibition on the third respondent to earn a living at* (sic) *through the employment of her skills, knowledge and know-how which she had acquired over the past 16 years. "*

I agree with these submissions. I find therefore that the undertaking in clause 4 of the document is unenforceable in its present form.

I now proceed to deal with the fourth respondent. The relief sought by the applicants is against all four respondents. In her founding affidavit the first applicant states that she is unsure of the exact nature of the business relationship between the fourth respondent and the other respondents although she is aware that he is directly or indirectly involved with them. No cost order is sought against him unless he opposes the application. The fourth respondent does oppose the application. In the respondents' answering affidavit deposed to by the first respondent, which is confirmed by the fourth respondent in so far as it relates to him, it is stated that the applicants have not made any allegation against the fourth respondent which would entitle them to any relief against the fourth respondent and the applicants were invited to withdraw the application against the fourth respondent. This did not happen.

I agree that no case of unlawful competition has been made out against the fourth respondent. The application against him should therefore be dismissed.

In prayer 4 of the notice of motion the applicants seek an order not only to prohibit the respondents from utilizing any information regarding the second applicant's clients, but also information regarding the second applicant's employees as well as information pertaining to the second applicant's technical, administrative and financial operations. No case has however been made out that the respondents are utilizing the second applicant's information regarding its employees or pertaining to its technical, administrative or financial operations.

I refer lastly to prayer 5 of the applicants' notice of motion in which they seek and order against the first respondent in his personal capacity as well as any representative capacity that he be prohibited in any way, directly or indirectly, and in an unlawful manner whatsoever to obtain the second applicant's equipment and assets and/or other information regarding the second applicant's business activities.

This relief is obviously sought pursuant to the applicant's allegations that the first respondents asked S[...] to steal software and cables from the second applicant. I have dealt with the first respondent's denials in this regard which, in my view, cannot be rejected as false. The applicants also did not in their replying affidavit deal with the first respondent's evidence in this regard. It follows that the relief claimed in prayer 5 cannot be granted.

As far as costs are concerned, the applicants seek a cost order on the attorney and client scale. In my view such an order is justified in ail the circumstances.

It was correctly pointed out by counsel on behalf of the respondents that the first applicant had no *locus standi* to bring the application in her personal capacity. The unlawful competition complained of was with the second applicant, not with the first applicant. Nothing really turns on this as all the relief sought was only

in respect of the second applicant. There will therefore be no cost order in favour of the first applicant.

In the result, I make the following orders.

ORDER

1. That the first, second and third respondents are prohibited to contact any of the second applicant's existing clients in order to persuade these clients to transfer their existing service agreements with the second applicant and to replace it with service agreements with the second respondent.

2. That the first and second respondents are prohibited to approach existing employees of the second applicant in order to persuade these employees to resign from the second applicant's employ in order to take up new employment with the second applicant.

3. That the first and second respondents are prohibited to utilize any information regarding the second applicant's clients.

4. That the first, second and third respondents are ordered to pay the second applicant's costs of the application on the attorney and client scale.

5. That the application against the fourth respondent is dismissed with costs.