

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

29/01/2014.

CASE NO: 64989/2012

**DELETE WHICHEVER IS NOT
APPLICABLE**

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER
JUDGES: ~~YES~~/NO
(3) REVISED

DATE: 29 Jan 2014

SIGNATURE: Jansen

In the matter between:

I E TERLOUW

Applicant

and

J DE BEER

First Respondent

**LABORATORY INFRASTRUCTURE
SOLUTIONS CC**

Second
Respondent

JUDGMENT

JANSEN J

Nature of the application and counter-applications:

- [1] The relief prayed for in the main application is that the first respondent, in terms of section 36(1) of the Close Corporation Act 69 of 1984, be ordered to sell his 50% interest in the second respondent to the applicant for an amount of R456 159.99, with 15.5% interest from date of the court order. Further relief is claimed to the effect that the applicant be authorised to sign, on behalf of the first respondent, an amended founding statement as envisaged in section 15(1) of the Close Corporations Act 69 of 1984, reflecting the cessation of the first respondent's membership in the second respondent after the purchase price has been paid in full. In the alternative to the relief set out above, it is prayed that the respondent be wound up and that the first respondent be ordered to pay the costs of the application.
- [2] The second respondent is a close corporation in which the applicant and the second respondent each held a 50% share.
- [3] There are also counter-applications, one by the first respondent and another by the second respondent.

- [4] The first respondent's counter-application against the applicant was also based on the provisions of section 36(1) of the Close Corporation Act.
- [5] In his answering affidavit in the main application the first respondent indicated his willingness to purchase the applicant's 50% interest in the second respondent for an amount of R534 272.08, which he believed to be a fair and reasonable value for the applicant's interest. The valuation and methodology adopted by the second respondent's accountant in order to ascertain the applicant's 50% interest was accepted by the first respondent in his answering affidavit as accurate, with certain adjustments.
- [6] As a result of the foregoing, the applicant transferred an amount of R572 349.96 to herself and tendered to transfer her membership interest in the second respondent to the first respondent. She also immediately instructed her attorney to pay the amount of R38 077.28, being the difference between R572 349.36 and R534 272.08, to the first respondent.

[7] In essence, therefore, the main application has been settled, except as far as the question of costs is concerned. The second respondent's counsel sought costs for the main application which took the applicant's counsel by surprise as the main application had been settled and the applicant's counsel believed that the main application (and the first respondent's counter-application) had become moot.

[8] During March 2013, about three months after the answering affidavit had been filed in the main application, the second respondent, namely the close corporation, belatedly launched a counter-application against the applicant seeking repayment of the said amount of R572 349.92, alternatively an amount of R158 154.00. In addition, the second respondent sought to enforce a restraint of trade clause against the applicant. (When the counter-application was launched, the first respondent was the only member of the second respondent, as appears from what is set out below.)

- [9] No relief was sought against the close corporation in the main application which had only been joined as an interested party.
- [10] In the result, the only application which was heard by the court was the second respondent's counter-application.
- [11] About 15 minutes before the hearing, the applicant's counsel was informed that the second respondent was abandoning prayer 2 of its notice of motion. Nonetheless, the second respondent still claimed interest on the amounts claimed in its notice of motion.
- [12] Prayer 2 reads as follows: —

“The applicant is ordered to pay the Second Respondent an amount of R572 349.00 alternatively an amount of R158 154.00.”

(As set out below, these amounts were subsequently amended during argument for purposes of the interest still claimed on these amounts.)

Relevant Facts:

- [13] Some of the facts set out in the main application are also set out in what follows, as the second respondent, in the founding affidavit deposed to by the first respondent in the second respondent's counter-application, relied on tracts of the evidence in the first respondent's answering affidavit in the main application. To understand such tracts of evidence one has to have knowledge of the facts set out in the founding affidavit in the main application.
- [14] The applicant and the first respondent were both employed "by companies owned by Toga Laboratories". The main businesses of the companies were the provision of medical testing and training.
- [15] The applicant was the quality and operational manager of the second respondent, whereas the first respondent was mainly responsible for the extension and development of business opportunities and the implementation of HIV/AIDS laboratories in rural areas.

[16] Whilst still in the employ of the said companies, the applicant and the first respondent discussed the possibility of leaving their employment with a view to providing similar services. As a result, the second respondent was incorporated at the instance of the applicant during November 2008. The second respondent commenced doing business during March 2010.

[17] During April 2008 the first respondent left the companies' employ to join a non-governmental organisation in rural northern KwaZulu-Natal. When the first respondent left the company the applicant took over the first respondent's responsibility to implement the HIV/AIDS laboratories in the rural areas (which included site inspections, logistics, feasibility studies, financial planning, the administration of agreements, quality control and the overseeing of projects).

[18] On 25 September 2012, the first respondent announced his resignation at the NGO to join the second respondent on a full-time basis.

[19] During February 2009, the applicant similarly left the companies' employ and took up employment with a diagnostic company, but continued her active involvement with the second respondent.

The applicant's version in the main application:

[20] As stated, although somewhat inelegant, but necessitated due to the haphazard way in which the main application and the counter-applications have been phrased, the court deems it necessary to set out the applicant's and the first respondent's respective versions.

[21] The main application was served on the first respondent on 9 November 2012. The answering affidavit of the first respondent, with a counter-application was filed on 14 December 2012. The filing of a replying affidavit was unnecessary as the applicant and the first respondent settled the main application. A counter-application by the second respondent was belatedly filed on 20 March 2013, on a non-urgent basis.

[22] The significant delay before the second respondent's counter-application was launched is highlighted as the second respondent already commenced trading during 2010.

[23] During January 2010 the applicant identified a business opportunity of “...*providing medical infrastructure in the open market.*”¹ The applicant discussed this with the first respondent and suggested that they use the close corporation. It was agreed that the applicant would be involved in the day-to-day running of the close corporation, and that the first respondent would do the technical and marketing side of the business. It was also agreed that the first respondent would be gradually phased into the business, over a period of time as and when the second respondent could financially afford to do so due to the first respondent's commitments towards the NGO in KwaZulu-Natal.

[24] The business of the close corporation, so the applicant alleges, would consist of the provision of expert design and implementation services for the development of rapid medical infrastructure and service capacity. This service would be

¹ The affidavits in the main application and counter-applications are replete with vague sentences with little or no meaning, which makes for difficult reading.

offered through the design, supply and deployment of infrastructure, in particular laboratory and related facilities and training in Medical ISO standards. This would be achieved by, *inter alia*, converting disused shipping containers into medical service and research laboratories in conjunction with other specialist companies. All of these statements are clearly sweeping statements lacking particularity.

[25] On 1 July 2011 (the agreement erroneously states 1 July 2010) in Pretoria, the applicant and the first respondent, without any legal assistance, concluded a written association agreement. Although the parties signed an agreement referring to a company, they intended it to relate to a close corporation.

[26] The close corporation flourished and completed projects in Zambia, Haiti, Peru and Botswana and had a pending business deal in Senegal.

[27] From the outset the first respondent's involvement in the close corporation was limited to the technical and marketing side of

the business. From 2011 the first respondent assisted with marketing.

[28] During the latter part of 2011 the applicant and the first respondent agreed, at the first respondent's instance, that he would work one day per month for the close corporation for which he would receive a monthly remuneration equal to his monthly house rental. The first respondent's remuneration was paid as agreed, but despite this, the first respondent failed to honour his commitment and did not, to date, spend a day per week attending to the business of the close corporation.

[29] Due to various factors the first respondent was asked to work for the close corporation only one day per month and he could not even keep that commitment.

[30] Notwithstanding a meeting to address the applicant's frustrations, nothing was resolved.

[31] During August 2012 things came to a head and the first respondent stated that he wished to liquidate the second

respondent, which the applicant refused to do. The first respondent withdrew R211 000.00, an amount equal to his loan account from the second respondent, without authority from the applicant and without her knowledge.

[32] On 20 August 2012 the applicant's attorney offered to purchase the first respondent's 50% interest for R300 000.00. Her offer was rejected. The offer was increased to R456 159.99, supported by the valuation of the second respondent's accountant and the second respondent's management statements. The first respondent now professed to be the brainchild of the second respondent and that he wished to become involved in the business on a full-time basis. He also professed a desire to buy out the applicant.

[33] The applicant hence avers that her relationship with the first respondent has broken down irretrievably.

[34] The applicant also made it clear that she would be willing to waive the provisions of clause 7.3 of the association agreement of the second respondent, to which reference is made below.

The first respondent's version in the main application

[35] The first respondent alleges that in 2002 he designed the first version of the Togatainer, a self-contained HIV (Human Immunode Deficiency Virus) monitoring laboratory in a 12 metre shipping container. The use of shipping containers for the creation of rapid infrastructure, including pathology laboratories, was not unique. The first respondent alleges that what was unique was the use of a shipping container structure for molecular work. No further clarification of this statement is given in the first respondent's affidavit. The Togatainers were manufactured to standards that he had developed. What these standards were, are not disclosed.

[36] According to the first respondent, the applicant had only administrative, and no design or technical skills and could also not finalise contract proposals or formulate cost schedules. The first respondent also alleges that he and a certain Mr Barry Kosloff employed by the Centre for Infectious Diseases Research, Zambia, collaborated on designing, manufacturing and delivering Containerised Tuberculosis Laboratories.

[37] Allegedly his interest to become involved in the second respondent full-time was when the second respondent commenced showing a profit during July 2012. Prior to that, the first respondent alleges that the second respondent could not afford to employ him on a full-time basis and hence he retained his full-time employment with the KwaZulu-Natal NGO.

[38] According to the first respondent he trained the applicant in technical detail and design and the applicant, although she was given the title of managing partner, was only given the designation as a sop for Cerberus. All final decisions vested in the first respondent, according to his version. Apparently the applicant's real role was to monitor progress and report back to the first respondent. He was “developing the applicant's ability”.

[39] However, on the first respondent's version, he allowed the applicant “more freedom” from the beginning of 2012 onwards, and, at her instance, taught her more of “the technical aspects.” What the “technical aspects” were, is not explained. This, the

first respondent now believes, was not an attempt to acquire knowledge on the part of the applicant but to marginalise him.

[40] The first respondent then recounts the disintegration of his and the applicant's relationship, the details of which are not relevant save that the thrust thereof is that she allegedly made rash decisions without the first respondent's input. Because his input was ignored by the applicant he "withdrew a portion of (his) loan amount to escalate a meeting request". The money, he alleges, was invested in an interest-bearing account. Upon receiving advice from his attorney he repaid the money and apologised.

[41] The first respondent called for a meeting on 19 August 2012, to settle their differences. Acrimonious correspondence between the applicant and the first respondent ensued. The first respondent believed that the applicant was seeking to take control of the second respondent, because she cancelled the second respondent's participation at a conference in Malaysia on lung health.

[42] On inspection, the first respondent found, in the second respondent's archived e-mails, a reference to the existence of an entity called Biocontainment Infrastructure Services (Pty) Ltd. The first respondent ascertained that the applicant had reserved the said company name two days before he withdrew the money from the second respondent. The second respondent's promotional material was also replicated by the applicant for her new company.

[43] Both the applicant and the first respondent attended the conference in Malaysia where Air Filter Maintenance Services, promoted the applicant's new company and not the second respondent in its brochures. The applicant further distributed brochures for the second respondent which only referred to her as the contact person. Air Filter Maintenance Services then concluded an agreement with the applicant's new company. (Air Filter Maintenance Services is an entity which, as a contractor, provided the requisite air regulation within the second respondent's containerised laboratories.)

[44] As stated above, the first respondent not only filed an answering affidavit but also a counter-application. The prayers of the first respondent's counter-application were overtaken by the settlement of the membership and loan account issues relating to the second respondent.

[45] The second respondent's counter-application and founding affidavit were filed out of time and condonation for the late filing was sought and granted due to the fact that there was no opposition thereto. The first respondent deposed to the affidavit on behalf of the second respondent in support of the counter-application wherein the relief, sought at the hearing of the counter-application, in an amended format, reads as follows: —

“

- 1. The Application instituted by the Applicant is dismissed with costs.*
- 2. The Applicant is ordered to pay the costs of the First Respondent's counter application.*
- 3. The Applicant is ordered to make payment to the Second Respondent, of the following:*

3.1. R38, 077.28;

**3.2. Interest on the amount of R572, 349.00
at 15.5% per annum from calculated
from 12 December 2012 to date of this
order;**

**3.3. Interest on R38,077.28 at 15.5% per
annum from date of this order to date of
payment;**

**3.4. Costs of the Second Respondent's
counter application.**

**4. The Applicant is until 2 January 2014 interdicted
and prohibited from conducting within the Republic
of South Africa any business similar to or in
competition with the Second Respondent and in
particular:**

**4.1. any business that engages in the design
and/or manufacturing of Containerised TB
Laboratories and/or Containerised
Molecular Laboratories.**

**5. The Applicant is interdicted and prohibited from
divulging details of the Second Respondent's**

business affairs to any third party including details pertaining to the design, structure and composition of the Containerised TB Laboratories and/or Containerised Molecular Laboratories manufactured by the Second Respondent.”

[46] The reason for the late filing of the counter-application was because the applicant forwarded a letter to the first respondent (when the first respondent’s answering affidavit in the main application was almost ready for signature) notifying him of the following developments: —

- ... the sale to the First Respondent of the Applicant’s 50% shareholding in the Second Respondent;
- the fact that the Applicant concluded the transfer of her total equity, as stipulated in the valuation and management accounts done by the Second Respondent’s Auditor, Hugo Roodt, on 31 August 2012;
- a copy of an amended statement (CK2) duly signed by the Applicant together with proof of payment of an

amount of R572 349.36 from the Second Respondent's banking account into the Applicant's banking account.

[47] In a letter addressed to the applicant by the respondents' attorneys of record on 20 December 2012: —

- The second respondent accepted the applicant's resignation as a member and employee of the respondent. The first respondent, however, denied that the applicant's full obligations and responsibilities towards the second respondent had been met;
- The first respondent extended a counter offer for the purchase of the applicant's member's interest for an amount of R534 272.08;
- The first respondent demanded that the applicant immediately repay the amount of R572 349.36 into the second respondent's banking account;
- The first respondent demanded that the applicant returns all property belonging to the second

respondent with specific reference to a laptop, TV, files and folders, promotional, informational and confidential information and backup drives, as well as any other equipment owned by the second respondent;

- Requested that the applicant confirm in writing that she would adhere to the contents of clause 7.2 of the second respondent's Members' Association Agreement and also that she would refrain from any conduct which may be in direct competition with the second respondent's business.

[48] The response by the applicant was as follows: —

[48.1] The applicant: —

- ...insisted that the value of her interest amounted to R572 349.36 and refused to repay the first respondent any amount whatsoever;
- refused to give any undertaking whatsoever;
- demanded that the relevant documentation be submitted to the Companies and Intellectual Properties Commission (CIPC).

[49] However, thereafter, the first respondent indicated that he was willing to pay the applicant the amount of R534 272.08 for her membership interest and the applicant instructed her attorney to accept the counter-offer and instructed her attorneys to pay the first respondent the amount of R38 077.28, being the difference between R572 349.36 and R534 272.08. The first respondent further undertook to take the relevant documentation to the Companies and Intellectual Properties Commission.

The applicant's alleged breach of the restraint of trade agreement:

[50] Clause 7.2 and clause 7.3 of the shareholders agreement (which the parties used as an association agreement for the second respondent) contains the following clause: —

“...

7.2.1 *The duties ... Shareholders ... will be those of the executive officers of the*

(corporation) ... and save as herein set out, such shareholders shall:

...

7.2.1.2 not, either during the currency of this Agreement or at any time thereafter, be entitled whether for their own benefit or that of others, to make use or avail themselves of or derive any information or knowledge in relation to the business or affairs of the Company which they shall or may have acquired by reason of their position in or association with the business and affairs of the Company;

...

7.3 In the event of such shareholders leaving the employ of the Company for any reason whatsoever, and in consideration for the benefits receive, (sic) and having regard to the fact that the goodwill pertaining to the Company is to a large extent based on services rendered by shareholders and in respect of the

know-how and expertise contributed or to be contributed by them they shall not for a period [of] one (1) year conduct any business along lines similar to or in competition with that of the Company, such restraint is to be applicable within the Republic of South Africa, such shareholders acknowledging that the terms of such restraint as to the duration and extent thereof are reasonable and necessary for the protection of the shares of the company and its shareholders.”

[51] The second respondent relied, in a large part (as set out above) on the contents of the first respondent’s answering affidavit in the main application.

[52] A further argument was put forward to the effect that the applicant’s customer base covers the entire Republic of South Africa and areas such as Senegal and Mozambique.

[53] It was also alleged that the second respondent (sic) has spent many hours perfecting the best approach to integrating equipment of its customers into containerised laboratories, the partitioning, exact location(s) of the ventilation duct connection points and the connection flanges (to name but a few).

[54] The alleged uniqueness of the second respondent's products was stated to appear from a document attached to the affidavit. This documentation included standard safety measures used in laboratories wherein biohazardous material is handled, including images of compartments and equipment within the containerised laboratory.

[55] It is further alleged by the second respondent that the applicant, due to her employment by the second respondent, had acquired an intimate knowledge of the second respondent's trade secrets which are stated to be "... *the design of the Second Respondent's containerised laboratories*". In this regard it should be borne in mind that information does not become trade secrets or confidential information by labelling it as such. The

information must be proved to be confidential or to constitute trade secrets.

[56] In terms of a labour dispute declared by the second respondent, the applicant was dismissed as an employee of the second respondent on 2 January 2003. The applicant failed to attend the disciplinary hearing and was summarily dismissed.

[57] The first respondent also referred to an archived e-mail of the applicant which reads as follows: —

“Please find enclosed the breakdown of freight costs for the Ghana project. I am at your disposal in case more assistance is needed”

[58] The first respondent confirmed that he knew nothing of a Ghana project.

**Injury actually committed or reasonably apprehended and
no other satisfactory remedy:**

- [59] The applicant refused to provide the second respondent's attorneys with any undertaking as requested by him, as set out above. The first respondent expressed the fear that the applicant will use or disclose the second respondent's trade secrets.
- [60] In the applicant's answering affidavit to the counter-claim she states that the main business of the second respondent was the manufacturing of movable laboratories. She states that the first respondent used the unoriginal idea to use shipping containers to build a laboratory. However, she states that shipping containers are used for various purposes, for example, housing, businesses or storage. All such laboratories in the shipping containers are customised to a specific client's needs usually by way of a tender. The set-up of the laboratory is dictated by the needs of a customer. This fact was stated by the first respondent himself.
- [61] The applicant states that the airflow in the movable laboratories is done by a contractor, Air Filter Maintenance Services

(“AFMS”). The electrical installations are also done by electrical contractors.

[62] Furthermore, the applicant states that the idea to use shipping containers for laboratories is not unique, and was used in the United States of America many years before 2002 and by Toga Laboratories. In any event, the Toga container was conceptualised by the first respondent during the cause and scope of his employment by the second respondent.

[63] In any event, the applicant alleges that she did most of the work after the first respondent had left Toga Laboratories.

[64] The applicant further states that Mr Barry Kosloff (on her version) is from the London School of Hygiene and Tropical Medicine and is the originator of mobile TB laboratories. She emphasises that Mr Barry Kosloff’s motive is to advance studies in science and medicine and that he is not an entrepreneur. He, according to her, taught her the requisite technical and scientific knowledge pertaining to TB laboratories.

[65] The applicant emphasises that the laboratories are custom manufactured to a client's specifications. Airflow and electrical requirements are in any event catered for by special contractors. She alleges that the first respondent is simply seeking to exclude competition and to prohibit her from using her own personal skills and acquired expertise over the years.

[66] The applicant states that clause 7.3 was merely copied from a shareholders agreement template without any thought given to the wording by her and the first respondent. She denies, in any event, that there is any "protectable interest" which justifies a restraint agreement.

[67] As far as technical assistance is concerned, the applicant admits that the first respondent assisted her with electrical installations and technical design but that she did the cost schedules of the quotations. Technical specifications of a laboratory are dictated by the client's needs and wishes, according to both the applicant and the second respondent.

[68] The applicant also created all the marketing material for the second respondent. She denies that there were any unique cost schedules. She also states that two manufacturers were used situated in Grasmere and Germiston.

[69] According to the applicant, the so-called confidential information is fully disclosed in the annex to this judgment and forms part of the public domain. By annexing various websites, the applicant sought to demonstrate that many companies manufacture mobile laboratories.

[70] The first respondent alleges, in reply, that he developed “the concept” of containerised laboratories before joining Toga Laboratories. Allegedly the second respondent developed specific templates to advance client discussions, which are alleged to be part of the second respondent’s intellectual property. The second respondent also allegedly has intellectual property in the form of electrical installation templates which form part of the applicant’s (sic) intellectual property. This evidence, tendered in reply for the first time, is ignored for purposes of this judgment.

[71] For the most part, the first respondent on behalf of the second respondent, denies most of the applicant's allegations made in her answering affidavit to the second counter application. However, the first respondent makes a very important concession in reply namely that ***“(t)he use of shipping containers for laboratories is indeed not unique”***.

[72] The first respondent's answer to the allegation that the alleged intellectual property held by the second respondent belongs to Toga Laboratories is denied on the basis that Toga Laboratories no longer exists. The allegations made by the applicant regarding Mr Barry Kosloff are allegedly the applicant's own interpretation.

[73] Furthermore, for the first time in reply, the first respondent alleges that the applicant ***“...retained the laptop, which belongs to (the second respondent) and on union no doubt she has unauthorised access to (the second respondent's) client lists, contracts, templates and design documents”***. Given that this

allegation is made in reply only, it is ignored for purposes of this judgment.

Interpretation of the evidence:

[74] The evidence has been set out above for a reason. It has no structure whatsoever. As can be seen, allegations are made in reply, which should be in the founding affidavits. So, for example, the first respondent sets out more detail of the second respondent's alleged intellectual property – namely how to develop a ventilation system which does not leak where it connects with a containerised laboratory, in his replying affidavit for the very first time. This he is not entitled to do.

[75] Furthermore, the document delineating the alleged intellectual property of the second respondent attached to the founding affidavit in the second respondent's counter-application refers to the known concepts of biocontainment for purposes of laboratory biosafety and biosafety-levels which range from BSC-1 to BSC-4. It is practically impossible to extract from the document precisely what the first respondent claims to be the

second respondent's intellectual property, as the use of shipping containers for laboratories is not unique, the biocontainment laboratories have to comply with prescribed biosafety levels and the input of clients as well as ventilation and electrical contractors is a necessity. In any event, the document is attached to the papers, thus, resulting in its publication.

[76] The court's question as to why a confidentiality regime was not agreed upon in respect of the second respondent's alleged intellectual property, remained unanswered during argument. There are further so many factual disputes that it is impossible to decide them on affidavit evidence. Furthermore, instead of relying on supporting affidavits, reference was made to e-mails and documents.

[77] None of the drafters of the affidavits demonstrates a clear understanding of the concept of intellectual property. So-called copyright works are relied upon as intellectual property without any attempt to demonstrate that there has been compliance with the provisions of the Copyright Act 98 of 1978 in order for the works to attract a copyright, or to demonstrate who the holders

of the ownership of the copyright are. Simply by way of example, it is, at times, alleged that the second respondent (a close corporation) and not individuals created certain works. As far as confidential information is concerned, it is apparently believed that a concept, which appears to fall within the common domain, constitutes confidential information. At times it appears that know-how, which clearly can constitute confidential information (but which is not identified with any precision) is relied upon.

[78] In any event, it is wholly unclear how containerised laboratories, which are admittedly not unique, and which are built in accordance with a client's requirements can ever constitute a trade secret, without further elaboration, which was not forthcoming. Furthermore, the first respondent, on behalf of the second respondent, admits that he was greatly assisted by the inputs of Mr Barry Kosloff.

[79] Furthermore it is nowhere stated that the clients' of the second respondent had to sign confidentiality agreements, that workers within the laboratories were bound by confidentiality

agreements or that the specialist airflow and electrical contractors used by the second respondent, were bound by confidentiality agreements. Once this is so, it seems as though the first respondent, as did the second respondent, never endeavoured to keep the precise construction of the containerised laboratories secret. Given this fact, the second respondent cannot now, *ex post facto*, claim that the design of its containerised laboratories constitutes an alleged trade secret. This point was not even raised in the main application and the first respondent's counter-application.

The relevant legal principles

- [80] It is trite that a restraint of trade clause within an agreement will be considered unreasonable and against public policy if, after the termination of a contractual relationship, there is not a sufficient protectable interest which will be served by enforcing a restraint of trade. This principle was enunciated in *Hirt & Carter (Pty) Ltd v Mansfield and Another* 2008 (3) SA 512 (D) at 520 [paragraph 36].

[81] Furthermore, it is trite that healthy competition is encouraged in case law, as it will lead to several competitors striving to reach the same goal and the public thus receiving superior products at the lowest prices. Van Heerden and Neethling **Unlawful Competition** LexisNexis 2004 (reprint) at page 130 refer to this principle as follows: —

“The real competition principle is therefore that the competitor who delivers the best or fairest (most reasonable) performance, must achieve victory, while the one rendering the weakest (worst) performance, must suffer defeat.”

[82] This principle complies with the basic human right set out in section 22 of the Bill of Rights of the Constitution of the Republic of South Africa, 1996. Closely tied to this principle is the further principle that a person is entitled to use the stock of knowledge and skills that she has obtained in the workplace.

[83] The four questions to be asked when the enforcement of a restraint of trade is sought were best formulated by Nienaber JA

in *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767.

These questions are: —

[83.1] Is there an interest of the one party which is deserving of protection at the termination of the agreement?

[83.2] Is such interest being prejudiced by the other party?

[83.3] If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?

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

[84] In the instant case, the evidence consists of sweeping and vague statements. It is impossible to answer any of the four questions. The affidavit in support of the second respondent's counter-

application (to be read with the first applicant's answering affidavit in the main application) neither defines the issues nor places the essential evidence before the court as required by our courts, in, for example, *Die Dros (Pty) Ltd & Another v Telefon Beverages CC & Others* 2003 (4) SA 207 [C] at paragraph 28.

[85] The onus in restraint of trade proceedings is on the respondent in the counter-application (the applicant in the main application) to show that enforcement of a restraint of trade clause is against public policy. This principle was correctly reiterated by Mbha J in *Experian South Africa v Haynes* 2013 (1) SA 135 (GSJ) paragraph [14]. Given the fact that the applicant in the counter-application denies that there is any protectable interest and has demonstrated that the first respondent has failed to delineate and prove the existence of a protectable interest in any coherent fashion, the counter-application is doomed to fail.

[86] Once this is the case, no further enquiry into the enforcement of the restraint of trade clause is called for.

[87] As far as a permanent interdict is sought to the effect that the applicant may not convey any of the alleged confidential information to third parties, the answer is clear. Once the second respondent has failed to demonstrate that it possesses any confidential information, then no interdict is called for. Confidential information has consistently been defined by our courts as information which is confidential and useful for carrying on a business and which, if disclosed to a competitor, could be used to gain a competitive advantage.

[88] It is further emphasised that the second respondent very belatedly brought its counter-application, on a non-urgent basis after the applicant had been trading, allegedly using the second respondent's confidential information, for, at the very least, more than seven months, and in all probability for much longer, for her own business purposes, (and not those of a second respondent).

[89] This, in itself, is significant. No entity or person who wishes to retain the confidentiality of information, waits until the horse has bolted before closing the stable door. Any springboard

advantage which may have been acquired by the applicant, would have been exhausted by the time the application was heard in October 2013. Given these considerations, the counter-application must fail, based on the fact that the second respondent has failed to set out its case with sufficient particularity to enable the court to grant an order. This is borne out by the fact that even though the second respondent's counsel was requested by the court to delineate the relief sought with precision, the prayer (namely prayer 5 of the counter-application quoted earlier) is still so vague as to be meaningless and clearly includes common domain information, for example, that the laboratories are contained.

[90] A quotation from the second respondent's heads of argument demonstrates this point trenchantly: —

“The first respondent emphasises that the second respondent has developed a unique product and that the applicant acquired an intimate knowledge of the second respondent's trade secrets (i.e. the technical design and

construction of the second respondent's containerised laboratories).”

[91] However, given the fact that it is impossible to ascertain what it is that the second respondent has allegedly compiled as a stock of confidential information and what his precise input was, the court is in no position to treat the “intellectual property” of the second respondent as its confidential information.

[92] In order to escape the consequences of the fact that all the alleged “confidential information” of the second respondent appears to fall within the common domain, counsel for the second respondent relied heavily on the fact that the onus to demonstrate, on a balance of probabilities, that a restraint of trade agreement is unenforceable because it is unreasonable, is borne by the applicant in the counter-application.

[93] Heavy emphasis was also placed on the dictum in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at paragraph [21] where it was emphasised that public

policy requires the enforcement of agreements entered into voluntarily and in the exercise of freedom to contract.

[94] Reliance was also, by necessity, placed on *Experian v Haynes supra* where it was held that whether information is in the public domain is irrelevant where a party has received information within the context of a confidential relationship, which means that it is protectable. The dicta of *Terrapin Ltd v Business Supply Co (Hayes) Ltd* 1960 RPC 128 at 130 and *Van Castricum v Theunissen and Another* 1993 (2) SA 726 (T) at 731 F-14 were also quoted. The latter dictum reads as follows: —

“What is clear from the aforesaid, is that someone who saves himself the trouble of going through the process of compilation of the document, even where it is compiled from information which is available to anybody, such a person would be interdicted if that information had been obtained in confidence. The reason is simply that confidential information may not be used as a springboard for activities detrimental to the person who made the

confidential information available. It would remain a springboard even when all the features have been published or can be ascertained by actual inspection by any member of the public.’”

[95] However, it is impossible to ascertain what the first respondent’s compilation is which can be attributed to the second respondent, as numerous people assisted in making the compilation.

[96] The second respondent has thus failed to make out a proper case.

Order

In the event, the following order is made: —

1. No costs order is made in respect of the main application.
2. In accordance with the tender, the applicant is ordered to pay the second respondent an amount of R38 077.28 (only in the event of such payment not having been effected).
3. Should the amount of R38 077.28 not yet have been paid before this court order, it is ordered that the applicant pays interest

thereon at a rate of 15.5% per annum from date of this order to date of payment.

4. The second respondent's counter-application is dismissed, with costs.



Jansen

**MM JANSEN J
JUDGE OF THE HIGH COURT**

**ATTORNEYS FOR THE APPLICANT
ARTHUR CHANNON ATTORNEYS
c/o DE JAGER ATTORNEYS**

Menlo Law Chambers
49-11th Street
MENLO PARK
Pretoria

Tel: (012) 346 5797
Fax: (012) 346 1512

REF: LDX1406/mb/MR CHANNON

**COUNSEL FOR THE APPLICANT
ADVOCATE APJ ELS**

083 455 6579

**ATTORNEYS FOR THE FIRST AND SECOND RESPONDENTS
BARNARD INCORPORATED**

Oak House
118 Oak Avenue
Highveld Technopark
CENTURION

Tel: (0861) 088 088
Fax: (0861) 099 099

e-mail: info@barnardinc.co.za

c/o PRETORIUS LE ROUX INC

339 Hilda Street
3rd Floor
HATFIELD
Pretoria
Tel: (012) 342 1797
REF: LT2488/GT/hjvr

COUNSEL FOR THE SECOND RESPONDENT
ADVOCATE BC STOOP
Mobile: 083 461 7640