

SOUTH AFRICA / JUDGMENT

Rlwa (Pty) Ltd v Mc Duling (56595/2019)

[2019] ZAGPPHC 422 (11 September 2019)

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COURT

North Gauteng High Court, Pretoria

BEFORE

JJC Swanepoel

CASE / FILE NUMBER

56595/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

Case number: 56595/2019

Heard on: 27

August 2019

Date of judgment: 11 September 2019

In the matter between:

RLWA (PTY) LTD.

Applicant

and

TYRONE

Mc DULING

Respondent

JUDGMENT

SWANEPOEL AJ:

[1] This is an urgent application that respondent be interdicted from:

1.1 directly or indirectly divulging applicant's trade secrets to third parties;

1.2 directly or indirectly divulging to third parties any of applicant's confidential information;

1.3 persuading, inducing, soliciting, encouraging or procuring confidential information from any of applicant's employees;

1.4 being directly or indirectly interested in or engaged with, or employed by a competitor of applicant in any capacity;

1.5 representing a competitive or non-competitive product line or service similar to that of applicant;

1.6 approaching or doing business with applicant's current customers or any customers "dealt with through the respondent's involvement with applicant";

for a period of 24 months, alternatively for a period that the Court deems appropriate.

BACKGROUND

[2] Applicant is a manufacturer and supplier of aluminium products to the construction industry. It is allegedly a niche supplier with a specialized products range that is unique to it. Some of its products are sourced from international manufacturers.

[3] It is common cause that respondent took up employment with applicant on 17 November 2014. He was employed as a junior sales representative at a salary of R 8 500.00 per month, excluding commission on sales. On 12 April 2017 respondent was promoted to the position of senior sales representative, and his salary increased to R 17 000.00 per month, excluding commissions.

[4] Applicant alleges that respondent was employed to represent and sell the applicant's products and services, explain the nature and quality of the products in comparison to the products of its competitors, and to attend to customers' needs. Applicant submits that in the course of his employment, respondent gained knowledge of applicant's customer base. Applicant also alleges that in the course of his employment, respondent became exposed to applicant's trade secrets which were the following:

4.1 Applicant provides a five-year warranty;

4.2 Applicant uses spacers in the installation of its products;

4.3 Applicant uses laser levels in order to make its installations more accurate;

- 4.4 Applicant advises its customers as to the use of kick plates;
- 4.5 Applicant has a unique after sales service in the form of a service team;
- 4.6 Applicant's quotation system is highly adaptable;
- 4.7 Applicant makes use of toughened glass instead of standard laminated glass.

[5] When applicant was promoted to senior sales representative he was required to sign an employment agreement. Two clauses of the agreement are relevant to these proceedings. In clause A 5 respondent agreed as follows:

"In no event shall the sales representative represent a competitive or non-competitive company product line or service of any kind within or outside the designated sales area."

[6] Clause D 5 reads as follows:

"Our standard non-compete agreement will be applicable as per discussed above. No business will be allowed with any competitor or non-competitor under no circumstances what so ever." (sic) (my emphasis)

[7] Only one clause "as per discussed above" has any relevance to non-competition, and that is clause A 5. Clause D 5 must therefore refer to clause A 5.

[8] Respondent resigned from applicant's employ with effect from 31 May 2019 and has started a business known as BMT Consulting (Pty) Ltd (albeit that the company is not yet registered). When applicant became aware of the fact that respondent was trading, seemingly in competition with applicant, and more specifically that respondent was providing services and goods to applicant's customers, it addressed a letter to respondent demanding that he desist. In the letter applicant alleged that respondent was acting in breach of the employment agreement, read in conjunction with a "Non-Compete Agreement". Applicant demanded respondent's written undertaking that he would have no contact, and conduct no business or communicate with past or current customers of the applicant.

[9] In reply to the aforesaid letter, respondent asked for a signed copy of the non-compete agreement. Applicant's attorneys forwarded the signed employment agreement, accompanied by an unsigned "Non-Compete Agreement" to the respondent. On 12 July 2019 respondent's attorneys wrote to applicant's attorneys, firstly, denying that respondent had signed the non-compete agreement, or that he had even seen the agreement before it was provided to him by applicant's attorneys. Secondly, they took issue with the enforceability of the "restraint" contained therein. Thirdly, respondent took the view that applicant did not have a proprietary interest capable of being protected. Fourthly, Respondent denied using confidential information, and finally, he denied that he is competing with applicant. It is the employment agreement, together with the non-compete agreement, that applicant is relying on for the relief that it seeks. In the alternative, applicant alleges that respondent is unlawfully competing with it, and that it is entitled to protection in terms of common law.

THE NON-COMPETE AGREEMENT

[10] Applicant has argued that the words “non-compete agreement” in clause D 5 of the employment agreement is a reference to the unsigned non-compete agreement which, it alleges, was incorporated in the employment agreement. Therefore, applicant says, respondent is bound by the terms of the non-compete agreement, even though he did not sign it.

[11] The non-compete agreement records that by virtue of his/her employment a sales representative will be exposed to all manner of confidential information and trade secrets. The representative undertakes not to disclose any of the information to others and not to retain copies of any company documents. The representative is also prohibited from poaching applicant’s personnel. Most relevant however, are the provisions of clause B 1 which read as follows:

“To further protect the proprietary interest of RLWA, the sales representative hereby undertake for a period of 24 (twenty four)

months (“the restraint period”) and within the geographical area of South Africa (“territory”), after termination of the sales representative agreement entered into by and between RLWA and the sales representative, the sales representative

in favour of RLWA undertakes: (sic)

a) Any business referred to in the industry to the sales representative shall be introduced to and conducted by RLWA, without the sales

representative becoming entitled to remuneration.

b) The restraint shall not be interpreted as precluding the sales representative from taking up a position in an institution that does

not compete with RLWA, but conditional on such concern not in any way approaching or dealing or doing business with any current customer, or any other customer dealt with through his involvement with RLWA, for the restrain period.”

c)

INCORPORATION BY REFERENCE

[12] The first question to be determined is whether the restrain agreement has been incorporated into the agreement between the parties by reference, as applicant alleges. The principle is trite, that if a written agreement expressly incorporates the terms of another document, the terms contained in the other document are binding on the parties. See: Sanso Property Joubert Street (Pty) Ltd v Kudsee 1976 (4) SA 761 (A.D.)

- [13] It is not even necessary for the document which seeks to incorporate the other terms to be a signed agreement. In cases where, for instance, a ticket or a consignment note or a similar unsigned document refers to terms that are contained in a separate document, and the ticket or consignment note or other document is accepted on that basis, the terms of the separate document are regarded as having been imported into the contract between the parties. (Central South African Railways v James 1908 T.S. 221; Burger v Central South African Railways 1903 T.S. 571)
- [14] However, in my view the wording of the document which seeks to import the terms of the separate document, whether it is a written agreement, ticket, consignment note or the like, must be such that a reader thereof must clearly understand that terms other than those contained in the document itself form part of the agreement between the parties. It is not sufficient for the written agreement vaguely to refer to another document, without it being clear that the terms of that document form part of the agreement between the parties.
- [15] It is within the above legal matrix that it must be considered whether Clauses A 5 and D 5 had the effect of incorporating the terms of the non-compete agreement into the agreement between the parties. The deponent to the founding affidavit was not present when the agreement was signed. He cannot say whether the non-compete agreement was discussed or not. In any event, respondent denies that the non-compete agreement was ever discussed with him. He alleges that he only became aware of its existence when applicant's attorneys demanded compliance therewith. In view of the test formulated in *Plascon Evans Paints (Ltd) v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (AD) at 634 H, I have to accept the respondent's version unless it is so obviously false, that it can be rejected out of hand, which is not the case in this instance.
- [16] Consideration must be given to the specific wording of the employment agreement, and the normal rules of interpretation should be applied. If the employment agreement unambiguously refers to the non-compete agreement, so that it is clear that respondent must have known upon reading it that terms contained in a different document were being incorporated into the agreement, then respondent cannot object to those other terms forming part of the employment contract. (See: Burger, *supra* at 577 – 578) In interpreting the contract, the ordinary meaning of the words is to be determined within the context of the particular document. (See: Swart *en 'n ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A); *De Beers Industrial Division (Pty) Ltd v Ishizuka* 1980 (2) SA 191 (T))
- [17] Clause D 5 of the employment agreement is hardly a model of clarity. It records that the standard non-compete agreement will be applicable "as per discussed above". It then reiterates that a sales representative is prohibited from doing business with a competitor or non-competitor. As I have stated above, the words "as per discussed above" can only refer to clause A 5 which prohibits the sales representative from competing with the applicant. On a proper reading of clause A 5, it seems to regulate the sales person's conduct whilst he/she is still employed by applicant, and does not, as applicant contends, create a prohibition against competition after the employment contract has ended. Neither of these clauses

unambiguously allude to the incorporation of terms contained elsewhere.

- [18] I cannot find that respondent must, on an ordinary reading of the employment agreement, have realized that a separate non-compete agreement formed part of the employment contract. Consequently, applicant's contention that the non-compete agreement was incorporated by reference stands to be rejected.

IS THE "RESTRAINT OF TRADE" ENFORCEABLE

- [19] However, even if I am wrong in this regard, I do not believe that the non-compete agreement greatly assists the applicant. Even though it records that a sales representative will be exposed to all manner of confidential information, the only prohibitions in the agreement are, firstly, against divulging confidential information to third parties, and secondly, against poaching applicant's employees. There is no clause restraining an ex-sales person from being involved with an entity that competes with applicant. The clause that applicant relies upon, clause B 1 a) of the non-compete agreement, however, requires the sales representative to refer any business "in the industry" to applicant during the restraint period without remuneration.

- [20] The principle that a restraint of trade agreement is enforceable if it is reasonable in the circumstances of the particular case, was laid down in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (AA) at 891 H - I:

"Dit sou dus volgens die beginsels van ons reg moontlik wees om te sê dat 'n ooreenkoms wat iemand se handelsvryheid inkort teen die openbare belang is indien die omstandighede van die betrokke geval sodanig is dat die Hof daarvan oortuig is dat die afdwing van die betrokke ooreenkoms die openbare belang sou skaad. Die 'indien' is belangrik, want nie elke bepaling wat iemand se handelsvryheid inkort sou noodwendig teen die openbare belang wees nie."

- [21] The question whether a particular restraint agreement is enforceable is thus a matter of public policy. The same approach was taken in *Sunshine Records (Pty) Ltd v Frohling and others* 1990 (4) SA 782 (AD) at 794 C - E, where the following principles were laid down:

21.1 The public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair;

21.2 All persons should, in the interests of society, be allowed as far as possible to engage in commerce, and it is detrimental to society that a fetter be placed on a person's freedom to trade;

21.3 It is in general contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade.

- [22] As I have noted above, the non-compete agreement does not prohibit the sales representative from competing with the applicant, but does require him to pass on all business that he may obtain "in the industry". The absurd result of this is that respondent is not prohibited from taking up employment with a competitor, but should he do so, he must pass along all business that comes his way without remuneration. Respondent's counsel

argued, dramatically but quite correctly in my view, that this clause made respondent a veritable slave to the applicant. It is clearly against the public interest.

- [23] A further point of contention is whether the terms of the restraint are reasonable. A restraint agreement must be reasonable as to its duration, and the geographical area to which it applies. (See: *Commercial Holdings v Leigh-Smith* 1982 (4) SA 226 (ZSC); *Magna Alloys supra* at 875 B – D; *Interest Computation Experts en andere v Nel en andere* 1995 SA 174 (T)) In this case, the restraint is for a period of 24 months, a relatively long period of time, given the facts of the matter. The restraint applies to the entire country, whilst there is no evidence whatsoever whether applicant's business is predominantly based in Gauteng, or whether it also has business interests in other parts of the country that require protection. However, given my view on the matter as expressed above, I do not have to make a finding on the reasonableness or otherwise of the restraint.
- [24] In summary therefore, my view is that the non-compete agreement was not incorporated in the employment agreement by reference, but even if it were, the restraint clause is against the public interest and thus unenforceable.

UNLAWFUL COMPETITION

- [25] Applicant argued that, if the non-compete agreement were found to be unenforceable, that applicant is nevertheless entitled to protection by common law, in that respondent is unlawfully competing with the applicant. Applicant's argument is that it has a clear right to the goodwill in its business, and to protection against unlawful infringement of that goodwill. Applicant bases its argument on the following:

25.1 Respondent, applicant says, was in a position to learn the identities of applicant's customers, what their requirements are, and how to contact those customers.

25.2 Respondent knows how applicant's pricing structure works and he can therefore undercut applicant when issuing tenders;

25.3 Respondent knows what the properties are of each product, and how to install the products in the best possible manner.

25.4 Respondent is now, according to applicant, using the knowledge that he acquired whilst in applicant's employ to contact applicant's customers and to compete directly with the applicant.

25.5 Applicant has allegedly conducted an investigation which revealed that many of its erstwhile customers were refusing to discuss future projects, and were using respondent's services instead.

WHAT IS CONFIDENTIAL INFORMATION?

- [26] As I have already stated, applicant seeks to protect two different kinds of information which, in applicant's submission, is confidential: firstly the information relating to its customer base, and secondly, its alleged trade secrets.

- [27] The first aspect to determine is whether the information that was allegedly taken from its compiler was in fact confidential. That question was dealt with in the matter of *Van Castricum v Theunissen* 1993 (2) SA 726 (TPD). The respondent had been employed as a claims clerk by the applicant who conducted an insurance brokerage. During the course of her work respondent came into possession of a telephone directory, a “Bantex”, which contained the names, telephone numbers and facsimile numbers of the applicant’s existing clients. The respondent also became privy to other confidential information relating to the business. Upon leaving the applicant’s employ, the respondent took the Bantex with her, joined a competitor, and started using the information contained in the Bantex to drum up business for her new employer.
- [28] In the *Van Castricum* matter the Court held that for information to be confidential it must not be something which is public property or public knowledge (See also: *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1948] 65 RPC 203 (CA) at 211). Roos J furthermore held that when a document is compiled by someone from information which is available to anybody, the person who receives the document in confidence may not use the document as a springboard to his/her own success. (at 731G) The learned judge quoted a passage from *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and another* 1967 (1) SA 686 (W) at 689 F with approval:
- “If however, it is objectively established that a particular item of information could reasonably be useful to a competitor as such, ie to gain an advantage over the plaintiff, it would seem that such knowledge is prima facie confidential as between an employee and third parties and that disclosure would be a breach of the service contract.”*
- [29] The learned judge furthermore quoted Cross J in *Printers and Finishers Ltd v Holloway* [1965] RPC 239 (Ch) at 255 – 256, where it was held in regard to client lists, that the mere fact that the information resides in the respondent’s head, and is not encapsulated in a document, does not mean that the unlawful use thereof cannot be interdicted. Therefore, in whatever format the confidential information is held, its disclosure may be actionable. The point must be made, however, that the mere fact that the employer asserts that information is confidential, does not make it so.

WHEN IS COMPETITION UNLAWFUL?

- [30] Once the determination is made that the information sought to be protected is confidential, then the question follows whether the conduct complained about is unlawful. The right to claim as a result of a breach of confidence was first recognized in South African law in *Dun v S.A. Merchants Combined Credit Bureau* 1968 (1) SA 209 (C.P.D.). In that matter Corbett J, (as he was then) relied on the dictum of Steyn CJ in *Geary and Son (Pty) Ltd v Gove* 1964 (1) SA 434 (AD), in recognizing that the basis for a claim for breach of confidentiality lay in the Aquilian action. Corbett J did not attempt to define the limits of lawful competition, but he did indicate that the facts in each case should be considered in light of the existing “good morals”, in other words, the *boni mores* of the day.

- [31] Corbett J, in quoting an extract from Prosser, Law of Torts 2nd ed., pp 749- 750, provided a guide to what is lawful and what is not:

“Though trade warfare may be waged ruthlessly to the bitter end, there are certain rules of combat which must be observed. The trader has not a free lance. Fight he may, but as a soldier, not as a guerilla. In the interests of the public and the competitors themselves, boundaries have been set by the law, and numerous practices have been marked out as ‘unfair’ competition, for which, in general, a tort will lie in favour of the injured competitor, although very often the tort is given some other name.”

- [32] In Tolgaz Southern Africa v Solgas (Pty) Ltd 2009 (4) SA 37 (WLD) at 50 C – E the point was made that not all competition is unlawful:

“It is trite that the delict of unlawful competition is based on the Aquilian action and, in order to succeed, an applicant must prove wrongfulness. This is always determined on a case-by-case basis and follows a process of weighing up relevant factors, in terms of the boni mores now to be understood in terms of the values of the Constitution. Any form of competition will pose a threat to a rival business. However, not all competition or interference with property interests will constitute unlawful competition. It is accordingly accepted that it is only when the competition is wrongful that it becomes actionable. The role of the common law in the field of unlawful competition is therefore to determine the limits of lawful competition. This determination, which takes account of many factors, necessitates a process of weighing up interests that may in the circumstances be in conflict. Fundamental to the determination of whether competition is unlawful is the boni mores or reasonableness criterion.”

- [33] In Tolgaz the Court considered the following factors in weighing the lawfulness or otherwise of the conduct:

33.1 The honesty and fairness of the conduct involved;

33.2 The morals of the trade sector involved;

33.3 The protection that positive law already affords;

33.4 The importance of competition in our economic system;

33.5 The question whether the parties are competitors;

33.6 The motive of the actor.

- [34] The learned Judge referred with approval to Schultz v Butt 1986 (3) SA 667 (A) in which case the following principles were identified as a guide to determining whether competition is unfair or not:

34.1 Every person is entitled to freely carry on his business within lawful bounds;

34.2 An applicant for an interdict based on unlawful competition must satisfy the requisites of an Aquilian action;

34.3 Fairness and honesty must be taken into account, but they are not the only criteria;

34.4 The boni mores (regsgevoel van die gemeenskap) must be considered;

34.5 Questions of public policy may be of importance, for instance the importance of a free market and of competition in the economic system.

[35] Applicant's contention is that during the course of his employment respondent would have become exposed to the trade secrets mentioned above. In his answer respondent says the following:

35.1 Although applicant provides a 5-year warranty, it will maintain its advantage over competitors as it is standard to provide a 2-year warranty;

35.2 The use of spacers is not unique, and is advertised on the supplier's website together with instructions as to how to use them;

35.3 The use of lasers to level a product during installation is not unique to applicant, and the equipment can be purchased for as little as R 650.00;

35.4 The kick plates are used by any aluminium supplier worth its salt;

35.5 It is common to have an after-sales service team;

35.6 In respect of the quotation system, respondent denies having had intimate knowledge thereof;

35.7 There is nothing unique in using toughened glass, and the choice of the particular glass to use in each instance lies with the architect who is involved in the project.

[36] In *Motion Transfer & Precision Roll Grinding CC v Carsten and another* [1998] 4 All SA 168 (N) Page J held that:

*"The position of the employee after his employment has ceased is, however, complicated by the fact that the proposition that it is unlawful for him to take his master's confidential information or documents and use them to compete with his master has to be reconciled with his right – both in his own and in the public interest – to be entitled to apply the skills and specialised knowledge of a particular trade or industry which he has acquired in the course of his employment elsewhere after the termination of that employment. As was observed by Van Dijkhorst J in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 192:*

'Our system of free enterprise requires for its successful functioning a competitive market where personal skills and expertise can be freely bartered.'

[37] In the Motion matter (*supra*) the Court quoted the learned authors Van Heerden and Neethling, *Unlawful Competition*, and held that for information to be a trade secret, it has to fulfil the following requirements:

37.1 The information must be capable of application in a trade or industry;

37.2 The information must be secret or confidential and known only to a restricted number of people, and therefore not public property or public knowledge;

37.3 The information must be of economic value to the applicant.

- [38] When the aforesaid test is applied to the facts of this matter, there is little doubt that the “trade secrets” that applicant is trying to protect are not secret nor confidential, in the sense that they are known only to a restricted number of people. Some of the information, such as that applicant provides a five-year guarantee and that it has an after-service sales team, is the kind of information that applicant has published to the general public. It cannot be a trade secret. The same applies to the use of spacers and laser levelling equipment. The use of spacers in the installation process is advertised on the internet, and according to respondent, the use of laser equipment is not unique to applicant.
- [39] Applicant was also concerned that respondent had access to its quotation system. Applicant says that respondent knows how applicant quotes its customers, that he is aware of applicant’s margins and that he is therefore in a position to undercut applicant’s prices. Respondent says that his role was simply to prepare house plans which he would submit to the quotation department who would then prepare the quotation. He denies that he had access to any information that might give him an unfair advantage. In reply, applicant takes issue with respondent’s version and reaffirms its contention that respondent had access to the quotation system. There is a clear dispute of fact regarding this allegation, but if I apply the test in *Plascon Evans Paints* (supra), I have to accept respondent’s version.
- [40] Simply reading applicant’s averments relating to the alleged “trade secrets” leaves one skeptical. In my view respondent is correct: The “trade secrets” that applicant is seeking to protect are not secret at all. Firstly, there are a number of competitors in the market selling essentially the same products, and utilizing essentially the same installation methods. Secondly, most of the “trade secrets” that applicant seeks to protect do not fall within the category of restricted or secret information, alternatively the applicant has openly published the information on its website, as have its suppliers.
- [41] In my view respondent was a relatively low-level employee. As pointed out above, he only dealt with a small percentage of the applicant’s customers. There is no evidence that he has taken business away from the applicant. It seems to be of concern to applicant that respondent is doing business with HLP Construction, one of the applicant’s customers. Mr. De Bruin, a director of HLP, has stated in an email that HLP does not exclusively do business with anyone, which contradicts applicant’s assertion that it has lost HLP’s business as a result of respondent’s conduct. Applicant is welcome to tout for HLP’s business and to provide it with tenders.

- [42] There is no evidence whatsoever to substantiate applicant's bald allegation that its investigation has revealed that "many" customers have stopped discussing project with applicant and are now using respondent's services. Who are these customers and how many erstwhile customers are now refusing to do business with applicant? What kind of business are they doing with respondent? The evidence for this contention is so vague that no value can be placed thereon.

USE OF KNOWLEDGE GAINED DURING RESPONDENT'S EMPLOYMENT

- [43] The final question is whether the respondent may lawfully use information that he gained regarding applicant's customers to launch his own enterprise. It is obvious that in the course of his employment respondent would have gained knowledge of the applicant's customers and how they can be contacted, and even though there is no evidence that he retained that knowledge either in writing, by memorizing same, or in any other manner, he has obviously retained some knowledge of the applicant's

customer base. The issue for determination is whether the use of information obtained in this fashion is unlawful.

- [44] Respondent's position, although it was titled "senior sales representative", does not seem to have been a particularly senior position within the company. He was paid a relatively lowly salary, and so says respondent, while he had contact with applicant's customers he only ever dealt with some 102 of applicant's approximately 689 customers. Respondent also says that there are hardly any trade secrets in the aluminium industry. The products can be sourced in numerous places and from a number of suppliers, and the methods used to install the products are not specialized, nor are they a secret. The methods of installation are also published on applicant's website for the world to see.
- [45] Respondent states that one can ascertain the identities of potential customers by driving around town looking for ongoing building projects. The details of potential customers are normally posted on sign boards erected at the particular site. Respondent says that while he was employed by applicant that is exactly the manner in which he drummed up business. He states that applicant's relationship with its customers is not exclusive, and that generally prospective customers also request applicant's competitors to submit quotations. There are apparently some 10 competing companies within a 20 km radius of applicant's premises and often more than one company is called upon to provide a quotation. An invitation to quote on a project is therefore in the public domain.
- [46] Respondent further contends that he is not competing with the applicant. He makes his living as a project manager. He finds customers, advises them on the specific project in which they are involved, and he then obtains quotations from different suppliers which he presents to the customer. Respondent derives an income from managing the procurement process. Respondent denies that he manufactures or sells aluminium products in his own right.

- [47] The facts in the Van Castricum matter can be distinguished from the facts in this case. There is no allegation in this matter that respondent took with him a customer list, or any other confidential documents. Applicant specifically disavowed that allegation. There is also no allegation that he memorized customer lists or any other confidential information. The allegation is simply that during the course of his employment he gained information about applicant's customers which makes him "aware" of applicant's customers or its customer lists.
- [48] In my view, the inevitable result of being employed is that the employee will gain knowledge of the employer's business and its customers. Unless there is an overt attempt by the employee to take information for his own use, such as in Van Castricum, one cannot hold the employee liable for using information that he has been exposed to by virtue of his employment. There has to be a more sinister element to his conduct, such as that he memorized information, took customer lists, has intentionally alienated the employer's customers, or some or other similar objectionable conduct. If the employer wants to protect itself against the use of its information in these circumstances, it should enter into a valid restraint of trade agreement with the employee.
- [49] I take heed of the fact that respondent obtained a quotation from a supplier in his personal capacity whilst he was still employed by the applicant. To that extent respondent's conduct was dishonest. It has not been shown, however, that he is now dishonestly using confidential information for his own purposes, or that he has dishonestly taken applicant's confidential information with him. There is no evidence that respondent is doing business with any of applicant's customers save for the fact that he has provided HLP Construction with a quotation.
- [50] I must weigh applicant's business interests against respondent's right to trade for his own account, and I must consider that it is generally in the interests of the free-market system that persons are allowed to trade their skills and products, albeit without infringing on the rights of others. Applicant is clearly an established business with a substantial customer base. Respondent is, in comparison, a veritable David to applicant's Goliath. On the facts before me, he is not even competing directly with applicant, but is selling his skills as a project manager.
- [51] Given the above, I am of the view that respondent is not unlawfully competing with the applicant. It follows therefore that the application must be dismissed. I must point out that Mr. Cook, counsel for respondent, urged me to find that the matter was not urgent, should the non-compete agreement be found to be unenforceable. Given my view of the matter, I do not have to make a finding on that issue.

[52] I consequently make the following order:

52.1 The application is dismissed with costs.

J.J.C. Swanepoel

Acting Judge of the High Court,

Gauteng Division, Pretoria

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