

SOUTH AFRICA / JUDGMENT

Universal Blending (Pty) Ltd v Henderson (2021/21636) [2023] ZAGPJHC 266 (24 March 2023)

[2023] ZAGPJHC 266

COURT

South Gauteng High Court, Johannesburg

BEFORE

WESLEY

CASE / FILE NUMBER

2021/21636

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FLYNOTES:

TRADE SECRETS AND PRODUCT FORMULA
LABOUR– Unlawful competition – Trade secrets – Company
seeking formula for product from former director

–

Contending that formula was its confidential information –
Seeking to interdict his use of the formula in competition

–

Whether company owned the formula – Evidence that a close
corporation owned the formula and that applicant
company attempted
to recreate the formula – Application dismissed.

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER: 2021/21636

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

NOT

REVISED

In

the matter between: UNIVERSAL
 BLENDING (PTY) LTD
 Applicant
 and
 SAREL
 HENDERSON
 Respondent
 Heard

on: 7
 March 2023
 Delivered

on: 24 March 2023

JUDGMENT

WESLEY AJ:

- [1] The respondent was employed by the applicant from 2014 and also became a director and shareholder in
2019. He resigned as employee and director in September 2020 and returned his shares at the same time. The applicant alleges that the respondent, through his employment at the applicant, acquired knowledge of the formula for manufacturing its “Roadsaver” product, a bitumen product that can be used to fill and seal potholes and cracks in tarred surfaces, and that the respondent is now using that knowledge to produce the Roadsaver product in competition with the applicant. The applicant contends that the respondent’s conduct is unlawful because the formula for producing the Roadsaver product is a trade secret that it owns.
- [2] The applicant claims further that in fact the respondent is the only person who knows the full formula for the Roadsaver product, because while still employed at the applicant he was responsible for revising the formula for the product (to replace an additive that could no longer be used because it was found to be carcinogenic). The applicant alleges that the respondent has refused to divulge the full formula to it despite demand.
- [3] In the circumstances, in April 2021 the applicant launched an urgent application in which it sought the following relief against the respondent:
- [3.1] ordering the respondent to reveal to the applicant, forthwith and immediately and in writing, the entire composition and manufacturing process of its proprietary solvent-based pothole and crack filler known to it and the respondent as “Roadsaver”;

[3.2] interdicting and restraining the respondent from competing with the applicant by using in any way, alone or with any other persons or entities, the applicant's confidential information, namely the formulation and manufacturing process of the aforesaid products, namely "Roadsaver";

[3.3] interdicting and restraining the respondent from revealing or divulging to any persons or entities the formulation and manufacturing process of the applicant's aforesaid products;

[3.4] interdicting and restraining the respondent from patenting or otherwise exploiting, in any way, the formulation and manufacturing process of the applicant's aforesaid products.

[4] The matter did not proceed on an urgent basis and now comes before me as an ordinary opposed motion, with the applicant seeking final relief and the respondent seeking that the application be dismissed.

The relevant legal principles

[5] The unauthorised use of another's trade secrets is unlawful competition and can be interdicted, even in the absence of a restraint of trade (*Pexmart CC and Others v H Mocke Construction (Pty) Ltd and Another* 2019 (3) SA 117 (SCA) at [63] – [67] and [77]).

[6] In order to establish a right to relief the applicant must show that:

[6.1] it is the owner of the Roadsaver product;

[6.2] the product constitutes a trade secret in that:

[6.2.1.] it relates to, and is capable of application in, trade and industry;

[6.2.2.] it is secret or confidential; and

[6.2.3.] it is of economic value to the applicant;

[6.3] the respondent is using the product to compete with the applicant.

[7] Since the applicant seeks final relief in motion proceedings, relief can only be granted if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify an order, unless the respondent's allegations or denials "are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers" (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634I – 635C)

[8] In *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at [56], the Supreme Court of Appeal re-stated the test in relation to "far-fetched" allegations as follows:

"A respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."

The merits

The nature of the Roadsaver product and its use by the respondent

- [9] The contents of the respondent's own answering affidavit confirm that the composition and formula for the manufacture of the Roadsaver product are not generally known and have substantial economic value. The respondent has also expressly confirmed in his answering affidavit that he intends competing with the applicant. In the circumstances, and as rightly conceded by the respondent's representative in argument, there is no dispute that the Roadsaver product constitutes a trade secret and that the respondent intends making use of it to compete with the applicant absent an order from this Court.
- [10] The main issue for determination by me then is whether the applicant has proved that it is the owner of the Roadsaver product.

Ownership

- [11] The applicant alleges in the founding affidavit that it is the owner of the Roadsaver product, but it does not clearly explain how it acquired ownership, a point I return to in more detail below. The respondent, on the other hand, expressly denies that the applicant is the owner. He asserts that he is the owner or, otherwise, a close corporation called Pilot Lubricant CC ("Pilot") is the owner of the product. Pilot is the entity that historically supplied the Roadsaver product to the applicant.
- [12] Since the applicant seeks final relief, I must accept the respondent's version that the applicant is not the owner of the Roadsaver product unless it is so far-fetched or untenable that it falls to be rejected out of hand.
- [13] In my view, the respondent's contention that he is the owner of the Roadsaver product can be so dismissed. The respondent says that in 2016 he, of his own accord, approached Mr CA Botes, the applicant's main shareholder, who gave him a list with the names of the chemicals used to produce the Roadsaver product. The respondent says that he used this list and, through a process of trial and error, eventually determined how to manufacture the Roadsaver product. He says he did this without financial support from the applicant and using his own resources. The respondent says that in the circumstances he developed the formula independently of the applicant and not for the applicant's benefit.
- [14] The contention is entirely implausible. The respondent acknowledges that Mr Botes, who, as I have said, was the applicant's main shareholder, provided him with at least the starting point for recreating the formula in the form of the list of chemicals. The respondent acknowledges that he was an employee of the applicant at this time. The respondent also himself says that at the

time Mr Botes provided him with the original formula the applicant was facing increasing prices from its then supplier, Pilot, which was making its business unprofitable.

- [15] The respondent's version in his answering affidavit that he approached Mr Botes specifically to ask for the names of the chemicals used in the Roadsaver product so that he could independently recreate the formula for his own account, is also inconsistent with what he said in his letter of resignation in September 2020, a copy of which the applicant attached to its founding affidavit, and which the respondent did not deal with in his answering affidavit. In that letter, the respondent indicated that during the course of a visit he made to Mr Botes, Mr Botes gave him the chemical ingredients and asked him if he could do something with them.
- [16] In these circumstances, the respondent's suggestion that Mr Botes assisted him to develop the formula for his own benefit and not for the applicant is simply not credible.
- [17] The respondent's allegation that Pilot is the lawful owner of the Roadsaver product requires more careful consideration. As I have indicated, Pilot is the firm that historically supplied the Roadsaver product to the applicant.
- [18] The respondent attaches two documents to his answering affidavit in support of his allegation. The first is an email from Mr Johnny Pillay, the sole member of Pilot, dated 31 October 2012 in which Mr Pillay refers to Roadsaver as a product "that I have formulated".
- [19] The second is a letter dated 11 July 2017 from Da Silva Attorneys to Mr Pillay. The letter indicates that it encloses "a draft response to Cornelius Botes which he can then forward on his attorney". There is no dispute that "Cornelius Botes" is Mr Botes, the applicant's main shareholder. The draft response, to be sent by Da Silva Attorneys on behalf of Pilot to Mr Botes, is headed "Re: Pilot Lubricants CC/Universal Blending" and indicates that Da Silva Attorneys have been requested to assist Mr Pillay regarding a draft agreement, "prepared by your offices and/or your attorneys". The draft agreement itself is attached to the draft response. It is an agreement of sale of Pilot's intellectual property rights in the Roadsaver product to the applicant.
- [20] The draft response records that there are various aspects of the agreement that need to be changed. It records that the first major issue that needs to be addressed is that Mr Pillay "in his capacity as a member of a close corporation and in his personal capacity is the owner of the product and the intellectual Property and this should be reflected accordingly". The draft agreement records in this regard in paragraph 2.1 that the applicant has "co-developed" the Roadsaver product and in paragraph 2.3 that the applicant and Pilot "have jointly developed and jointly own the Intellectual Property Rights" to the Roadsaver product. The draft response indicates that paragraph 2.1 "needs to be deleted in its entirety as [the applicant] has not been a co-developer as alleged" and that paragraph 2.3 must also be amended.
- [21] The respondent's claim that Pilot is the lawful owner of the Roadsaver product is consistent with his allegation in his answering affidavit that the reason he and Mr Botes discussed recreating the Roadsaver formula in 2016 was because Pilot had increased its prices for the product to the extent that it was no longer profitable for the applicant to continue purchasing the product. If the applicant was the owner of the product then, on the face of it,

it would not have needed to recreate the formula in order to escape its difficulty. It could simply have found another manufacturer and provided that manufacturer with the formula to produce the product.

- [22] The draft agreement also supports the respondent's assertion in the answering affidavit that the applicant initially considered buying the formula from Pilot, but could not reach agreement on an acceptable price.
- [23] Finally, the respondent's claim that the Roadsaver product is owned by Pilot is also consistent with what he asserted at in his letter of resignation in September 2020.
- [24] The simplest way for the applicant to have dealt with the respondent's claim would have been for it to procure an affidavit from Pilot confirming that it was not the owner of the product and to have put this up along with its replying affidavit, delivered some two months after the answering affidavit. The applicant did not do so and provided no explanation for this omission.
- [25] The applicant also did not deal adequately in the replying affidavit with the documents put up by the respondent or the claims he made in relation to ownership in his answering affidavit. The applicant did not deal at all with the contents of Mr Pillay's email of October 2012, while its only response to the letter from Da Silva Attorneys to Mr Pillay in July 2017, and the attached draft response and agreement, was to say that it had never before seen these documents and to point out that clause 2.3 of the draft agreement recorded that the formula for the Roadsaver product was jointly owned by the applicant and Pilot. The applicant did not though deal with the fact that the draft response recorded that this clause needed to be amended. The applicant also did not address at all the substance of the respondent's assertion, that in 2017 the applicant was struggling with high prices from Pilot and engaged in discussions with Pilot to purchase the formula for the Roadsaver product from Pilot.
- [26] The applicant also went on to say in the replying affidavit that Pilot "only supplied a portion of the formula, which was secret", a statement that appears to suggest that Pilot owned at least some portion of the formula and for which counsel for the applicant could not provide any other explanation.
- [27] The applicant did attach to its replying affidavit an undated document on a Pilot letterhead headed "certificate of quality", in which it is stated that Pilot "are the developers, blenders and manufacturers of the cold bitumen product 'Roadsaver', used in the sealing of road potholes and cracks. We manufacture on behalf of Universal Blending (Pty) Ltd, who are the owners, distributors and exporters of the product". The applicant provided no explanation though as to when this document was created, or the circumstances surrounding its creation, or any proof that it even in fact emanated from Pilot.

- [28] What the document does indicate is that Pilot developed the Roadsaver product. Documents attached to the founding affidavit by the applicant reflect the same claim. For example, the applicant attached a letter on a Pilot letterhead, which is also undated but which the applicant says was prepared in October 2004, which records that “CA Botes approached Mrs EJ Van Assen (see CV on p36) to assist us under contract to develop a cold bitumen asphalt crack filler” (my underlining). The letter suggests that “should you require more information please do not hesitate to contact us at the above company”.
- [29] Curiously, the applicant also attached to the founding affidavit another letter on a Pilot letterhead, also undated, which is identical to the letter I have just discussed save that a paragraph has been inserted at the commencement of the letter recording: “Pilot Lubricants was involved in the development of roadfix cold mix pothole filler. We developed roadfix in conjunction with CSIR (Council for Scientific and Industrial Research), by supplying the secret formula and improved it all the time in collaboration with the owners, Universal Blending Pty Ltd”. Although it is suggested in the founding affidavit that this letter was prepared at around the same time as the first letter, this cannot be correct, because it is common cause that the applicant was only registered as a company in 2012, and so could not have been mentioned by name in a letter drafted in 2004. No other explanation is provided as to the circumstances in which this second letter was drawn up, or who prepared it, or how it came into the applicant’s possession.
- [30] To be clear, there is also support in the papers for the applicant’s version that is the owner of the Roadsaver product. The letter I have just mentioned says this in terms, as does the letter on a Pilot letterhead attached to the replying affidavit that I have discussed above. Other letters attached to the founding affidavit, including a letter from the CSIR to Roadfix International, but marked for the attention of Mr Botes, also seem to confirm Mr Botes’ role in developing the product from 2004. The respondent’s own allegations in his answering affidavit confirm at least Mr Botes’ knowledge of some part of the formula for manufacturing the Roadsaver product, because Mr Botes provided this to the respondent.
- [31] There is also evidence that the applicant represented to third parties that it owned the Roadsaver product, for example its discussions with representatives from Hi-Eco-Teck (Pty) in 2019 and its application to Agreement South Africa (Pty) Ltd for certification of the product around the same time, both of which are discussed in the founding affidavit and are not disputed in the answering affidavit.
- [32] There is not though any clear explanation in the founding affidavit as to how the applicant acquired ownership of the Roadsaver product that satisfactorily resolves the evidence to the contrary that I have identified above. The facts relating to the acquisition of ownership are dealt with vaguely by the applicant, insofar as they are dealt with at all. The deponent to the founding affidavit alleges, for example, that the applicant developed the Roadsaver product from 2004. But the applicant did not exist in 2004. It was only registered as a company in 2012. The deponent to the founding affidavit makes the bare allegation that the applicant was

“then known as Roadfix International”, but this also does not appear to be correct. Roadfix International is clearly a separate firm from the applicant, albeit that Mr Botes appears to have been the driving force behind both.

- [33] Finally, it is true that the respondent has admitted that he provided the applicant with the formula he had developed at a meeting in November 2019 and signed various documents on that date in which he acknowledged that the applicant owned the formula. The respondent asserts, however, that the statements in these documents are not true and that he was coerced and intimidated into signing the documents, a claim that I certainly cannot dismiss simply on the papers before me.
- [34] This brings me back to the important point. I am not required in this application to try and weigh up the probabilities of the parties’ respective versions. I am required to determine only whether the respondent’s version is so improbable that it falls to be rejected out of hand. Having regard to the facts I have set out above, I do not consider this to be the case. It may well be that the applicant has answers to all of the concerns I have raised above. But they do not appear on the papers before me, and in the absence of such answers I cannot conclude that the respondent’s version is so far-fetched that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.
- [35] In the circumstances, for purposes of determining the applicant’s right to the final relief it seeks in this application, I must accept the respondent’s version that the Roadsaver product was owned by Pilot and find that the applicant has not proved that it is the owner of the Roadsaver product.

Conclusion

- [36] I have found that the applicant has not established that it is the owner of the Roadsaver product. Counsel for the applicant accepted in oral argument before me that all of the relief sought by the applicant is predicated on a finding that it is the owner of the product. In the circumstances, it follows that the applicant has not established a right to any of the relief sought in the notice of motion.
- [37] Having reached this conclusion, it is not necessary for me to consider the respondent’s further objections to the relief sought, namely that it is too vague to be enforceable and that he had already handed over the formula rendering the relief requiring him to do so superfluous. It is also not necessary for me to consider whether I should admit the supplementary affidavit delivered by the respondent in November 2022, which admission the applicant opposed, although for completeness I note that the respondent did not bring any formal application for the admission of that affidavit, and, in any event, I do not consider that its contents are relevant to any of the issues to be determined in the application, on which basis I would not have been minded to admit it.

[38] Both parties sought costs in the event that they were successful and there is no reason why costs of the application should not follow the result. Although the respondent suggested faintly that I should make a special order of costs against the applicant, no proper basis was advanced for such an order and I do not consider that there is one.

[39] In the circumstances, I make the following order:

1. The application is dismissed;
2. The applicant is to pay the respondent's costs.

MA WESLEY

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to Case Lines and by release to SAFLII. The date and time for hand-down is deemed to be 24 March 2023.

Appearances:

On behalf of the applicant:

Adv M Coetzee

Instructed by: Vercueil

Attorneys

On behalf of the respondent:

Mr CE Boden of JJS Manton Attorneys

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