IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GQEBERHA)

Case No.: 438/2022

Date heard: 17 March 2022
Date delivered: 28 June 2022

In the matter between:

KALLVEST (PTY) LTD	First Applicant
KALLVEST EC (PTY) LTD	Second Applicant
KALLVEST COASTAL CLEANING (PTY) LTD	Third Applicant
KALLVEST COASTAL SECURITY (PTY) LTD	Fourth Applicant

and

NEIL LAWRENCE HARVEY	First Respondent
HARVAN SERVICES (PTY) LTD	Second Respondent

JUDGMENT

ZIETSMAN AJ:

[1] The applicants approached this court, on an urgent basis, for an interim interdict and further ancillary relief, pending an action to be instituted.

[2] The applicants, in essence, allege misuse of confidential information by the respondents in order to advance their own business interests at the expense of the applicants. In other words, a form of unlawful competition.

[3] The first to fourth applicants are part of the Kallvest Group of Companies, of which the first applicant is the holding company. The first respondent ("Harvey") is the erstwhile regional manager of the second applicant. Harvey is the sole director of the second respondent.

Urgency

[4] The application was served on the respondents on 17 February 2022, calling upon them to file their notice of opposition by no later than 21 February 2022 and answering affidavit by 1 March 2022. The matter was initially set down for hearing on Tuesday, 22 February 2022, but in the event of it being opposed, it was to be heard on Tuesday, 8 March 2022. The respondents' notice of opposition was duly served and filed on 21 February 2022.

[5] Consequently, on 22 February 2022, the matter was postponed to 8 March 2022 and the costs occasioned by the postponement reserved. On 8 March 2022 the matter was, by agreement, postponed to 15 March 2022 and time periods agreed for the filing of answering and replying affidavits, and heads of argument. The costs were reserved.

[6] On 15 March 2022 I heard argument on urgency, which included preliminary argument on the merits of the application. I stood the matter down to 17 March 2022 for argument on the merits of the application. I indicated that my reasons will follow in the judgment.

[7] In *Commissioner, South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership and Others*[1] Cameron JA (as he then was) said as follows:

> "*Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the Rules of Court permit a Court (or a Judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This, in effect, permits an urgent applicant, subject to the Court's control, to forge its own Rules (which must 'as far as practicable be in accordance with' the Rules). Where the application lacks the requisite element or degree of urgency, the Court can, for that reason, decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the Court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance.*"

[8] "An applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."[2]

[9] The court then exercises a judicial discretion with regard to which deviations it will tolerate in a specific case.

[10] The applicants refer to the need to protect their interests, from unlawful competition, before the respondents approach all their clients; contend that the respondents have already taken 40% of the applicants' business in the Eastern Cape; and that the respondents refuse to provide an undertaking not to approach the applicants' remaining clients. In addition, they contend that they fear job losses, or even closure of their business, and it is cold comfort to the applicants that they will have a damages claim in due course. In my view, the circumstances as set out in

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[1] 2006 (4) SA 292 (SCA) at para [9].
[2] Uniform Rule 6(12)(b).

the applicants' founding affidavit, which allegedly render the matter urgent, do not pass muster. This will become apparent below.

[11] Although the respondents contend that the applicants fail to make out a case for urgency, the parties' respective counsel were *ad idem* that the matter be argued since all papers and heads of argument were filed.

[12] The circumstances relating to urgency and the merits of the matter are, in my view, linked. This was also the sentiment conveyed by the respondents' counsel in argument on urgency.

[13] In order to ensure an expeditious[3] and inexpensive decision, I proceeded to hear argument on the merits of the matter. I am fortified in my decision since it became apparent during argument on urgency that none of the applicants appeared to have made out a case for the relief which they seek against the respondents, as will become apparent later in this judgment.

Factual background

[14] The applicants and respondents are all involved in the security and cleaning industry, some longer than others.

[15] The first applicant has been trading since 2004 and the second applicant since 2013. The third and fourth applicants only commenced trading in October 2021, after having taken over the business of the second applicant.

[16] Harvey has been in the security and cleaning industry for approximately 22 years. He attended to the security for various buildings and townhouse complexes, managed by Trafalgar Property Management, from 1998 to 2002. In 2004 he started his own security and cleaning business. Initially as sole proprietor, but in 2008 he registered a close corporation, Iqela Cleaning and Security CC ("Iqela").

[3] As expeditiously as possible.

[17] During Harvey's prior employment, with Trafalgar Property Management, and when he ran his own business, he acquired all of the necessary skills and training in relation to the security and cleaning industry, and, in general, how to run a business.

[18] It is common cause that the security industry is highly regulated. A service provider must be registered with the Private Security Industry Regulatory ("PSIRA"). PSIRA imposes minimum wages to be paid to security guards according to their different grades. The cleaning industry is not as regulated, but the minimum wages are determined by bargaining councils.

[19] Service providers accordingly secure business by competing on pricing and their quality of service delivery.

[20] During 2013 Pierre Charl van Wyk ("Van Wyk)", as managing director of the first applicant, approached Harvey with the proposal to join forces in the Eastern Cape. Van Wyk knew Harvey since they attended high school together. At that stage, the first applicant was involved in the security and cleaning industry in Johannesburg. Van Wyk's idea was to increase the first applicant's footprint.

[21] The proposal was that the second applicant be established, that it would purchase the business and/or clients or existing contracts of Iqela and the shares in the second applicant be allocated as follows, 60% to the first applicant and 40% to Harvey. Harvey would be employed by the second applicant as its regional manager.

[22] Importantly, it was made clear to Van Wyk that neither Harvey nor Iqela would be prepared to be restrained from carrying on business in the security and cleaning industry since that is the only industry which Harvey knew and he had no assurance that the business would work out.

[23] Accordingly, during January 2013 a shareholders agreement, in respect of the second applicant, was entered into between the first applicant and Harvey.

[24] During January 2014 Iqela, duly represented by Harvey, sold its "Business Assets", defined as "Client List of [Iqela]", to the second applicant. The first applicant paid Iqela approximately R350 000.00 for the purchase of the Client List, and the 40% shareholding in the second applicant was, allegedly, allocated to Harvey.

[25] Having regard to the agreement relating to the sale of the Client List (of Iqela), the shareholders agreement and the terms of Harvey's employment with the second applicant,[4] the following appears to be common cause:

25.1. None of the aforementioned agreements contain provisions restraining either Harvey or Iqela from conducting business, or being employed in the security and cleaning industry, albeit in competition to the second applicant, or not.

25.2. All confidential information of Iqela, which included all know-how and specifications, remained the exclusive property of Iqela. This included, *inter alia*, pricing of services provided to its clients, identity of suppliers and terms upon which the services were rendered.

25.3. Confidential information known to Harvey prior to the conclusion of the shareholders agreement, remained his exclusive property.

25.4. None of the agreements contain a restraint of trade clause.

[26] The second applicant proceeded to trade in the security and cleaning industry.

[27] In respect of the second applicant, there was no confidential marketing strategy to secure new business. Harvey was not involved in securing any of the national clients, whereas Van Wyk was.

[28] Only four of the clients[5] transferred from Iqela to the second applicant remained as clients of the second applicant, namely Pagdens Attorneys, Harvest

[4] There is no employment agreement attached to the papers.

Christian Ministries, Pier 14 and Bidfood. The remaining twelve clients were introduced by Harvey to the second applicant through personal relationships which he had with their representatives or through friends.

[29] The relationship between Harvey and Van Wyk deteriorated over time.

[30] During mid 2021 Harvey became concerned when Van Wyk informed him that he would be splitting the business of the second applicant in order to achieve a saving. The rate for Workmen's Compensation for cleaning employees was apparently substantially less than for security employees. Van Wyk's plan was to transfer the security business of the second applicant to the fourth applicant and the cleaning business to the third applicant. The split was apparently prompted by the second applicant owing the Workmen's Compensation Commissioner approximately R500 000.00. Harvey was deeply concerned and alarmed by these developments.

[31] With regard to Harvey's shareholding, Van Wyk's proposal was that the value of the second applicant's business would be used to determine Harvey's percentage shareholding in the third and fourth applicants. Van Wyk pressured Harvey to agree to a figure since he wanted the plan to be implemented by 1 October 2021. Harvey realised that he would effectively be taking up a minority stake in two companies. The debt owed to the Workmen's Compensation Commissioner was also of great concern to Harvey. He did not want to be involved in proposals which could be conceived as circumventing liabilities to the State.

[32] Therefore, during August 2021 Harvey decided to rather start his own business. He commenced with applying for the second respondent's registration with PSIRA, obtaining quotes for insurance and so forth.

[33] On 2 September 2021 Harvey informed Van Wyk that he would not be taking up any shares in the third and fourth applicants, but that he would be leaving the second applicant. Harvey proposed that he takes Bidfood and Pier 14, which, at that stage, constituted 40% of the turnover of the second applicant. This, according to Harvey, would have been in lieu of his 40% shareholding in the second applicant.

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[5] The applicants attached a list of sixteen clients to their notice of motion.

[34] Van Wyk, however, proceeded with the transfer of the business to the third and fourth applicants, without the consent and approval of Harvey, bearing in mind that he was a 40% shareholder and that such decision required the consent of 75% of the shareholders of the second applicant.

[35] In October 2021, Van Wyk wanted to meet with Harvey in order to discuss his proposal and the business of the second applicant. Harvey did not feel comfortable to meet since he was uncertain about his long-term commitment to the second applicant.

[36] On 15 November 2021, Van Wyk addressed an e-mail to Harvey, stating that the proposed splitting would not work since a client, Lactalis, had been lost and the shareholders agreement does not provide for it. Van Wyk proposed that Harvey buys the shares of the first applicant, in the second applicant, for R1.1 million. By then the business of the second applicant had already been transferred to the third and fourth applicants and they were invoicing clients directly.

[37] During December 2021, the second applicant was deregistered with PSIRA, and the third and fourth applicants registered.

[38] On 1 January 2022, Harvey tendered his resignation from the second applicant. On the same day, Pier 14 and Bidfood's contracts for security and cleaning services were terminated and Harvey was informed that they would be using the second respondent's services, with effect from 1 February 2022.

[39] Van Wyk proceeded with a notice to Harvey to attend a disciplinary hearing on 7 January 2022, despite the fact that Harvey was no longer employed by the second applicant. This elicited a response from Harvey in that his attorney of record addressed a letter to Van Wyk. They, *inter alia*, placed on record that Harvey is not bound by any covenant in restraint of trade and is free to establish a business in competition with the second applicant in order to earn a livelihood. Further, if Van Wyk contends otherwise, he should state what the basis for such contention is. They also requested copies of the 2021 financial statements of the second applicant

and demanded that Van Wyk must stop defaming Harvey. Van Wyk neither responded to the letter nor did he provide a copy of the financial statements.

[40] On 14 January 2022, Harvey received a demand, from the applicants' attorneys of record, that he must desist from approaching its clients and that that was "*in contravention of the rules of unlawful competition*". The letter neither mentions that Harvey is in possession of any confidential information nor did it demand that he returns such information, if any, in his possession.

[41] The applicants thereafter proceeded, in February 2022, to launch the application, on an urgent basis.

The relief

[42] The applicants seek the following relief against the respondents:

> "*1. Condoning the applicants' non-compliance with the Rules relating to forms, service and time periods and allowing the matter to be heard as one of urgency …*
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> *2. Pending the outcome of an action to be instituted by the applicants against the respondents within one (1) month of the Order, an order in the following terms:*
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> *2.1. The respondents are interdicted, prevented and restrained from:*
>
> *2.1.1. utilising the applicants' confidential information, inclusive of the applicants' business methods; the applicants' pricing methods (including, but not limited to, the details of cost prices and mark-up); products, suppliers, and know-how, for the benefit of the respondents or any other person;*
>
> *2.1.2. approaching, directly or indirectly, or assisting any other person in approaching, directly or indirectly, the applicants'*

clients situated in the Eastern Cape – a complete client list is attached …;

2.1.3. doing business with, and servicing, the applicants' erstwhile clients, Bidfood and Pier 14; and

2.1.4. competing unlawfully with the applicants.

2.2. The respondents are ordered to surrender all confidential information in their possession relating to the applicants' business, such information to include but not be limited to:

2.2.1. all of the applicants' customer and supplier lists, including the contact details thereof;

2.2.2. all pricing details and product lists pertaining to the services offered by the applicants; and

2.2.3. all documents containing details of the applicants' business model.

2.3. That the respondents are ordered to delete, in the presence of the applicants' representatives, of all the applicants' confidential information on any computer hardware possessed by the respondents.

3. Costs of the Application."

Legal framework

[43] The relief sought by the applicants is analogous to that of a temporary interdict, which requires them to show: (1) that the right which is the subject-matter of the main action and which they seek to protect is clear or *prima facie* established though open to some doubt; (2) if the right is only *prima facie* established, that there is a well-grounded apprehension of irreparable harm to the applicants if the interim

relief is not granted and they ultimately succeed in establishing their right; (3) that the balance of convenience favours the granting of the interim relief; and (4) that the applicants have no other satisfactory remedy.[6]

[44] The court must take into account the allegations made by both the applicant and the respondent in deciding whether a *prima facie* right has been established. It is not sufficient that the applicant has in affidavits, taken alone, made out a *prima facie* case.[7]

[45] The following approach, as set out by Clayden J in *Webster v Mitchell*,[8] has been followed by our courts for more than 70 years:

> "*The use of the phrase 'prima facie established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.*"

[46] The approach as set out in *Webster*, however, became subject to a qualification as set out in *Gool v Minister of Justice*,[9] as follows:

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[6] *Bandle Investments (Pty) Ltd v Registrar of Deeds and Others* 2001 (2) SA 203 (SE) at 214I – 215B; see also *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Spur Steak Ranches Limited and Others v Saddles Steak Ranches, Claremont, and Another* 1996 (3) SA 706 (C) at 714B; and more recently, *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) at para [49].
[7] Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5 ed at 1460.
[8] 1948 (1) SA 1186 (W) at 1189.

"*With the greatest respect, I am of opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to that qualification, I respectfully agree that the approach outlined in Webster v Mitchell, supra, is the correct approach for ordinary interdict applications.*"

[47] The position in relation to the granting of interim interdicts has been succinctly summed up in *Olympic Passenger Services (Pty) Ltd v Ramlagan*[10] as follows:

"*It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.*"

[48] With regard to an employee leaving his employment, the following is applicable:

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[9] 1955 (2) SA 682 (C) at 688E – F.
[10] 1957 (2) SA 382 (D) at 383C – G.

"*An employee who by virtue of his employment would be in a position to exploit on his own behalf his employer's customer connections is free on leaving his employment, subject to certain limitations, to compete with his erstwhile employer for the business of the latter's customers unless restrained by contract from doing so.*"[11]

[49] In *Roberts v Etwell's Engineers Ltd*[12] Lord Denning MR said:

"*It is settled law that a servant, having left his master's service, may, without fear of legal consequences, canvass for the custom of his late master's customers, whose names and addresses he has learned during the period of his service, so long as he does not take a list of them away with him .... All the more so, an agent may do so, especially when the customers have been introduced by the agent himself. In the absence of express restriction (which must be reasonable) he cannot be restrained from canvassing the customers for a new principal.*"

[50] Also, in *Meter Systems Holdings (Pty) Ltd v Venter & Another*[13] categories of confidential information were referred to, which list is not exhaustive, *inter alia*:

"*Customer lists drawn up by a trader, and kept confidential for the purposes of his own business, contain confidential information, the property of the trader. The legal protection afforded to this type of confidential information is limited by the fact that the law, whilst prohibiting an employee from taking his employer's customer list, or deliberately committing its contents to memory, nevertheless recognises that, on termination of an employee's employment, <u>some knowledge of his former employer's customers will inevitably remain in the employee's memory</u>; and it leaves the employee free to use and disclose*

[11] *Reeves and Another v Marfield Insurance Brokers CC and Another* 1996 (3) SA 766 (A) at 772E – F (footnotes omitted).
[12] [1972] 2 All ER 890 at 894; quoted with approval in *Freight Bureau (Pty) Limited v Kruger and Another* 1979 (4) SA 337 (W) at 341E – F.
[13] 1993 (1) SA 409 (W) at 428E – F (references omitted).

such recollected knowledge, in his own interests, or in the interests of anyone else, including a new employer who competes with the old one."[14]

[51] I bear the above principles in mind.

The applicants

[52] Before I deal with whether the applicants have satisfied the requirements for an interim interdict, it is necessary to first deal with the various applicants.

[53] The first applicant is a holding company which does not trade. It is common cause that other than the shareholders agreement, between the first applicant and Harvey, no other contract exists between them. Significantly, the shareholders agreement expressly reserves ownership of confidential information possessed by Harvey prior to the conclusion thereof, to him.

[54] The second applicant has been deregistered from PSIRA. The respondents contend that since the business of the second applicant has been transferred, and it is incapable of rendering private security services, there is no legal basis upon which the respondents could be competing unlawfully with the second applicant since it, in fact, ceased doing business. The second applicant also failed to disclose the terms upon which the business were transferred.

[55] It is also common cause that no contract exists between either or both of the respondents and the third and fourth applicants. The business operated by the second applicant, of which Harvey is/was a 40% shareholder, was transferred to the third and fourth applicants on 1 October 2021, without Harvey's consent. The third and fourth applicants are invoicing the erstwhile clients of the second applicant directly for services previously rendered by the second applicant to such clients.

[56] Mr Nepgen, who appeared for the respondents, submitted that the applicants set out no basis for the relief sought by the first, third and fourth applicants in their founding affidavit and, therefore, the application insofar as it relates to the first, third

[14] Own emphasis added.

and fourth applicants ought to be dismissed with costs. The same argument was advanced in respect of the second applicant.

[57] Mr Bands, who appeared for the applicants, conceded that the first and second applicants do not persist with any relief.

[58] The question which then remains to be answered is, have the third and fourth applicants made out a case for the relief which they seek.

Discussion

[59] The applicants contend that the respondents are in possession of confidential information, of the applicants, and have "*a right not to be competed with unlawfully*."

[60] Misuse of confidential information to advance one's own business interests and activities at the expense of a competitor is a form of unlawful competition.

[61] It is common cause that Harvey is not in possession of any information capable of return. That disposes of the relief sought in paragraphs 2.2 and 2.3 of the notice of motion.

[62] What then remains is the interdict to prevent and restrain the respondents from approaching the third and fourth applicants' clients in the Eastern Cape; doing business with Bidfood and Pier 14; competing unlawfully with the third and fourth applicants; and costs.

[63] The alleged confidential information is that of the second applicant. The respondents contend that the third and fourth applicants cannot have a proprietary interest in the second applicant's clients. It was submitted, on behalf of the respondents, that, therefore, the third and fourth applicants cannot be granted an interdict pending a damages claim. I agree with the respondents, but if I am wrong I proceed to deal with such relief. In any event, the applicants merely contend that they have "*a claim for unlawful competition*", without providing any further details. Without such details, I am unable to consider their prospects of success.

[64] Section 22 of the Constitution provides:

> "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law".

[65] In *Phumelela Gaming and Leisure Ltd v Gründling and Others*[15] the court held that:

> "*The Bill of Rights protects the right to property, and also promotes and protects other freedoms, notably in this case, the right to freedom of trade. The consequence of the right to freedom of trade is competition.*"

[66] The Sale of Business Asset Agreement (Iqela) and the Shareholders Agreement, referred to above, contain no express stipulation relating to the use of confidential information. The applicants rely on the allegation that the conduct of the respondents *per se* amounts to unlawful competition.

[67] The starting point would therefore be to determine whether the information in question is truly of a confidential nature. If it is not, it is not protected. That would, in my view, be the end of the matter since the applicants would then have failed to establish the first requirement, a *prima facie* right.

[68] It is necessary to have regard to when information is considered to be confidential. For information to be considered confidential, it must be (i) useful – that is, if it involves and is capable of application in trade or industry; (ii) (objectively determined) not public knowledge or public property but known to a restricted number of persons; and (iii) objectively of economic value to the applicant.[16]

[69] Information does not become confidential merely because an applicant contends that it does, or, perhaps, even if an applicant believes it to be so. An

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[15] 2007 (6) SA 350 (CC) at para [33] (footnote omitted).
[16] *Alum-Phos (Pty) Ltd v Spatz* [1997] 1 All SA 616 (W) at p 623.

applicant must set out the facts from which the conclusion could be arrived at that the information is indeed confidential.[17]

[70] In its notice of motion the applicants refer to "*applicants' confidential information, inclusive of the applicants' business methods; the applicants' pricing methods (including, but not limited to, the details of cost prices and mark-up); products, suppliers, and know-how …*".

[71] However, during argument on behalf of the applicants, it became apparent that it is only the customer list and pricing which the applicants contend amount to confidential information. This is also apparent from the applicants' replying affidavit, which refers to "*pricing and service specifications*".

[72] It is common cause that the information of clients, whom a service provider renders services to, is intentionally placed in the public domain by all service providers in the security and cleaning services industries. This is also the case with the applicants. They display the names of some of their clients on their website. In addition, security and cleaning personnel are identifiable by their uniforms, which are used, *inter alia*, for purposes of marketing.

[73] With regard to the customer list, as already mentioned above, it is common cause that Harvey is not in possession of any information capable of return.

[74] Regardless, confidential information known to Harvey prior to the conclusion of the shareholders agreement, remains his exclusive property. Also, none of the agreements contain a restraint of trade clause.

[75] What remains then, is the pricing.

[76] It is common cause that the industry is not complex and pricing methods are uniform and simplistic. The applicants provide no explanation of what pricing and service specifications entail. As already mentioned, PSIRA imposes minimum wages to be paid to security guards according to their different grades. The cleaning

[17] *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) at 87A – C; and see *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA) at para [15].

industry is not as regulated, but the minimum wages are determined by bargaining councils.

[77] Therefore, in my view, the pricing appears to be so standardised and of such general application that it cannot justifiably be regarded as confidential.

[78] It is common cause that Harvey neither approached nor requested either Bidfood or Pier 14 to do business with him or terminate their agreements with the second applicant. Both were informed in December 2021 that Harvey would be tendering his resignation from the second applicant in January 2022 and that he intended to open up his own business as from 1 February 2022.

[79] Representatives of Bidfood and Pier 14 deposed to affidavits, confirming that neither entities would do business with the applicants, even if the respondents were prevented from doing business with them. In fact, the representative of Pier 14 even went as far as stating that Pier 14 would never do business with the applicants again.

[80] The only clients of the second respondent are Bidfood and Pier 14.

[81] I agree with the respondents contention that the applicants "*seek under the guise of unlawful competition an interdict to impose a restraint of trade on [Harvey]*" for an undetermined period of time. That would, in my view, inordinately hamper the respondents' right to freedom of trade and be against public policy.

[82] The following, as was held in *Motion Transfer & Precision Roll Grinding CC v Carstens and another*,[18] is apposite:

> "*In the present case there is no proof whatsoever that the respondents stole the applicant's customer list or even memorised it without purloining the actual document. The most that can be said is that the first respondent in particular, on his own admissions, learned in the course of his employment the identity of a number of the applicant's clients and that respondents have, since they*

[18] [1998] 4 All SA 168 (N) at 177.

commenced trading in competition with the applicant, solicited work from some of those clients. In my view, it has not been shown in the first place that their approach to those clients was because those clients featured on the applicant's customer list; and, secondly, even if the first respondent originally learned of their identity because they were on the list, there is nothing to show that his subsequent dealings with them were not of such a nature as to render it inevitable that he would remember them and carry away their identity in his head as potential customers when he left the applicant's employ. I accordingly do not think that the applicant has proved, even prima facie, that his conduct in approaching them was unlawful; and it was, in my view, no more than a legitimate exercise of his right freely to compete with the applicant after he left its employ. To hold that under those circumstances he should be precluded from approaching any potential customer who happened to have featured on the applicant's customer list would be unduly to stultify that right and against public interest."

[83] Also, in *Townsend Productions (Pty) Ltd v Leech and others* Erasmus AJ (as he then was) said as follows:[19]

"*I am, however, in agreement with Page J in Motion Transfer & Precision Roll Grinding CC v Carsten (supra) at 176h that the approach suggested by Van Heerden & Neethling Unlawful Competition at 237–238 is to be preferred. On the approach suggested by the learned authors, it must first be determined, with reference to the requirements of confidentiality and economic value, whether the information concerned actually constitutes a trade secret. If the information does not constitute a trade secret, cadit quaestio: the employee is entitled to use it. If the information is found to be a trade secret, the court must pass a value judgment as to whether the use of the information by the ex-employee is justified despite its confidential nature. Such judgment involves a weighing up of the conflicting interests of the employer and ex-employee employing the criterion of reasonableness or the boni mores in the light of all the relevant circumstances of the case. The matter which the applicant seeks to protect is not confidential or secret; in other words, the applicant has not*

[19] [2001] 2 All SA 255 (C) at pp 273 – 274 (also reported in 2001 (4) SA 33(C) at 54J-55D).

passed the first hurdle of the test enunciated by Van Heerden & Neethling Unlawful Competition at 237–238."

[84] Accordingly, I am of the view that the applicants have failed to establish even a *prima facie* right although open to some doubt, and therefore the application must, on this basis alone, fail.

[85] If I am incorrect in concluding that the applicants have failed to establish a *prima facie* right, the balance of convenience favours the refusal of the interim relief. I say so because the prejudice to the applicants in refusing the relief, and in the event of them proving successful in their claim (of which no details, save for the bald allegation of unlawful competition, have been given), is that it will in the interim have to compete with the second respondent, on the basis of them having unlawful use of confidential information. Although its trading activities may be adversely affected, it will not be put out of business. On the other hand, if the interim relief is granted, and the respondents are ultimately successful in defending an action (yet to be instituted), they would in the interim have been effectively precluded from trading. This prejudice, in my view, far outweighs that which would be suffered by the applicants if the relief is refused.

Conclusion and costs

[86] The information which the applicants seek to protect is not confidential. Therefore, they have not passed the first hurdle of the test. In other words, the applicants have not demonstrated a *prima facie* right for the relief which they seek. Nor have they satisfied the other requirements for interim relief.

[87] At the hearing of the matter it was conceded that the first and second applicants are not seeking any relief.

[88] The third and fourth applicants, for the reasons as set out above, have not made out a case for the relief which they seek.

[89] Although the respondents' counsel submitted that costs should be awarded on the attorney and clients basis, no such relief is sought in the papers.

[90] Accordingly the following order will issue:

90.1. The application is dismissed.

90.2. The applicants are ordered to pay the respondents' costs jointly and severally, the one paying the other to be absolved.

T. Zietsman
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicants:	Adv D S Bands, instructed by Lawrence Masiza Vorster Inc., Gqeberha
For the Respondents:	Adv J J Nepgen, instructed by Joubert Galpin Searle Inc., Gqeberha