IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 09/35493

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

26/02/2010 **FHD van Oosten**
SIGNATURE

In the matter between

INSIMBI ALLOY SUPPLIES (PTY) LIMITED	**FIRST APPLICANT**
INSIMBI THERMAL INSULATION (PTY) LTD	**SECOND APPLICANT**
INSIMBI TECHNICAL TEXTILE EMPLOYEES (PTY) LTD	**THIRD APPLICANT**

and

VINAYAGAM MUNSANY	**FIRST RESPONDENT**
L&S THERMAL PRODUCTS CC	**SECOND RESPONDENT**
MTHOMBENI TRADING CC	**THIRD RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] In this application the applicants seek an order declaring the first respondent to be in contempt of court in respect of his alleged breach of an order of this court.

[2] For a proper understanding of the issues requiring determination it is necessary to briefly outline the salient facts of this matter. The applicants are all interrelated companies. The second applicant and the second and third

respondents (who are nominal parties to this application) are rival traders and direct competitors in the field of thermal insulation products. The first respondent was employed by the second applicant until July 2009. He was also a shareholder in the second applicant. The first and third applicants were also shareholders in the second applicant. In terms of a shareholders' agreement, the first respondent had undertaken in favour of the second applicant (as his former employer) and the first applicant (as co-shareholder in the second applicant) not to take up employment with a competitor of the second applicant.

[3] The first respondent with effect from 1 August 2009 took up employment with the second respondent. The applicants regarded the first respondent's conduct as a breach of the shareholders' agreement, which prompted them to launch an urgent application in this court for interdictory relief against the first respondent. The first respondent filed a notice of intention to oppose, and gave notice that certain legal points would be argued but did not file an answering affidavit. The matter proceeded to trial and on 4 September 2009, by agreement between the parties, Bregman AJ granted an order, the relevant part of which reads as follows:

> '*The first respondent is interdicted and restrained:*
>
> 1.1 …
>
> 1.2 *Until 10th July 2010 from enticing or soliciting or attempting to entice or solicit whether directly or indirectly any customer of the Second Applicant or any of its subsidiaries from time to time including but not limited to those customers reflected in annex(sic)"A" and regardless of whether those customers were existing customers of the Second or Third Respondent as at 10th July 2009.'*

(The order)

[4] In the present application, the applicants allege that the first respondent has committed breaches of the order on five occasions in respect of five of the applicants' customers. In counsel for the applicants' heads of argument notice is given that the applicants were persisting only in relation to one thereof, which is the first respondent's alleged breach in respect of BEP Bestobel. The argument before me proceeded on this aspect only.

[5] The applicants' case against the first respondent, concerning BEP Bestobel, is based entirely and solely on information imparted to them by Andrew Vermaak, who is the division manager at BEP Bestobel. It is common cause between the parties firstly, that BEP Bestobel was a customer of the applicants listed as such in Annexure "A" to the order, and secondly, that BEP Bestobel was also a customer of the second respondent. In the founding affidavit on behalf of the applicants, the information disclosed to them by Vermaak, in respect of the contact the first respondent had made with BEP Bestobel, is dealt with rather tersely as follows:

> '*65. BEP Bestobel is listed on annexure "A" to the order.*
> 66. *It was brought to my attention by Andrew Vermaak, a division manager at BEP Bestobel that, also on 18 November 2009, the first respondent had quoted Bestobel for the supply of SK 20 (Novatex M) material and non-asbestos boards.*
> *67. The applicants are the sole South African agents and distributors of these products.*
> 68. *It is respectfully submitted that by doing so the first respondent is soliciting or attempting to solicit BEP Bestobel which, in terms of the order, he is not allowed to do.*
> 69. *A confirmatory affidavit by Vermaak is annexed hereto as "FB5".*'

[6] In the confirmatory affidavit (Annexure FB5) Vermaak merely confirms the correctness of the allegations made in the founding affidavit "as far as same relate to me".

[7] This brings me to a point *in limine* raised by counsel for the first respondent. It is quite clear from simply looking at the attestation of Vermaak's affidavit that the commissioner of oaths, although having signed the attestation as such, omitted to state the place and date of the taking of the declaration and that he/she has failed to print his/her full names below the signature. In addition, the blank spaces opposite the commissioner's designation and area/office were left blank. Based on these imperfections, counsel for the first respondent submitted that the document does not constitute an affidavit and, accordingly, evidence under oath. Extensive reference was made in counsel's heads of argument to the applicable Regulations governing the administering of an oath, as well as s 6 of the Justices of the Peace and Commissioner of Oaths Act, 16 of 1963, as to the

requirements of a valid attestation which he quite correctly submitted were not complied with.

[8] Obviously having been made aware of the shortcomings in the attestation of his first affidavit, Vermaak in a further affidavit annexed to the replying affidavit filed on behalf of the applicants, states the following:

> '*3. I have read the founding and replying affidavits deposed to by FREDERIK BOTHA (the deponent to the affidavits on behalf of the applicants) and the annexures thereto and confirm the correctness thereof as far as same relates to me and to Bestobell.' (underlining added)*

This time around the affidavit was properly attested to and the attestation in any event has not been attacked.

[9] In *Abromowitz v Jacquet and Another* 1950 (2) SA 247 (W) at p 251 Roper J proposed the following three possible courses open to the court dealing with an objection raised against an affidavit lacking proper attestation:

> '*(1) To order that the deponent who made the affidavit be called for oral examination, as was done in Duke of Northumberland v Todd (supra) (L.R., & Ch. D. 777); or*
>
> *(2) to require that the affidavit shall be re-drawn and re-attested; or*
>
> (3) *to require that the affidavit shall be re-attested only.'*

[10] In the instant matter the applicants have taken the initiative to rectify the imperfections of Vermaak's first affidavit in his second affidavit which effectively constitutes a re-attestation of the first affidavit. I am unable to find fault with such a procedure. The first respondent has in any event dealt with the contents of Vermaak's first affidavit in his answering affidavit. It is true that Vermaak's second affidavit was annexed to the replying affidavit to which the first respondent did not have a right of reply. But nothing turns on this, no prejudice has been alleged nor was I able to find any prejudice resulting from this procedure. For these reasons both affidavits deposed to by Vermaak are accepted and admitted as evidence.

[11] Next, it is necessary to consider the first respondent's version concerning the contact he had made with BEP Bestobel. He admits having provided Vermaak with a quotation, but adds thereto:

> '*Any contact that I personally had with Mr Vermaak was initiated by him and I accordingly did not "solicit" or "entice" him in any way.'*

In elaboration hereof the first respondent annexed a copy of a quotation from the second respondent to BEP Bestobel, dated 2 September 2009 (*ie* prior to the date of the order) "in response to an enquiry made by Vermaak" .

[12] In response to the scarce information disclosed by the first respondent, the applicants in their reply, again through Vermaak, refer to two further instances of the first respondent having made contact with BEP Bestobel – both having occurred after the date of the order.

[13] It is not in dispute that Vermaak and the first respondent had known one another since approximately 2007, when the first respondent was still an employee of the second applicant. Vermaak states that he contacted the first respondent telephonically during July 2009 thinking that he was then still employed at the second applicant. The first respondent did not answer and he left a message on his cell phone voice mail facility. The first respondent returned the call and a meeting was arranged which took place during August 2009 at BEP Bestobel's premises. At the meeting the first respondent informed Vermaak that he was no longer employed by the second applicant, that he had now taken up employment with the second respondent "but that he could nonetheless still do business with Vermaak and BEP Bestobel, through his new employer". Vermaak, who apparently had recently acquired first-hand practical knowledge and experience of the consequences of a restraint of trade enforcement, "specifically asked the first respondent whether he was subject to a restraint of trade", to which he replied in the negative. On the acceptance of this assurance, Vermaak indicated his willingness in future to do business with the second respondent and accordingly the third respondent. Thereafter, Vermaak states the first respondent periodically contacted Vermaak with the request whether any business could be done.

[14] These allegations by Vermaak, in particular those imputing dishonesty to the first respondent, have been left uncontroverted by the first respondent. It

is true that the fuller and more detailed version concerning the first respondent's conduct is contained in the replying affidavit on behalf of the applicants. The first respondent, however, purposely steered clear from any attempt to seek leave to file a duplicating affidavit. In argument before me, counsel for the applicants prominently referred to Vermaak's unchallenged version, and almost challenged the first respondent to provide an answer thereto. Counsel for the first respondent prior to one of the adjournments of the court, informed the court that he would obtain instructions from the first respondent. Nothing came of this and the argument simply proceeded on the merits.

[15] The significance of Vermaak's version is this: it effectively disposes of the first respondent's version that Vermaak initiated the contact between them, which lies at the heart of his version. This brings me to the two quotations earlier referred to. The first is dated 19 October 2009 (in respect of the material known as "Isoplan 1100 Millboard", which is a product that the second applicant at all times supplied to BEP Bestobel) which for reasons that are not relevant, was not accepted by Bestobel. The second quotation was sent on 10 November 2009, in respect of the same material. The 10 November quotation was faxed to Vermaak together with an application for credit facilities, which the applicants correctly submit is nothing but an open invitation by the first respondent to Vermaak on behalf of BEP Bestobel to apply for credit facilities with the second respondent and so to become its customer. The quotation was likewise not accepted as Vermaak by then had already received notification from the applicants' attorneys that the order had been granted.

[16] Against this background I turn to the question whether the first respondent's conduct as described by Vermaak constituted a breach of the order. The first respondent in the answering affidavit submits that the order is "vague" and "uncertain" as to what it means. Of critical importance is the meaning to be attributed to the words "entice" and "solicit" as they appear in the order. Useful guidance as to the meaning to be attributed to the words

"soliciting" and "canvassing" of business are to be found in the judgment of Coetzee J (as he then was) in *Sellers v Eliovson and Others* 1985 (1) SA 263 (W). In this matter, the question the learned Judge was asked to determine was whether an invitation by a customer of the restraint covenantor to the restraint covenantee to submit a tender in respect of work resorting in the category protected by the restraint, would fall under the restraint. The learned Judge, after an extensive and detailed discussion of the concept of "solicit", with specific reference to two New Zealand decisions, answered the question in the negative. Concerning such a request to the person bound by the restraint, the learned Judge reasoned as follows:

> '*It only means that he is now being prompted to canvass or solicit business, the very thing which he promised not to do. He should not be led into temptation by their blandishments, which may only serve as mitigation of his sin but not of its expunction. If MSD really wanted to do business with the applicant without enticing him to commit a breach of the restraint, they should go to him, ask him what his price is for the job, and if so advised, place their order at that price. Inviting him to become one of a number of supplicants is a different thing altogether. If he succumbs, he as tenderor is the offeror who solicits business.*'

On this basis and at best for the first respondent, even had he been asked by Vermaak to submit the quotations, as he has suggested, he would still have been in breach of the order. On the accepted facts of this matter the first respondent, in submitting the quotations to Vermaak on behalf of BEP Bestobel, in my view clearly "solicited" their business and in particular by inviting BEP Bestobel to avail themselves of the second respondent's credit facilities, "enticed" it to become a customer of the second respondent.

[17] One last aspect: the first respondent, in an attempt to place his conduct in perspective, states that his understanding of "entice" and "solicit" was "that I would obtain or attempt to obtain a customer of the second applicant at their expense", to which he adds, is "something I most certainly never did". The test ultimately to be applied is whether the first respondent breach was committed "deliberately and *mala fide"* (*per* Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para [9]). A "genuine" albeit mistaken belief by the first respondent that he was entitled to act as he did, would have sufficed to "avoid the fraction" (the words used by Cameron JA in the

paragraph referred to). I am unable to find any of these attributes in the first respondent's conduct. He was acutely aware of the order and the restriction it imposed on him which clearly came to the fore when he falsely assured Vermaak that he was not bound by a restraint of trade. The first respondent's exculpatory conclusion I have referred to, is nothing but an afterthought and in any event is a *non-sequitur*. It carries no weight: on his own interpretation of the order his conduct beyond any doubt constituted a breach thereof. He accordingly deliberately and with *mala fides* disobeyed the order. It follows that the application must succeed.

[18] Counsel for the applicants, in my view correctly so, did not persist in seeking the sanction of direct imprisonment. A suspended term of imprisonment, in my view, would be appropriate in the circumstances of this case. Finally, where dishonesty has been shown a punitive costs order is justified.

[19] In the result I make the following order:

1. It is declared that the first respondent is in contempt of the order of Bregman AJ, dated 4 September 2009.
2. The first respondent is committed to gaol for a period of 30 days, which is wholly suspended until 10 July 2010, on condition that the first respondent is not again within the period of suspension found to be in contempt of the said order.
3. The first respondent is ordered to pay the costs of this application on the scale as between attorney and own client.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANTS	***ADV B GILBERT***
APPLICANTS' ATTORNEYS	***EVERSHEDS***

COUNSEL FOR FIRST RESPONDENT	***ADV HP v NIEUWENHUIZEN***
FIRST RESPONDENT'S ATTORNEYS	***SCHOLTZ & SCHOLTZ***
DATE OF HEARING	***18 FEBRUARY 2010***
DATE OF JUDGMENT	***26 FEBRUARY 2010***