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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 43156/2021

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

.....
DATE

.....
SIGNATURE

LUMAX ENERGY (PTY) LTD
(Registration Number: 2015/283048/07)

Applicant

and

SOLASTRUCT (PTY) LTD

First Respondent

LLOYD VAN ROOYEN
(Identity Number: [...])

Second Respondent

WERNER ROBINSON
(Identity Number: [...])

Third Respondent

JUDGMENT

MALINDI J

Introduction

[1] Lumax Energy (Pty) Ltd (“Lumax”/ the “Applicant”) seeks urgent interim interlocutory relief under Part A of the Notice of Motion pending the adjudication of Part B thereof interdicting the Respondents from:

“2.1. Unlawfully competing with the Applicant, by way of manufacturing, selling, distributing, marketing, or in any manner using the Applicant's Confidential and Proprietary Information (as defined and set out in paragraphs 26 to 44 of the founding affidavit (" the Applicant's Confidential and Proprietary Information")); and

2.2. Misusing the Applicant's Confidential and Proprietary Information to advance their own business interests, at the Applicant's expense;

2.3. Unfairly utilising the Applicant's fruits and labour in respect of the Applicant's Confidential and Proprietary Information;

2.4. Interfering with the Applicants existing and/or contractual relations through the unlawful utilisation of the Applicant's Confidential and Proprietary Information;

2.5. Directing that the cost of this application be paid by the Respondents, jointly and severally, the one paying and the other to be absolved, in the event of opposition by the respondents, on the Attorney and Client Scale, alternatively, that such are reserved for determination in terms of Part B of this Application.”

[2] The Respondents oppose Part A of the application and the Third Respondent ("Mr Robinson"), deposes to the answering affidavit in his personal capacity and on behalf of the First and Second Respondents.

[3] Mr Robinson States that he was previously in the employ of Lumax as a sales engineer. The Second Respondent ("Mr van Rooyen") holds degrees which qualify him in "environmental engineering which includes renewable energy as a subset" and has "in-depth knowledge of the different mechanical elements which are integral to enable the securing of renewable energy."

[4] The Respondents oppose the application on both the lack of urgency or self-created urgency and lack of the merits to grant it.

Urgency

[5] The Applicant alleges that Mr Robinson and Mr van Rooyen are former employees of Lumax in managerial positions who have misappropriated Lumax's confidential and proprietary information with the aim "to springboard the First Respondents' business and, in so doing enable the First Respondent to compete unlawfully with the Applicant".

[6] The Applicant pleads that the application is urgent because if the relief under Part A is not granted, the utilisation of its confidential and proprietary information unlawfully will cause it irreparable harm, that is, that it will not be afforded substantial redress if the application were brought in the ordinary course.

[7] The Applicant explains that it acted with reasonable expedition in that First Respondent ("Solastruct") refused, on 4 August 2021, to provide the undertakings

sought. Lumax conducted and finalised the analysis necessary to establish the Respondents' unlawful conduct on 22 August 2021. Undertakings had been sought on 23 July 2021 after Lumax had become aware of their conduct on 24 June 2021.

[8] After finalising the analysis on 22 August 2021, Lumax's attorneys of record commenced with the preparation of the application on 23 August 2021 and counsel received the draught on 25 August 2021, which he settled on 26 August 2021.

[9] The Respondents contend that the application is not urgent since Lumax failed to act expeditiously after the deponent to the founding affidavit ("Mr Vermaak") had "received information from an unidentified whistle-blower on 24 June 2021 already."

[10] Furthermore, the Respondents make the contention that Lumax had full knowledge of the necessary facts which it relies on by 28 or 30 June 2021 after Mr Selwin Roon, a business partner at Lumax, had accessed Mr van Rooyens work computer on 28 June 2021 and thereby gaining access to emails with the information referred to in the Founding Affidavit.

[11] Mr Nowitz, for the Applicant, responded that the court has to take into account that alleged breaches in these matters have to be defined precisely. This laborious process of establishing the facts is set out in paragraphs 47 to 72 of the Founding Affidavit. New and crucial facts were still being uncovered by 29 July 2021 where an email exchange between Mr Van Rooyen and Mr Kruger, copying Robinson, of 9 June 2021 made reference to Trapezoidal Portrait (200KWP), a trapezoidal shape roof sheeting to be mounted in a portrait orientation, which is only possible by making use of Lumax's confidential and proprietary information and, in particular the LM-TBR-P.

[12] I am satisfied that the time spent from 24 June 2021 to 29 July 2021 was spent to properly establish Lumax's case against the Respondents and that this does not amount to self-created urgency. Immediately that the emanating information was obtained on 29 July 2021, the Applicants attorneys directed urgent correspondence to the shareholders of Solastruct, copying Mr Van Rooyen and Mr Robinson, setting out that Mr Van Rooyen had misappropriated the Applicant's confidential and proprietary information and that Solastruct intended to use the information to springboard its own business.

[13] Undertakings sought by Lumax on 3 August 2021 were not given and Lumax believes that Mr Andrew Stockil's letter of 4 August 2021 constitutes an admission that Solastruct intended using the confidential and proprietary information by reason of his statement denying that Solastruct is not entitled to use the information.

[14] I conclude therefore that Lumax is not guilty of self-created urgency and that this matter warrants being heard as a matter of urgency.

Merits

[15] Lumax is involved in the solar mounting industry, that is, the manufacturing of mounting structures for solar panels. Having operated as an agent for a German company, Renusol, and a North American company that produced the S-5 brand, for some time, Lumax explored the idea of internal design and development in order to suit and satisfy the domestic solar mounting industry.

[16] As a result, Lumax established supply chain relationships in China and was able to "develop distinguishable specific solar mounting structure products" with its specifications. It claims proprietary rights and confidentiality over the information

used to design these products. These product specifications pertain to the LM-TBR-P, LM-CRL, LM-SSG and LM-PC-60, designed during or about 2017.

[17] Lumax claims that these products are unique by design and to the South African environment.

[18] The interdict is sought against the Respondents on the basis that the Second and Third Respondents have misappropriated Lumax's confidential and proprietary information in order to establish the First Respondent. The Second Respondent was employed by Lumax from 6 March 2019 and in terms of the employment contract, undertook to treat all information of any kind shared by Lumax with him as confidential. The Third Respondent was employed on identical terms on 22 February 2018.

[19] To the extent that Lumax relies on Mr Stockil's letter of 4 August 2021, for the proposition that the Respondents have admitted the use of Lumax's proprietary and confidential information, the Respondents argue that Mr Stockil was not writing on behalf of Solastruct as the letter of demand that Mr Stockil was responding to was not addressed to the First Respondent but to one of its shareholders. This argument is spurious. The legal position that "a company with limited liability is an independent legal person and separate from its shareholders or directors"¹ applies to the question of civil or criminal liability as it says. Such an entity is communicated with through its directors and shareholders as such as it does not run itself except through them. The Applicant is entitled to rely on that admission in order to establish a *prima facie* case as I do herein.

¹ Francis George Hill Family Trust v South African Reserve Bank 1992 (3) SA 91 (A) at 97.

[20] In Keeping with Mr Stockil's response to the letter of demand the Respondents have dedicated a significant measure of argument, both in the heads of argument and in oral submissions to the proposition that copying *per se* is not unlawful.²

[21] Whist the cases relied upon by the Respondents indeed lay the principle that absent statutory protection from the breaches of intellectual property rights such as in the *Patents Act*³, *Copyright Act*,⁴ *Designs Act*⁵ and the *Trade Marks Act*⁶ the least likely is the complainant to receive protection, the principle that fairness and honesty remain relevant criteria in deciding whether competition is fair. The principles of fairness and honesty stand alongside considerations of public policy in a particular case and whether free market and competition in our economic system should tamper with statutory protections. In this regard for information to be confidential it must be capable of application in the trade or industry concerned, it must be useful and not in the public knowledge; known only to a restricted number of people or a close circle and must be of economic value to those seeking to protect it.⁷ These are circumstances, among others, where a complainant may be protected despite not having availed themselves of statutory protections.

[22] Reliance is placed on *Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited*⁸ for the submission that "there are strong policy considerations that place free competition as a central feature of our legal and commercial framework." The

² Aruba Construction (Pty) Ltd v Aruba Holdings (Pty) Ltd 2003 (2) SA 155 (C).

³ Patents Act 57 of 1978.

⁴ Copyright Act 98 of 1978.

⁵ Designs Act 195 of 1993.

⁶ Trade Marks Act 194 of 1993.

⁷ Townsend Production (Pty) Ltd v Leach & Others 2001 (4) SA 33 (C) at 53J to 54B.

⁸ 2017 (1) SA 613 (CC) at [29].

Respondents' central submission therefore is not one of denial of utilising Lumax's confidential and proprietary information to manufacture copies of its products but that the court should find that interdicting them from doing so would stifle and destroy a fledgling company in circumstances where the country's economy can least afford it.

[23] The Applicant has provided evidence of its research and development, uniqueness of its products and how to manufacture its four products is not in the public domain. Only a limited number of people, including Mr Van Rooyen and Mr Robinson, had access to this information and could therefore manufacture copies or "knock-offs" of these products. These requisites for successfully protecting confidential information are set out in *Waste Products Utilization (Pty) Ltd v Wilkes and Another*.⁹

[24] Further to the above requisites "confidential information may not be used as a springboard for activities detrimental to the person who made the confidential information available."¹⁰ Messrs Van Rooyen and Robinson were Lumax's employees at the time that they appropriated Lumax's confidential and proprietary information. They were not only bound to keep their employers' confidential information confidential but they had also bound themselves in contract to this effect.¹¹

[25] Lumax at paragraphs 47, 48, 51, 52, 54-56 of the founding affidavit and paragraphs 37-39 of the replying affidavit shows how its confidential information is imparted to its employees and preserved. The Second and Third Respondents

⁹ 2003 (2) SA 515 (W).

¹⁰ *Van Castricum v Theunissen and Another* 1993 (2) SA 726 (T) at 731 G.

¹¹ *Meter Systems v Venter* 1993 (1) SA 409 (W) at 426 F-J.

breached their undertakings to their employer when this information was copied and forwarded to third parties in order for Solastruct to unlawfully compete with Lumax.

[26] Examples of the Respondents' collaboration and collusion are: the email exchanges of 17 May 2021 wherein Mr Robinson provides Mr Van Rooyen with Lumax's confidential information for the benefit of Solastruct; a trail of emails of 3 June 2021 sent by Mr Van Rooyen to Solastruct and an email from Mr Van Rooyen to other parties and entities making business arrangements that would take business away from their employer; and the discovery after Messrs Robinson's and Van Rooyen's laptop computers were seized and assessed that Mr Van Rooyen had deleted and removed all the information that Lumax had imparted to him. These acts, among many others, demonstrate the concerted efforts by the respondents to act in unlawful competition against Lumax.

Requisites for interdict:

[27] the Applicant satisfies all the requisites for an interim interdict, and most importantly that it has no adequate alternative remedy to undo the harm caused or could potentially be cause to it. To hold otherwise would erode its clear right to invoke clause 17.1 of the contracts of employment of the First and Second Respondents for the protection of its confidential and proprietary information and protection against unlawful competition.

Conclusion:

[28] I conclude that the Applicant is entitled to the relief it seeks of an interim interdict against the Respondents. The issue of costs will follow the result.

[29] I therefore make the following order:

1. The forms, time periods and service provided for in the Rules of the above Honourable Court are dispensed with and this matter is dealt with as one of urgency in terms of Rule 6(12);

2. Pending the outcome of Part B of this application and with immediate effect, the Respondents are interdicted from:

2.1. unlawfully competing with the Applicant, by way of manufacturing, selling, distributing, marketing, or in any manner using the Applicant's Confidential and Proprietary Information; and

2.2. misusing the Applicant's Confidential and Proprietary Information to advance their own business interests, at the Applicant's expense;

2.3. unfairly utilising the Applicant's fruits and labours in respect of the Applicant's Confidential and Proprietary Information;

2.4. interfering with the Applicant's existing and/or prospective contractual relations through the unlawful utilisation of the Applicant's Confidential and Proprietary Information;

3. The Respondents are to pay the costs of this application jointly and severally, the one paying the others to be absolved.

**G MALINDI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances

For the applicant:	Adv M Nowitz
Instructed by:	Schindlers Attorneys
For the respondents:	Adv C Bester
Instructed by:	Lee and McAdam Attorneys
Date of hearing:	28 August 2021
Date of Judgment:	16 November 2021