REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: ***1st November 2023*** Signature:

CASE NO: 2023-103550

DATE: 1st November 2023

In the matter between:

EMLINK (PTY) LTD	First Applicant
GHURAHU, SATISH	Second Applicant
BRIGHTON, TERENCE	Third Applicant
THE TRUSTEES N O OF THE RAK TRUST	Fourth Applicant
THE TRUSTEES N O OF THE WIJA SHARE TRUST	Fifth Applicant

and

MATTHEE, RUDOLPH	First Respondent
MATTHEE, ELIZE M	Second Respondent
CLYROSCAN (PTY) LIMITED	Third Respondent

Neutral Citation: *Emlink and 4 Others v Matthee and 2 Others (103550/2023)* **[2023] ZAGPJHC ---** (01 November 2023)

Coram: Adams J

Heard: 25 October 2023

Delivered: 01 November 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to *SAFLII*. The date and time for hand-down is deemed to be 10:00 on 01 November 2023.

Summary: Urgent application – enforcement of restraint of trade agreement – interdictory relief – enforceability – protectable interest - confidential information and trade connections - sufficient if shown that there was confidential information or trade connections to which respondent had access and which could be exploited by new employer – application succeeds.

ORDER

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(1) The application is urgent. The applicants' non-compliance with the Uniform Rules of Court, pertaining to service and time periods, be and is hereby condoned and the matter is heard on an urgent basis in terms of Rule 6(12)(a) of the Uniform Rules of Court.

(2) An interdict is granted in terms whereof the respondents are prohibited, for a period of twenty four months, from directly or indirectly, in any way and in any capacity whatsoever (including but not limited to advisor, agent, contractor, consultant, financier, employee, manager, partner, proprietor, member of a close corporation, shareholder or trustee), be involved in the soliciting of, or the provision of transport services to, any existing client of the first applicant, through a service provider used by the first applicant, or otherwise;

(3) The respondents shall immediately cease and desist from making use of, or enabling any third party to have access to or use any trade secrets and confidential information of the first applicant, for any reason or purpose whatsoever, which shall include any technical information, business or commercial information, all information relating to creditors, debtors and clients, technical knowledge and know-how, specifications, drawings,

sketches, modules, samples, data, documentation, concepts, ideas, business plans, business connections, methods, methodologies, procedures, processes, techniques, templates, software (both source and object codes), software tools, utilities and routines of the first applicant contained in written, electronic or any other format, or which is to the knowledge of the respondents;

(4) The respondents be and are hereby interdicted from divulging any trade secret or confidential information of the first applicant, or to disclose such information, to any third person or party, or to use it in any way to compete with the first applicant, or for any other purpose;

(5) The respondents are interdicted from enabling any other person or entity to have access to or make use of the trade secrets and confidential information of the first applicant in any way whatsoever to canvas or solicit clients of the first applicant, and to use it to compete with the first applicant;

(6) The respondents are ordered to forthwith provide the first applicant with full particulars of any loads which were conveyed for any clients of the first applicant by or on behalf of any one of the respondents, DFS Global Freight Services (Pty) Ltd or any other supplier of freight services since June 2023;

(7) The respondents are ordered to forthwith provide to the first applicant the names of all clients of the first applicant in respect of which such loads were diverted to other persons or entities for transport, and particulars of the loads carried for such clients;

(8) The respondents are ordered to return to the first applicant all documents or copies of documents of the first applicant, and any other documents containing confidential information of the first applicant which are in their possession, whether in hard copy, computerised or otherwise, delete any computerised documents from any computer, cellular phone or other similar device in their possession or under their control, and report to the applicants' attorneys in writing that they have done so;

(9) The respondents are prohibited from making and keeping any copies of any information of the first applicant which are in their possession;

(10) The first respondent is ordered to immediately take all steps that may be necessary to provide full access and control of the 'Value' and 'Part Sales' *WhatsApp* groups to the third applicant, as the Administrator ('Admin') of such groups, or to such other person as may be nominated by the first applicant, and that the first respondent be prohibited from participating in, or being involved with, any *WhatsApp* - or other communications with clients of the first applicant.

(11) The first to the third respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs of the urgent application.

JUDGMENT

Adams J:

[1]. The second to the fifth applicants and the third respondent (Clyroscan) are all shareholders in the first applicant (Emlink). They are party to a shareholders' agreement concluded between them and Emlink during July 2022. The first respondent was an employee of Emlink from about that date to October 2023, when he handed in his resignation, as was the second respondent (the first respondent's wife), who is also a shareholder in and a director of Clyroscan. The first respondent is in fact the controlling mind and the *de facto* director of Clyroscan, which he uses as a vehicle to hold his 10% shareholding in Emlink.

[2]. The aforegoing contractual arrangement and relationship between the parties came about as a result of an approach by the first respondent to the applicants during 2022 for them to assist him and to 'come to the rescue' of his financially distressed company and its established customer base. Emlink and the distressed company of the first respondent operated in the same field as

transport and freight forwarding companies and could, until the conclusion of the aforegoing agreement, be regarded as direct competitors offering the same services to the same customers in the same market.

[3]. This is an application for urgent interdictory relief in which the applicants seek to enforce a contractual restraint of trade and confidentiality undertakings made by the first and the second respondents via Clyroscan and which were incorporated into the shareholders' agreement. The applicants simultaneously ask the Court to restrain the first, the second and the third respondents from unlawfully competing with the first applicant by diverting business away from the first applicant to a third party entity. I am satisfied that the matter is urgent.

[4]. The relief is sought on an urgent basis as the applicants are of the view that they have presented sufficient evidence to the court that the respondents have been acting in breach of the aforesaid restraint of trade and that they have been unlawfully competing with the first applicant. Furthermore, so the applicants contend, the respondents are continuing with this unlawful conduct and that a reasonable apprehension exists that they will continue to do so, to the detriment of the first applicant, and consequently also to its shareholders. It is also the case of the applicants that the conduct of the respondents, in addition being in violation of the restraint of trade, also amount to unlawful competition and to unlawful interference with contractual relationships between the first applicant and its clients.

[5]. The issue to be considered in this urgent application is whether the applicants have made out a case for the interdictory relief claimed. That issue is to be decided against the factual backdrop of the matter as per the facts set out in the paragraphs which follow.

[6]. As I have already indicated, the first respondent is the controlling mind behind Clyroscan, and he has always been involved with the said company as its *de facto* director and manager. He has always acted on its behalf. The first respondent was at all times, and remains, in effective control of the third respondent.

[7]. During 2022, after the first respondent had approached the applicants with a request for assistance with his company, it was *inter alia* agreed that the first respondent would bring clients for Emlink, which would then become the latter company's clients. These customers already had access to the transport business and, in return, the first applicant would receive 10% of the shares in Emlink, to be held on his behalf by Clyroscan. The first respondent was also to receive remuneration in the form of commission on all business which originate from such clients, which he was required to 'service' on behalf of Emlink. The first respondent was therefore contracted to the first applicant to act as consultant and a salesperson, representing the first applicant and acting as its dedicated agent tasked with dealing specifically with a certain group of 151 clients of the first applicant. The first respondent has very close personal relationships with at least these 151 clients of the first applicant, and he is therefore in a position to persuade and solicit such clients to follow him to a competitor of the first applicant.

[8]. On his own version, the first respondent 'started working at Emlink' as 'contractor, operations manager and salesperson', and on 22 July 2022 the relationship between the parties was further formalised by way of the shareholders' agreement, which included the restraint of trade contained therein.

[9]. As correctly submitted on behalf of the applicants, the protectable interest of Emlink consists of its client base, list of clients, and other confidential information and trade secrets. About this there can be little doubt. The respondents – all three of them – had access to Emlink's full database, including the confidential information and trade secrets such as its client lists and tariffs.

[10]. Our Courts have recognised that information and documents of the type that the applicants seek to protect *in casu*, are considered trade secrets worthy of protection. In that regard see, for example *Sibex Construction (SA) (Pty) Ltd*

and Another v Injectaseal CC and Others[1]; *Van Castricum v Van Castricum*[2]; *Sage Holdings Ltd and Another v Financial Mail (Pty) Ltd and Others*[3];

[11]. The Author, *Neethling*, explains the position regarding trade secrets as follows:

'Since the proprietor acquires an immaterial property right to trade secrets, he has exclusive powers of use, enjoyment and disposal (exploitation) of the secrets. Consequently, any unauthorised conduct (or misappropriation) by another competitor or non-competitor in respect of the trade secret, including the acquisition and acquaintance with, use or appropriation of, and revelation or publication of the confidential information, is prima facie unreasonable or contra bonis mores, an infringement of the right to trade secret, and therefore unlawful in principle.'

[12]. The first respondent, as agent of Emlink, cannot make a secret profit out of anything (including information which can be used for the purposes of the principal's business) which belongs to his principal and which the agent possesses in a fiduciary capacity. The respondents have throughout had personal contact with clients of Emlink and the first respondent, in particular, has personal relationship with the said clients, which he cannot exploit to its detriment.

[13]. The evidence confirms that the respondents are making use of their relationships and Emlink's confidential information and trade secrets to solicit and canvas clients for third party entities, including a company seemingly under the control of the first respondent's son. It is not disputed, for example, that the respondents are causing to be diverted loads for transport for clients of Emlink to its competitors and this they do by making use of such trade secrets and confidential information

[14]. The restraint provisions are unequivocal and contains explicit protection of confidentiality and intellectual property rights. All of the respondents are bound by these provisions. They are, in any event, not entitled to unlawfully compete with Emlink by utilising its confidential information and trade secrets. The applicants do not seek to deny the respondents the opportunity to continue to be involved with the freight transport sector, but they seek to prevent the

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1 *Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC and Others* 1988 (2) SA 54 T);

2 *Van Castricum v Van Castricum* 1993 (2) SA 762 (T);

3 *Sage Holdings Ltd and Another v Financial Mail (Pty) Ltd and Others* 1991(2) SA 117 (W);

unlawful soliciting of their clients and the unlawful use of their confidential information.

[15]. Agreements in restraint of trade are valid and enforceable, and the onus is on the party who challenge the clause to show that it is unreasonable and against public policy. *In casu*, the respondents have not done so.

[16]. I am also of the view that the applicants do indeed have protectable interests in the form of customer connections and confidential information. As was held by this Court in *Experian SA v Haynes*[4] and *Sibex Engineering Services (Pty) Ltd v Van Wyk*[5], there are two kinds of proprietary interests that can be protected by a restraint of trade undertaking. The first is 'the relationship with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "trade connections" of the business, being an important aspect of its incorporeal property known as goodwill'. And the second is 'all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a competitive advantage'.

[17]. On the basis of the facts in this matter, I am of the view that the respondents have not proven the unreasonableness of the restraint. They have not established that they never acquired any significant personal knowledge of, or influence over, the applicants' customers, not that they had no access to confidential information. By all accounts, the first respondent, through his position at Emlink and his previous history with the clients, developed relationships with at least the 151 customers referred to above. A business's customer connections are a proprietary interest that can be protected by a restraint of trade undertaking.

[18]. What is more is that the first respondent has relationships with customers of a nature that he could induce them to follow him to a new business. The applicants set out in some detail the strength of these relationships with the customers of the applicants, developed in the exercise of his duties. All of this

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4 *Experian SA v Haynes* 2013 (1) SA 135 (GSJ) at para 17;

5 *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (20 SA 482 (T) at 502D;

serves to show an employee with the knowledge of the identity and requirements of the applicants' customers and who had regular and repeated contact with the customers so as to build up a connection in the course of trade with them.

[19]. For all of these reasons, I conclude that there can be no doubt that customer contact exists and that respondents could exploit these connections if employed by a competitor. These customer connections form a part of the applicants' goodwill. It is this interest that the applicants are entitled to have protected by enforcing the restraint of trade. On this basis alone, the restraint should be enforced.

[20]. For all of these reasons, I am of the view that the applicants have made out a case for the interdictory relief sought in this application. In that regard, I am persuaded that the requirement for a final interdict are met, *to wit* (1) there is a clear right; (2) an injury is reasonably apprehended; and (3) there is no other remedy available to the applicants.

[21]. For all of these reasons, the applicants' urgent application should succeed and they should be granted the relief claimed herein.

Costs

[22]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[6].

[23]. I can think of no reason why I should deviate from this general rule.

[24]. I therefore intend awarding costs in favour of the first to the fifth applicants against the first, the second and the third respondents.

Order

[25]. Accordingly, I make the following order: -

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6 *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

(1) The application is urgent. The applicants' non-compliance with the Uniform Rules of Court, pertaining to service and time periods, be and is hereby condoned and the matter is heard on an urgent basis in terms of Rule 6(12)(a) of the Uniform Rules of Court.

(2) An interdict is granted in terms whereof the respondents are prohibited, for a period of twenty four months, from directly or indirectly, in any way and in any capacity whatsoever (including but not limited to advisor, agent, contractor, consultant, financier, employee, manager, partner, proprietor, member of a close corporation, shareholder or trustee), be involved in the soliciting of, or the provision of transport services to, any existing client of the first applicant, through a service provider used by the first applicant, or otherwise;

(3) The respondents shall immediately cease and desist from making use of, or enabling any third party to have access to or use any trade secrets and confidential information of the first applicant, for any reason or purpose whatsoever, which shall include any technical information, business or commercial information, all information relating to creditors, debtors and clients, technical knowledge and know-how, specifications, drawings, sketches, modules, samples, data, documentation, concepts, ideas, business plans, business connections, methods, methodologies, procedures, processes, techniques, templates, software (both source and object codes), software tools, utilities and routines of the first applicant contained in written, electronic or any other format, or which is to the knowledge of the respondents;

(4) The respondents be and are hereby interdicted from divulging any trade secret or confidential information of the first applicant, or to disclose such information, to any third person or party, or to use it in any way to compete with the first applicant, or for any other purpose;

(5) The respondents are interdicted from enabling any other person or entity to have access to or make use of the trade secrets and confidential information of the first applicant in any way whatsoever to canvas or solicit

clients of the first applicant, and to use it to compete with the first applicant;

(6) The respondents are ordered to forthwith provide the first applicant with full particulars of any loads which were conveyed for any clients of the first applicant by or on behalf of any one of the respondents, DFS Global Freight Services (Pty) Ltd or any other supplier of freight services since June 2023;

(7) The respondents are ordered to forthwith provide to the first applicant the names of all clients of the first applicant in respect of which such loads were diverted to other persons or entities for transport, and particulars of the loads carried for such clients;

(8) The respondents are ordered to return to the first applicant all documents or copies of documents of the first applicant, and any other documents containing confidential information of the first applicant which are in their possession, whether in hard copy, computerised or otherwise, delete any computerised documents from any computer, cellular phone or other similar device in their possession or under their control, and report to the applicants' attorneys in writing that they have done so;

(9) The respondents are prohibited from making and keeping any copies of any information of the first applicant which are in their possession;

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(11) The first to the third respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs of the urgent application.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

HEARD ON:	25th October 2023
JUDGMENT DATE:	1st November 2023 – judgment handed down electronically
FOR THE FIRST TO THE FIFTH APPLICANTS:	Advocate J S Stone
INSTRUCTED BY:	Hattingh & Ndzabandzaba Attorneys, Centurion, Pretoria
FOR THE FIRST TO THE THIRD RESPONDENTS:	Advocate G Jacobs
INSTRUCTED BY:	Joubert Scholtz Incorporated, Kempton Park.