REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ***NO*** (2) OF INTEREST TO OTHER JUDGES: ***NO*** (3) REVISED: Date: ***25th August 2023*** Signature:

CASE NO: 082049/2023

DATE: 25th August 2023

In the matter between:

TORASOURCE (PTY) LTD t/a SOLARWIZE AFRICA Applicant

and

LLEYDS, TYRIQUE KIERON First Respondent

AFRISTAR LIGHTING GROUP (PTY) LTD Second Respondent

AFRIPOWER TECHNOLOGY (PTY) LTD Third Respondent

Neutral Citation: *Torasource v Lleyds and 2 Others (082049/2023)* **[2023] ZAGPPHC ---** (25 August 2023)

Coram: Adams J

Heard: 24 August 2023

Delivered: 25 August 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 15:00 on 25 August 2023.

Summary: Urgent application – enforcement of restraint of trade – interdictory relief – factual dispute – respondent's version cannot be rejected as far-fetched – application falls to be dismissed.

ORDER

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(1) The applicant's urgent application is dismissed with costs.

(2) The applicant shall pay the first respondent's costs of this urgent application.

JUDGMENT

Adams J:

[1]. The applicant ('Solarwize Africa') is a direct importer, retailer and wholesaler of solar panels, solar inverters, solar batteries and solar installation accessories, as well as of related and other electrical supplies. With effect from 01 May 2022, the first respondent ('Mr Lleyds') was employed by Solarwize Africa as an Energy Sales Consultant and he was so employed until his resignation from the said company, which came into effect on 31 July 2023. Whilst at Solarwize Africa, Mr Lleyds entered into a written employment contract with the said company. There is a dispute about the detail of their employment agreement, such as the date on which the said contract was concluded and the exact terms and conditions thereof.

[2]. On or about 01 August 2023, Mr Lleyds commenced employment with the second respondent ('Afristar Lighting') as a sales representative. Afristar Lighting is related to the second respondent ('Afripower Technology'), which carries on business as a wholesaler and a supplier of solar inverters and lithium batteries and claims to have been at the forefront of the lighting and alternative Energy Solution Industry for over 25 years. The second and the third respondents, who refer to themselves as the 'Afristar Lighting Group', also

proclaim to be 'expert designers and manufacturers of *LED* and Solar Lighting Solutions'. Accordingly, I think that it can safely be said that Solarwize Africa, on the one hand, and Afristar Lighting and Afripower Technology, on the other, are competitors operating in the same market and in the same industry.

[3]. In this opposed urgent application, Solarwize Africa applies, as against all three respondents, for an order interdicting the infringement of an alleged written restraint of trade entered into between it, as employer, and Mr Lleyds, as employee. It may be apposite to cite the relief sought by the applicant in its notice of motion, which, in the relevant parts, reads as follows: -

'PLEASE TAKE NOTE THAT the applicant intends applying to the above Honourable Court, at a date and time to be fixed by the registrar, for an order in the following terms:

(1) … … … .

(2) Interdicting and restraining the first respondent, for a period of 36 months from 10 August 2023 from:

2.1. Being employed by either the second or third respondents or any other person or entity which is a solar panel, solar inverter, solar battery, solar installation accessories or electrical goods supplier operating within any area in Gauteng;

2.2. Distributing, retaining or selling any of the applicant's intellectual property and/or trade secrets which include inter alia:

2.2.1. Any and all technical specifications of its solar electrical systems, which include the solar panels, solar inverters, solar batteries installation accessories;

2.2.2. import information of the various types of solar electrical systems;

2.2.3. Its price lists of the various types of solar electrical systems;

2.2.4. Its solar electrical system installation and solar inverter configuration training manual;

2.2.5. The advantages and disadvantages of each solar electrical system product category;

2.2.6. The contact information of its clients and customers in South Africa and abroad;

2.2.7. The details of the solar electrical system products which are still being tested by the applicant and which are yet to be brought to market; 2.2.8. The details of the new Graphite Solar Battery which the applicant launched on 4 August 2023;

2.2.9. The firmware and/or software in respect of each type of solar inverter;

2.2.10. The lifespan of each category of solar battery sold by the applicant;

2.2.11. The Microsoft Excel sheet which contains the formula to calculate the number of solar panels, the wattage of the solar inverter, as well as, the voltage, the number and the type of solar battery required based on the needs of the particular purchaser of these products;

2.2.12. The mobile application which connects to the solar inverter;

2.2.13. The products available within each category of solar pa inverter, solar battery and solar installation accessory s applicant;

2.2.14. The manufacturers and suppliers of solar panels, solar inverters, solar batteries and solar installation accessories in China, to the applicant;

2.2.15. The manufacturers and suppliers of solar panels, solar inverters, solar batteries and solar installation accessories in South Africa, to the applicant;

2.2.16. The volumes of sales of each particular solar panel, solar inverter, solar battery and solar installation accessory by the applicant.

… … …’.

[4]. It is instructive to note that the applicant’s case and its cause of action are based almost exclusively on the existence of the restraint of trade agreement, which is denied by Mr Lleyds. This then means that, if it is found by me that a restraint of trade agreement was not entered into between Solarwize Africa and Mr Lleyds, then the application should fail.

[5]. As already indicated, the applicant’s case against the respondents is based on a restraint of trade agreement, which was allegedly incorporated into the contract of employment entered into between the Solarwize Africa and Mr Lleyds. This is vehemently denied by Mr Lleyds, who explains in his answering affidavit that, when he signed the employment contract, during November 2022, he was presented with a document which did not contain a restraint of trade clause. This is evidenced by photographs he took of the document, which was presented to him, which clearly shows that the contract of employment that he signed – a four-page document – did not contain a restraint of trade clause. The document was not yet completed, but did contain his signature, which he had attached before he took the photographs. He states that he took pictures of the agreement on the day he signed it because he wanted to understand its contents and what was provided for therein.

[6]. Mr Lleyds furthermore goes on to explain that, although he started working for Solarwize Africa on or about 01 April 2022, the contract was only presented to him for signature on 17 November 2022. He knows that this is the specific date as the personal device he used to take pictures of the agreement, reflects this information. The said device, so Mr Lleyds avers, even shows the

address at which the pictures were taken, that being the business premises of Solarwize Africa. The restraint of trade clause, so Mr Lleyds concludes his case, is a fabrication and was fraudulently inserted *ex post facto* into the employment contract.

[7]. From the aforegoing, it is clear that the main dispute between the parties is a factual one. The question is this: Which one of the two versions, relating to the existence or not of a restraint of trade agreement, is to be accepted? In deciding that question, it should be borne in mind that this is an application and factual disputes are to be decided on the basis of the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited*[1]. This is the so-called *Plascon-Evans* rule.

[8]. The general rule is that a court will only accept those facts alleged by the applicant which accord with the respondent's version of events. The exceptions to this general rule are that the court may accept the applicant’s version of the facts where the respondent's denial of the applicant's factual allegations does not raise a real, genuine or *bona fide* dispute of fact. Secondly, the court will base its order on the facts alleged by the applicant when the respondent's version is so far-fetched or untenable as to be rejected on the papers.

[9]. In *Room Hire Co (Pty) Limited v Jeppe Mansions (Pty) Ltd*[2], it was held that:

‘A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary investigation ... and to ascertain whether the denials are not fictitious and intended merely to delay the hearing.'

[10]. It is necessary to adopt a robust, common-sense approach to a dispute on motion. If not, the effective functioning of the Court can be hamstrung and circumvented by the simplest and most blatant of stratagem. A Court should not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.

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[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A);

[2] *Room Hire Co (Pty) Limited v Jeppe Mansions (Pty) Ltd* 1949 (3) SA 1155 (T);

[11]. The applicant submits that the version of the first respondent should be rejected on the papers. I disagree. If regard is had to the evidence before me as a whole, it cannot possibly be said that the version of the first respondent is so far-fetched that it can be rejected on the papers. In fact, in my view, the first respondent's story has a ring of truth to it. His narration seems to be confirmed by the document relied upon by the applicant and which it contends represents the written contract of employment concluded between them. The numbering of the document, with the 'inserted page', is completely at odds in that the numbers 12 and 13 are duplicated as different headings. The point is that, in the context of the aforegoing, the first respondent's story may very well be true.

[12]. Howsoever I view this matter and if regard is had to the evidence, I cannot reconcile myself with a suggestion that the first respondent's version is far-fetched. I am therefore not prepared to reject same on the papers, which means that the applicant's application against the respondents stands to be dismissed.

[13]. In light of my aforegoing finding, it is not necessary for me to deal with the other aspects raised in the matter by the applicant. Suffice to say that, in my judgment, even if I am to accept that the applicant's case is also based on the 'confidentiality clause' in the employment agreement, the existence of which is not seriously challenged by the first respondent, the application should still fail because the applicant has not made out a case for the legitimate protection of its confidential information which includes, but is not limited to the applicant's customer lists and software program. I am not persuaded that the applicant has demonstrated that it has a protectable interest.

[14]. As pointed out by Mr Lleyds, whilst he was employed by the applicant, his task was simply that of a sales consultant and as such his job was to sell the products and not to manufacture it. He has very little technical knowledge in relation to the applicant's technical operation.

[15]. Whether information can be classified as confidential is a factual question and can only be determined on a case to case basis. Ordinary general information about a business is not confidential simply because the proprietor

defines it as such. In *Alum-Phos (Pty) Ltd v Spatz*[3], the court held that in order to qualify as confidential information, such information must comply with the following three requirements: (a) It must involve and be capable of application in trade or industry; that is it must be useful; (b) It must not be public knowledge and public property, that is objectively determined, it must be known only to a restricted number of people or to a closed circle of persons; and (c) The information objectively determined must be of economic value to the person seeking to protect it.

[16]. As I have already indicated, I am not persuaded that the applicant has made out a case based on confidential information, which complies with these requirements.

[17]. For all of these reasons, the applicant's urgent application falls to be dismissed.

Costs

[18]. 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*[4].

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

[20]. I therefore intend awarding costs in favour of the first respondent against the applicant.

Order

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

(1) The applicant's urgent application is dismissed with costs.

(2) The applicant shall pay the first respondent's costs of this urgent application.

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3 *Alum-Phos (Pty) Ltd v Spatz* [1997] 1 All SA 616 (W);

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

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

HEARD ON:	24th August 2023
JUDGMENT DATE:	25th August 2023 – judgment handed down electronically
FOR THE APPLICANT:	Advocate Muhammed Coovadia
INSTRUCTED BY:	Allibhai Wadee Incorporated Attorneys, Robertsham, Johannesburg
FOR THE FIRST RESPONDENT:	Advocate K M Choeu
INSTRUCTED BY:	Dewrance Attorneys Incorporated, Brooklyn, Pretoria
FOR THE SECOND AND THE THIRD RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance