



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 9817/2015

In the matter between:

LONRHO LOGISTICS (PTY) LTD

Applicant

v

TOLL GLOBAL FORWARDING (SA) (PTY) LTD

First Respondent

GEOFFREY MILLS PARTRIDGE

Second Respondent

BRUCE JAMES CHAPLIN

Third Respondent

IAN COLLIN MCALLISTER

Fourth Respondent

ANDREW MCGRATH

Fifth Respondent

MARTIN PAUL BROWN

Sixth Respondent

Court: Justice J Cloete

Heard: 18 August 2015

Delivered: 23 October 2015

JUDGMENT

CLOETE J:

Introduction

- [1] This is the opposed return date of a rule *nisi* issued on 5 June 2015 interdicting the first respondent ('TGF') for a period of 12 months from providing freight forwarding services in respect of perishable goods exported from Cape Town to certain customers of the applicant ('Lonrho'), and restraining the respondents for the same period from soliciting those customers. The respondents were also ordered to deliver up to Lonrho its confidential information in their possession and interdicted, again for the same period, from accessing or using it. Lonrho had also sought an interim order restraining the respondents from poaching its employees. This relief was however ordered to stand over for determination on the return date.
- [2] The respondents complied with the delivery of the confidential information after having tendered (without admission of liability) to do so and have also agreed not to access or use it. They oppose the remaining relief with which Lonrho persists.
- [3] In pursuing final relief Lonrho contends that the disclosure of its confidential information by the fifth and sixth respondents ('McGrath' and 'Brown' respectively) to TGF's representatives resulted in TGF preparing for itself a

springboard for its own benefit and, *inter alia*, enabling it to entice Lonrho's customers away. Lonrho also maintains that TGF has unlawfully poached some of its staff and that it will take until approximately June 2016 to replace them and train new staff properly.

- [4] The respondents essentially dispute that Lonrho has established a clear right to the relief sought, contending that Lonrho has failed to establish a causal link between its confidential information (which has been returned or destroyed and, so it is alleged, is no longer of any benefit to TGF) and the manner in which TGF could use it to target and entice Lonrho's customers away. They submit that to the extent that TGF derived any benefit from Lonrho's confidential information, this has abated over time since Lonrho launched this application and there is no longer any need for protection. The respondents deny that Lonrho's employees were poached. They maintain that none of the employees concerned were subject to restraint of trade agreements and in particular that there was therefore nothing unlawful about McGrath and Brown joining TGF.

Background

- [5] Lonrho is a logistics company which specialises in freight forwarding by air, sea and road. It operates throughout Southern Africa and according to IATA (the International Air Transport Association) was the fourth largest export agent for airfreight in South Africa in 2014, during which year it moved some 7.5 million kilograms of air freight for its customers. Lonrho is the vehicle used in 2011 to

merge the perishables freight forwarding businesses of the Lonrho and Grindrod Groups (the latter having operated since the 1950's). It is Lonrho's export arm of its air freight division (of which perishables constitute a significant part) which is pertinent to this application.

- [6] TGF is the South African arm of the freight forwarding operation of the Toll Group, an Australian-based logistics company. It too provides freight forwarding services to customers throughout Southern Africa. While it offers freight forwarding services in respect of perishable goods in jurisdictions abroad, in contrast to Lonrho it has historically handled minimal volumes of these products within South Africa. In his answering affidavit Brown himself stated that:

'28.3 [TGF's] business in the perishables market may be small by Lonrho's standards but this does not justify a conclusion that it was "insignificant". It was certainly significant enough for me to earmark [TGF] as a prospective employer with good scope for growth in its own business and from my own personal career point of view.'

- [7] The second respondent (*'Partridge'*) is TGF's managing director. The third respondent (*'Chaplin'*) is its financial director and the fourth respondent (*'McAllister'*) is its national operations director.

- [8] McGrath was appointed by Grindrod on 1 March 2010 as the export manager of its Cape Town branch and, following the 2011 merger, he became employed by Lonrho in the same capacity. During his employment some 25 staff members

reported to him, and he in turn reported to Brown. McGrath's main role as Lonrho's export manager was to oversee the export arm of its air freight division at the Cape Town branch. McGrath gave notice to Lonrho of his intention to resign from his employment at the end of March 2015 and left Lonrho on 30 April 2015. He joined TGF the following day, i.e. 1 May 2015 as its operations manager in respect of perishable goods at its Cape Town branch.

[9] Although he attempted to downplay this, it was not seriously disputed by McGrath that, during the course of his employment with Lonrho, he became intimately involved with its Cape Town based export operations via air freight and, in particular, the export of perishable goods. He has detailed knowledge of Lonrho's procedures and processes in place at its Cape Town branch, its costs and profit margins, and its customers and suppliers. He also has significant experience in and knowledge of the protocols that need to be followed in order to ensure the swift and successful export of airfreight from South Africa.

[10] Brown was previously appointed by Grindrod on 4 June 1998 and similarly became employed by Lonrho following the merger. He was at all material times the operations manager, air freight division of Lonrho's Cape Town branch, as well as the *de facto* manager of the branch as a whole. In early April 2015 Mr David Swart (Lonrho's chief executive officer and the deponent to its main affidavits) and Mr Craig Campbell (Lonrho's chief operating officer) met with Brown to discuss McGrath's resignation and the impact it would have on Lonrho's operations. During that meeting Brown informed them that he also

intended to resign. He said that this was due to certain grievances which he had with Lonrho and that he had in fact already signed an employment contract with TGF. Campbell asked Brown to send him a copy of that agreement. Swart asked Brown to give Lonrho three months in order to address his grievances which, according to Swart, Brown agreed to do. Brown however maintains that Lonrho had been aware of the '*general unhappiness*' of himself and McGrath for a long time and in fact became aware at the beginning of March 2015 that both intended to leave and join TGF. According to Brown, it was only when several other employees resigned at the beginning of May 2015 to join TGF that '*Lonrho suddenly realised that the loss of several employees at once would have a direct impact on its business*'.

[11] On 30 April 2015 Brown gave Campbell notice of his intention to resign with effect from 31 May 2015. He left Lonrho on 21 May 2015. According to his written contract of employment with TGF, Brown was appointed as perishables manager reporting directly to McAllister (TGF's national operations director) with effect from 1 April 2015. This contract had already been concluded on 28 January 2015 and thus, on Brown's own version, at least one month before Lonrho became aware of his intention to resign and join TGF.

[12] Brown does not seriously dispute that during his employment with Lonrho he was exposed to significant confidential information both in respect of its Cape Town operations and elsewhere. According to Swart, this information included details

of Lonrho's customers and their decision makers; freight forwarding rates; profit margins; types of products and volumes as well as delivery destinations; credit terms afforded to customers; payment terms negotiated by Lonrho with certain airlines; Lonrho's budgets, costs, expenses, profitability and protocols. Brown himself stated in his answering affidavit that:

'30.1 During the course of my employment with Grindrod and subsequently with Lonrho over a period of some seventeen years, I have established a sound working knowledge of the day to day workings of the perishables freight forwarding business. Over this period of time, I have also developed sound working relationships with many of the customers. There is absolutely nothing confidential about any of this.

30.2 ... It is important to note that, whilst I agree that knowing the decision makers at a particular client and earning their trust is important, it is also something that is directly affected by individual personalities. This is not proprietary to Lonrho but is a direct function of my efforts to ingratiate myself with a particular person, going beyond what is strictly speaking required of me and making every effort to assist the client in every way possible in the most helpful and professional manner I can.'

[13] Neither McGrath nor Brown were subject to restraint of trade agreements with Lonrho but both are bound by secrecy or confidentiality clauses contained in their respective contracts of employment, which prohibit them from disclosing any of Lonrho's confidential information (including its business information) to any third party either during or after termination of their employment. In particular, Brown is

precluded from disclosing information concerning Lonrho's clients (or customers), as is evident from clause 2.3 of the annexure to his employment contract.

- [14] Both McGrath and Brown have bound themselves to even more stringent confidentiality clauses in their respective contracts of employment with TGF. They are prohibited from divulging to any person (whether during the currency or after the termination of their employment) any information relating to the trade secrets or trade connections of the company; any confidential information concerning the company's business or affairs and in particular any information pertaining to the salaries, wages and personnel records of any employees; as well as from soliciting any client (or customer) of TGF. In addition, both have bound themselves to separate restraint of trade agreements for a period of 12 months from date of termination of their employment with TGF.
- [15] Notwithstanding the confidentiality clauses contained in their employment contracts with Lonrho, it was Brown's contention in the answering affidavit filed on behalf of himself and McGrath that:

'31.5 The subsequent search and fuss about confidential documents is nothing more than a red herring. Lonrho was quite willing to let me depart with all of that knowledge in my head and this is definitive of the question as to whether it is really information and knowledge of customer relationships that is protectable under law. I submit that it is not.'

- [16] Given that McGrath aligned himself completely with Brown's contentions as a whole, it is fair to accept that he shares the same view. TGF did not respond to Lonrho's allegations concerning these confidentiality clauses.
- [17] On the same date that Brown gave notice to Lonrho seven other members of its staff at the Cape Town branch did so as well. All but one of these individuals were employed in Lonrho's exports arm of its air freight division at that branch. Three were export clerks, two were general workers and the other was a driver. All gave notice of their intention to leave Lonrho at the end of May 2015, i.e. the same date as Brown.
- [18] Campbell viewed this simultaneous mass resignation as suspicious, given that all of the staff members involved were employed in the same department. Lonrho obtained legal advice and a preliminary informal investigation commenced the same day. The investigation produced an email in which Brown had disclosed reams of confidential information about Lonrho's operations to TGF's national operations director, McAllister, during November 2014 (i.e. some five months earlier). This caused Lonrho to task Mr Charles Weber, a certified fraud examiner and internal auditor, to undertake a formal comprehensive investigation which commenced on 13 May 2015 and ultimately resulted in Lonrho launching these proceedings on an urgent basis on 26 May 2015.
- [19] In Lonrho's founding affidavit Swart stated that Weber's investigations had necessarily been limited to data in Lonrho's possession. Although it appeared

that several of the respondents had been communicating with each other via their personal email addresses, Weber was able to read some of those emails because Brown had also forwarded them to his own work email address. These limited communications revealed the following.

[20] On 2 October 2014 McAllister invited Brown to a meeting with Partridge, TGF's managing director. He requested Brown to provide the following information *'in preparation for our discussion'*, namely: (1) the resources required in terms of staff, location and infrastructure, including *'restraints of trade?'*; (2) diversity across operating branches with reference to sea and air freight, seasonality of perishable goods and product percentage splits; (3) probability of client loyalty, i.e. *'certainty of client relationship and migration'* as well as a list of potential clients – McAllister stated that TGF would be *'happy'* to sign a non-disclosure agreement *'to protect interests'*; (4) anticipated revenue both per month and per annum; and (5) anticipated costs relative to revenue (McAllister proposed that Brown should *'maybe do a 12 month run on revenue and cost'*).

[21] It would appear that the scheduled meeting went ahead because on 11 November 2014 McAllister wrote a further email to Brown with the subject line *'Opportunity'*. In this email McAllister made it clear that he also intended approaching Campbell to come on board:

'Thanks for the time this afternoon to take the call. As discussed, we will make contact with Craig to have a social beer and chat. Please can you provide me with a contact number. I have to say I am somewhat apprehensive to meet with

Craig, as a result of our discussions and his mixed feelings in terms of stay or go. You know him well and have already highlighted our discussions so I am trusting that this may not be a stumbling block should he decide to wait and see? Either way, I am confident that we can do something with Cape Town and may possibly be a win/win in terms of making a success of CPT and then Craig moving across later?'

[22] McAllister continued as follows:

'As mentioned, we will be meeting with the Global CEO in the next couple of weeks and may even be down in Cape Town as part of the trip. [Partridge] and I would like to be in a position to table this as a development opportunity that we would like to pursue. Please can you provide a high-level overview of the following...'

[23] McAllister went on to request detailed and highly confidential information concerning Lonrho's operations:

'Base the reports on a 12 month period, this will show seasonality, as mentioned let us be as conservative as possible, so rather show what you believe will move, and then we can agree on a % reduction for discussion/presentation purposes.

- *Volumes by:*
 - *Month*
 - *Commodity*
 - *Fruit*
 - *Veg*
 - *Fish*
 - *General cargo*
 - *Destination*

- *Team Size – maybe put a Structure Chart together in respect of people required. (remember we will have back office support on things like Finance, HR, IT etc)*
- *Sales – what do you invoice to the clients each month, just by way of example (don't need to disclose client's name)*
 - *Client 1 Invoice Total RXXX,XXX*
 - *Client 2 Invoice Total RXXX,XXX etc*
- *Cost of Sales – what do you disperse on behalf of the clients each month*
 - *Freight charges*
 - *Cartage etc*
- *Monthly General & Administrative Costs*
 - *Salaries – Based on Start date 1 March (our increases are October each year).*
 - *Basic*
 - *Car Allowance*
 - *Medical Aid*
 - *Pension*
 - *Tax*
 - *Communication Costs – Telephone, Cellphone*
 - *Travel – Local, Airfares, Petrol etc*
 - *Insurances – Debtor Insurance – relative to % of credit limit*
 - *Stationery – Printing*
 - *Rental – if we rent a facility / sub lease*
- *Capital Expenditure – which will make up the Depreciation or Amortisation*
 - *Refrigeration Facilities - +/- R300K*
 - *Vehicles?*
 - *Other*
 - *Computers – Once I know how many people from point above, I will factor a cost for PC's and Furniture etc.*
- *Sales less Cost of Sales will then give us the bottom line Profit on the business.*

Give me a shout if anything is unclear and will review prior to our meeting with our Global CEO.'

[24] Brown responded on or before 21 November 2014 by supplying McAllister with three documents. In the founding affidavit Swart explained their contents which, *inter alia*, included the following:

24.1 The total of the monthly revenue generated by each of Lonrho's Johannesburg, Cape Town, George, Port Elizabeth, Durban and "Trucking" branches for the 2013 calendar year and January to October 2014;

24.2 The total of Lonrho's monthly budgeted revenue for each of the aforementioned branches for the 2013 and 2014 calendar years;

24.3 A breakdown of the monthly revenue generated by each of the branches by type of freight forwarding service rendered, both for the 2013 calendar year and January to October 2014;

24.4 A breakdown of the "commodity" split of products exported by Lonrho's Cape Town branch for the same periods;

24.5 Lonrho's budgeted revenues, gross profit and volumes for each month of the 2014 calendar year up to that date for each type of freight forwarding service rendered at each of its branches;

24.6 A list of each invoice Lonrho issued for the month of October 2014, including the identity of the customer invoiced, the amount and date of each invoice, and the type of product handled in respect of each invoice; and

24.7 Details of Lonrho's income in respect of its operations for the month of October 2014 and "year-to-date", revealing a breakdown of Lonrho's expenditure as well as its net income.

[25] Brown's covering email to McAllister stated that:

'Hi Ian

Attached are some of the financials that I was able to do without drawing too much attention.

The staff requirements including myself will be

9 office staff

7 warehouse workers

Refrigeration we'll need two, one for fruit and one for flowers,

+/- R 600k

Two 8 ton trucks to get the shipments to the airlines

two light vehicles

I hope everything I give you is enough

cheers'

[26] However, this was not the end of Brown's assistance to McAllister and other representatives of TGF. On 17 February 2015 Brown wrote to Chaplin (TGF's financial director) requesting Chaplin to send him a copy of the '*...business plan for Cape Town*'. Chaplin duly complied and asked Brown to provide him with

'...the list of supplies [sic] and vendors to check on our current facilities and guarantees'.

- [27] The business plan, although incomplete, clearly relates to an anticipated air freight forwarding business in respect of perishable goods for TGF. Mr Philip De Witt, a business development analyst employed by Lonrho's parent company, analysed the plan which Chaplin sent to Brown. His analysis revealed similarity of not less than 99% between the revenue figures in the business plan and those contained in the information Brown sent McAllister. It also revealed that the gross profit and revenue margins contained in the business plan are very similar to those of Lonrho's, and that there was a high probability that some of Lonrho's margins were used to determine those in the business plan.
- [28] The business plan also included a list of anticipated customers and the types of commodities that would be handled for them. Save for the last one on the list, the identified customers were all Lonrho's main customers together with the type of commodities handled by Lonrho for them. As Swart pointed out, this information would of course have been known to Brown. The request for *'...the list of suppliers and vendors'* showed that Chaplin also wanted Brown to provide him with details of Lonrho's suppliers so that he could incorporate that information into the business plan as well.
- [29] In their answering affidavits some of the respondents (Chaplin in particular) made feeble attempts to assert that the information disseminated by Brown was not

confidential. However during argument, and without admitting the extent of the confidentiality, this concession was properly made on their behalf, as was the fact that TGF should not have used it. Also conceded was that TGF's business plan, in its infancy, came about as a direct result of collusion between Brown and (at least) McAllister.

[30] According to Chaplin, Brown did not provide a '*customer listing*' although he admitted that Brown disclosed the identity of some of Lonrho's customers to TGF. Chaplin also stated that the business plan annexed to the founding affidavit was prepared for purposes of presentation to TGF's Australian-based parent company and was not a '*blue print*' of how TGF intended operating its air freight perishables business in South Africa. According to Chaplin:

'10.5.2 ...Such business plan was prepared in line with the requirements, systems and benchmarks applicable to all business divisions of [TGF] and its aim was to seek the approval of [the parent company] to expand, not launch, its perishables division in South Africa. The information that was provided by [Brown] that was included in the business plan related to the end result of a business process and did not include any workings relating to factors affecting pricing, which are set out below;

10.5.3 [Brown] provided me with the names of nine customers who he thought might be prepared to conduct business with [TGF] in the future and such names were included in the business plan, together with estimates of possible profit margins (which were not based on [Lonrho's] information, but discussions about the industry in general between me and [Brown], which were part of the information that would be considered by [the parent company] in considering the business plan.'

- [31] Chaplin's denial about the use of Lonrho's pricing figures and profit margins must, in light of De Witt's substantially uncontested findings and the subsequent concessions made, be rejected.
- [32] Chaplin also stated that it was his responsibility to develop the business plan and to include therein certain variables unique to TGF. He stated that TGF had already undertaken '*significant market research and preparation prior to its expanding its Cape Town perishables freight division*'. No details were provided on what this market research and preparation had entailed; for how long it had been in progress; and the extent to which it had been incorporated in the business plan and/or its subsequent revisions prior to presentation to TGF's parent company. These bald allegations are thus of no assistance. Chaplin maintained that Lonrho's information is '*no longer*' of any value to TGF and will not assist it to compete with Lonrho in any way, although he refrained from explaining the exact nature and volume of Lonrho's information utilised in the preparation and finalisation of the plan. Lonrho's version on this aspect thus stands uncontested.
- [33] Chaplin confirmed that by 19 January 2015 TGF's parent company approved its plan as well as a total investment of R12.2 million for its implementation '*...at which point the proposed expansion of the South African perishables division was to proceed*'. Thus on critical assessment of TGF's own version the confidential information provided by Brown not only enabled TGF to prepare and

develop a business plan such as to merit approval and substantial investment by TGF's parent company within only two months of its "infancy", but immediate expansion was able to be proceeded with. Furthermore Brown concluded an employment contract with TGF just nine days after the parent company granted approval for the expansion of its air freight perishables division in South Africa based on that plan.

[34] Chaplin also stated that:

'11.7.3 Inevitably, senior employees in organisations develop relationships with customers and suppliers in the industry in which they are employed. Such relationships often remain strong when such employees change employment and it is not uncommon for such customers to take their business to their new employer and commence trading with the new employer because of such relationship. It is both naïve and irrational to adopt a view that the potential of future business is not a factor that is taken into consideration when negotiations take place between potential senior employees and future employers.'

[35] And further:

'16.2 I point out that [Lonrho] seems to regard itself as entitled to some sort of exclusive right to its customers when in law this is not the case – all competitors in the perishable freight industry are free to approach such customers to seek business.'

- [36] Chaplin went on to state that a number of Lonrho's customers might be inclined to conduct business with TGF as their representatives have strong relationships with Brown. According to Chaplin, there was nothing unlawful in this.
- [37] Apart from Brown's disclosure of confidential information and assistance in the preparation of the business plan, Weber's investigation also revealed that Brown had taken active steps to assist TGF in its implementation. In addition to instigating the migration of Lonrho's staff, which I deal with below, Brown assisted TGF in fitting out a new cold room during February 2015; installing equipment in April 2015, and just prior to his departure from Lonrho, taking one of Lonrho's major clients to view TGF's new facilities.
- [38] In early May 2015 McGrath, in collusion with one of Lonrho's staff, Ms Toni Campbell, provided TGF with a spreadsheet setting out a list of office requirements for its expanded operation. Weber analysed the electronic version of this document and established that it had already been created on 19 January 2015. On the day of his departure from Lonrho (i.e. 30 April 2015) McGrath took with him confidential data relating to Lonrho's operations, including waybills issued in respect of a significant client, reflecting volumes and type of product moved. Weber also established that McGrath attempted to divert a customer away from Lonrho to TGF whilst still in Lonrho's employ.
- [39] Aside from Lonrho's confidential information used by TGF to prepare its business plan and to solicit Lonrho's main customers, the implementation of the plan

contemplated the recruitment of Lonrho's staff employed in the export arm of its air freight division. This is evident from the fact that the plan contains a list of the staff TGF would need to employ to run its expanded division. Nine of Lonrho's staff (including McGrath and Brown) are named in the plan together with details of salaries to be offered to them.

[40] Swart stated that five of these staff members constitute Lonrho's entire complement of export clerks who reported to McGrath. Another is one of two warehouse supervisors who similarly reported to McGrath. Ms Toni Campbell is an administrative supervisor employed in the air freight division of the Cape Town branch who reported to Brown. According to Swart the mass migration of these staff members to TGF would all but eradicate the air freight arm of Lonrho's export division in Cape Town. This of course excludes the severe blow dealt to Lonrho by the departure of McGrath and Brown and McAllister's stated intention to solicit Campbell as well.

[41] Apart from those of McGrath and Brown, the salaries indicated in the business plan represent an approximate 15% increase on those paid to the various staff members by Lonrho. Brown was aware of these salaries and would have thus been able to provide TGF with this information to enable it to offer the individuals concerned an incentive to leave Lonrho and join TGF.

[42] Swart maintains that it is extremely difficult to replace individuals with the particular skills and experience of McGrath and Brown, which would be

compounded by the loss of support staff who have gained a detailed working knowledge of the particular niche in the industry. According to Swart:

'93.2 ...This includes having a working knowledge of the various procedures and bureaucracies one must go through to export the various types of perishable goods. For [Lonrho] to be competitive its staff need to know those procedures well, as well as the various government officials, etc. they need to deal with on a day to day basis. There are very few prospective employees with those skills and knowledge, and any employees [Lonrho] recruits to replace those poached by [TGF] will need to be trained up before they can do their work properly and be productive.'

[43] And further:

'95. While [Lonrho] will still be able to service its clients notwithstanding a number of its staff having resigned (I point out that not all of the employees targeted by the business plan have left [Lonrho's] employ), [Lonrho] will be placed under some pressure to meet its clients' expectations while new staff are trained up, a process that will, optimistically speaking, take approximately a year to complete. This pressure on [Lonrho's] resources will represent an excellent opportunity for [TGF] to acquire [Lonrho's] clients and their business. This, I submit, is by design and is unlawful.'

[44] According to Swart at least two of the targeted staff members (other than McGrath and Brown) have confirmed that it was at Brown's instigation that they resigned. He went on to explain the very limited pool of experienced export clerks available in the market, given the nature of the skills and knowledge required in

the clearing and forwarding industry. He stated that the normal recruitment process will take a minimum of three months: a month to advertise and receive applications; a month to review and compile a shortlist of candidates; and a month to conduct interviews. In addition the successful candidates may have to work out a notice period with an existing employer (assume a month). A further standard three month probationary period would follow. At least a further six months should reasonably be allowed for the individuals concerned to gain sufficient skills and experience in order to properly replace their predecessors. This is a total of 13 months. It is for these reasons that Lonrho contends that it requires an interdict until June 2016.

[45] Chaplin dismissed Swart's allegations, maintaining that there is nothing untoward or unlawful about individuals changing jobs and earning more money with a new employer. He stated further that:

'37.8 Also, any perceived difficulties in replacing senior or specialised staff are part of the risk that a business assumes and must manage. This is not a good reason to approach a court for an order preventing competition.'

37.9 Similar considerations apply to the time taken to advertise, interview and recruit replacement staff. This is simply a business risk that all employers need to make provision for.'

[46] According to Chaplin, TGF advertised for staff for its expanded air freight perishables division during April 2015. He disputed Swart's allegations about the

time it would take to replace staff lost by Lonrho to TGF, maintaining that this was *'unrealistic, overstated and opportunistic'*.

- [47] Mr Brendon Cannel, TGF's human resources director, stated (by way of a confirmatory affidavit) that he is inundated with applications within a few days of advertisements being placed; is able to arrange interviews with suitable candidates within a week of advertisement; and that an offer of employment is usually made within two weeks (although not clear, it is assumed in favour of TGF that the offer of employment is made within two weeks of interview). In the rare instances where a suitable candidate is not found in a short period, recruitment agencies are utilised to expedite the process.
- [48] According to Cannel he has been involved in staff recruitment in the freight industry for 12 years, and has not once taken longer than two months to fill a vacant position, no matter how specialised the post, during the period of his employment with TGF. Neither Chaplin nor Cannel disclosed how long the latter had been employed by TGF. Cannel also maintained that if training is required it is usually "on the job" training and at most takes two weeks.
- [49] Neither Chaplin nor Cannel made mention of any probationary period which would need to be served. However Brown's employment contract with TGF stipulates a six month probationary period, the purpose of which is described in clause 3.1 thereof as follows:

'...The purpose of this period is to allow a familiarization (sic) and assessment period to assess your suitability and ability to fulfil the job requirements and to provide you with the information and necessary guidance to perform your job responsibilities.'

- [50] Chaplin and Cannel agree that usually one month's notice of termination of employment is required. Therefore, according to them, the recruitment process should take no longer than about two and a half months and, if the sixth month probationary period stipulated in Brown's contract is added, it would take roughly eight months including two weeks of in-house training.
- [51] However in the particular circumstances of this matter, on TGF's own version, this is not what happened.
- [52] TGF placed its advertisements on 17 April 2015. According to Chaplin a number of employment seekers with experience in the perishables freight forwarding industry applied for positions *'shortly thereafter'*. Chaplin listed four *'examples'* of these individuals who, he stated, applied on 28 April 2015 (11 days after the advertisement), 1 May 2015 (two weeks later), 6 May 2015 (just under three weeks later) and 29 May 2015 (six weeks later) respectively.
- [53] In his earlier affidavit of 2 June 2015 Chaplin advised that, of the 17 potential employees who were listed in the business plan, TGF had *'only at present 5 individuals although it is in negotiations with 4 others to join the workforce in*

future'. This affidavit was signed more than six weeks after TGF placed its advertisements.

[54] No attempt was made in Chaplin's supplementary affidavit of 8 June 2015 (i.e. three days after the interim interdict was granted) to disclose whether or not these negotiations had been successful. It is accordingly fair to accept that the allegations made by Chaplin and Cannel concerning recruitment periods were not simply inaccurate. They were untruthful and must be rejected. What is more, Brown, who was in an ideal position to place facts before the court, did not respond to Swart's allegations, nor for that matter did McGrath, save to contend that a '*few*' additional members of Lonrho's staff resigned to join TGF '*as a result of [its] properly advertised recruitment drive*'.

[55] Therefore more accurately TGF's version is that the initial response period is realistically one and a half months to which must be added at least three weeks to interview and make an offer of employment, followed by a one month notice period to the existing employer and a probationary period of six months to train up the staff member and to properly assess his or her suitability and capabilities for the position. This is about 9 months. It is however acknowledged that less skilled employees such as drivers and general workers would probably be subject to shorter probationary periods.

Discussion

- [56] I have deliberately set out the facts in some detail given that the Plascon-Evans rule applies. It is against these facts that Lonrho seeks to interdict TGF from carrying out its expansion plans for a limited period until June 2016 for what it contends is the advantage which TGF's alleged unlawful competition has created to dissipate. Put differently, Lonrho seeks a levelling of the playing field for a limited period to enable it to recover from the ongoing harm which, it argues, TGF's actions have caused it.
- [57] On the other hand the respondents deny a campaign to bring this particular division of Lonrho to its knees, that the use of Lonrho's confidential information has or will in the future afford TGF any advantage, and that a period of one year to replace key staff is unnecessary and thus unwarranted. McGrath and Brown are also concerned about the temporary halting of their own career paths and the entrenchment of their future employment with TGF.
- [58] The respondents also maintain that Lonrho changed its approach during the course of this litigation. They submit that the unlawful competition upon which Lonrho initially relied is different to that advanced in the heads of argument filed on its behalf. The difference, it is submitted, is that Lonrho initially sought an interdict to prevent *future* misappropriation by TGF of its confidential information for the purpose of identifying and entrenching itself with Lonrho's customers; and to prevent the harm it would incur as a result of staff poaching, thereby rendering

it unable to service its customers properly and in turn affording TGF the opportunity to take those customers for itself.

[59] It is submitted that in the heads of argument Lonrho instead seeks to advance a case to interdict TGF from using its confidential information in the *development of the business plan* and from adopting a strategy of poaching key staff with a view to rendering it unable to compete with TGF in that market. TGF submits that the reason for this “change in approach” is that Lonrho cannot demonstrate that the confidential information provided to it enabled TGF to obtain any competitive advantage in relation to Lonrho’s major customers.

[60] In my view the so-called “change in approach” is more apparent than real. The argument on which it rests is rather a strategy adopted by the respondents to avoid the relief sought by Lonrho. This strategy is to take individual evidentiary components of Lonrho’s case and break them down in the hope of demonstrating that each one taken in isolation is insufficient to warrant a final interdict.

[61] I am not persuaded that this is the correct way to assess the evidence. It should be viewed as a whole on TGF’s version taken together with the undisputed facts.

[62] It has throughout been Lonrho’s case that TGF took its confidential information (including that relating to its major customers and key staff) for its own direct benefit and to Lonrho’s direct prejudice through the conduit of a willing and complicit Brown (and to a lesser extent McGrath). That Brown initially

approached TGF is irrelevant. On a proper consideration of the evidence as a whole there can be little doubt that McAllister, and later Chaplin, seized the golden opportunity which came their way in the form of McGrath and Brown and embarked upon a concerted and well-orchestrated strategy to use that information to TGF's advantage. Similarly, there is little doubt that McAllister and Chaplin deliberately set out to poach Lonrho's major customers and its key employees as an integral part of the envisaged implementation of TGF's expansion plan.

[63] I have already sought to demonstrate the improbabilities and plain falsehoods in the respondents' version and they will therefore not be repeated. It is enough to say that the evidence, considered in light of the Plascon-Evans rule, shows on a balance of probabilities that: (1) Lonrho has an interest in the information stolen by TGF, Brown and McGrath; (2) the information stolen was Lonrho's confidential information; (3) Brown and McGrath had a contractual relationship with Lonrho which imposed a duty on them to preserve the confidence of information imparted to them during the course of their employment with Lonrho; and (4) Brown and McGrath knowingly misappropriated that information by disclosing it to TGF: see *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (WLD), esp at 573I-581I.

[64] To my mind, whether or not it was TGF's sole intention to bring Lonrho's perishables air freight division to a halt or whether this was consequential fallout to Lonrho does not really matter. In the particular circumstances of this case it is

rather whether the improper possession and use of Lonrho's information by TGF gave it a springboard to launch its expansion in the air freight perishable goods market. In other words, has Lonrho established the causal link between its confidential information and the manner in which TGF used, or could use it to target and entice Lonrho's customers and key employees away.

[65] Van Heerden & Neethling: Unfair Competition (2nd Edition) at 222-223 deal with the springboard doctrine as follows:

'In connection with the interdict and the assessment of damages for unlawful competition, the springboard doctrine of English law, which has been adopted in our law, must also be taken into account. The basic philosophy of this doctrine is that the competitor who acquires the plaintiff's trade secret and uses it in his performance, has an "unfair and improper head start" or springboard enabling him to gain an advantage over the plaintiff. It is important that the springboard may be of limited duration because its effectiveness may diminish with the passage of time and ultimately vanishes entirely. This may happen where a product containing the trade secret is marketed, and the information then gradually becomes more and more known (for example, by reverse engineering) until its confidentiality disappears completely and it no longer qualifies as a protectable trade secret. As Knobel correctly points out, the limited duration of the springboard must be taken into account in the assessment of damages, as well as in determining the period for which an interdict should be granted.'

[66] In *Van Castricum v Theunnissen and Another* 1993 (2) SA 726 (TPD) at 731F-H the court, having reviewed the authorities, held that:

'What is clear from the aforesaid, is that someone who saves himself the trouble of going through the process of compilation of the document, even where it is

compiled from information which is available to anybody, such a person would be interdicted if that information had been obtained in confidence. The reason is simply that confidential information may not be used as a springboard for activities detrimental to the person who made the confidential information available. It would remain a springboard even when all the features have been published or can be ascertained by actual inspection by any member of the public.'

[67] Of course, in the present matter, *Lonrho* did not make its confidential information available to TGF. It was obtained by McAllister and Chaplin, predominantly from Brown, at a time when the latter was still employed by *Lonrho*. The point however is that, if *Lonrho*'s confidential information is protectable *even in circumstances when it is made available by Lonrho itself to a third party who then uses it as a springboard*, there can be no question that where it is obtained illicitly for the purpose of springboarding *Lonrho* must enjoy a right to protection.

[68] Although TGF maintained that *Lonrho*'s major customers whose details were provided by Brown and incorporated in the business plan are up for grabs by any competitor, and this is true, TGF cannot escape the fact that the information concerning these customers was confidential to *Lonrho*, and in particular the information pertaining to *Lonrho*'s confidential dealings with them *came directly* from Brown.

[69] TGF similarly cannot avoid the overwhelming probability that the business plan presented to its parent company was developed by the direct use of *Lonrho*'s confidential information. Its origins lay in the initial business plan incorporating

virtually identical information to that of Lonrho's margins, pricing and the like. The final plan was presented to TGF's parent company within just two months of the conception of the initial plan. McAllister and Chaplin were not mere passive bystanders. They actively encouraged Brown to steal confidential information from Lonrho so that TGF could use it to target Lonrho's main customers and key staff, whilst armed with unlawfully obtained knowledge such as to give them the edge over Lonrho, and thereby rendering what TGF could offer Lonrho's main customers and key staff more attractive than what Lonrho had in the past.

[70] In *Waste Products*, the court, dealing with the fifth requirement to establish misuse of confidential information (namely improper possession or use of that information, whether as a springboard or otherwise), held as follows at 582E-H:

'It has already been established that the defendants used the confidential information obtained about the plaintiff's plant and processes. It is useful, nonetheless, to consider also the concept of springboarding, since the same conduct may constitute both unlawful use of confidential information and the use of that information to gain a springboard in order to compete.'

*"Springboarding" entails not starting at the beginning in developing a technique, process, piece of equipment or product, but using as the starting point the fruits of someone else's labour. Although the springboard concept applies in regard to confidential information, the misuse of the fruits of someone else's labour may be regarded in a suitable case as unlawful even where the information copied is not confidential. This was the case in *Schultz v Butt* 1986 (3) SA 667 (A), where the boat hull designed by the plaintiff and copied by the defendant was found not to be confidential because it was in the public domain. But the copying of it, as a springboard, was regarded as unlawful.'*

[71] The court continued at 583F-G:

'In terms of the springboard doctrine, an interdict against the use of confidential information may be limited by the duration of the advantage obtained, or the time saved, by reason of having had access to the confidential information.'

[72] In order to obtain the final relief sought, Lonrho has to establish a clear right; an injury actually committed or reasonably apprehended; and that there is no satisfactory alternative remedy.

[73] I have found that the conduct of McGrath and Brown was in breach of Lonrho's rights arising from their respective employment contracts. It constitutes the delict of unlawful competition, as do the actions of TGF, in that TGF has unlawfully made use of confidential information belonging to Lonrho as a springboard in order to compete with it.

[74] In addition, I am satisfied that Lonrho has established an injury already committed and that the ongoing harm is reasonably apprehended for the future. Were it not for the interim interdict granted on 5 June 2015 TGF would have proceeded with its expansion plan, targeting Lonrho's major customers and making use of its key staff, thereby rendering Lonrho unable to service its customers properly. I agree with Lonrho's contention that this would have presented an excellent opportunity for TGF to acquire Lonrho's customers and their business. I also agree that this was by design and would have been

unlawful. Were the interim order to be discharged, there is every indication that TGF would simply pick up where it left off and unashamedly continue to target Lonrho's major customers and poach its key employees.

[75] Lonrho has no other satisfactory remedy. Although TGF appears to be able to afford to pay a substantial award of damages, the difficulty faced by Lonrho is how its damages claim could ever be properly quantified, let alone proven.

[76] The interdictory relief sought by Lonrho is for the limited period until June 2016. As argued on Lonrho's behalf, in this case the parties supply services. Theoretically, TGF should be precluded from supplying services resulting from its unlawful conduct, i.e. from implementing its expansion. However practically speaking, an interdict precluding TGF from implementing its expansion plan will be too vague to be of any meaningful benefit. This is particularly so given that TGF has historically provided air freight forwarding services in respect of perishable goods albeit on a limited scale.

[77] The way to overcome this practical difficulty is to interdict TGF, McGrath and Brown from doing business with Lonrho's main customers or soliciting more of its employees while the benefit TGF secured from its unlawful conduct dissipates. Not only will this create certainty, but it is less onerous on the respondents than would be the case if TGF was precluded completely from implementing its expansion: it may do so, provided it does not deal with Lonrho's major customers or poach any more of Lonrho's key staff for a limited period.

- [78] The determination of the period of an interdict in cases such as these almost always entails some form of approximation, and a relatively robust approach is required. This is because it is a somewhat artificial exercise to ascertain the time benefit a wrongdoer has achieved by misusing confidential information or springboarding. Such a robust approach was adopted in *Telefund Raisers CC v Isaac & Others* 1998 (1) SA 521 (C) at 536G where the court determined the duration of the interdict by applying fair and equitable considerations.
- [79] Lonrho maintains that it will take approximately 13 months (from May 2015) to recover in terms of staff replacement and harm caused in relation to its major customers. A period of 13 months (i.e. until June 2016) is not unreasonable, given the mass exodus of Lonrho's key staff as well as the fact that the information stolen by TGF contained a detailed account of Lonrho's trade and profitability over a period of just under two years, and which thus took that same period of time to accumulate.
- [80] On critical analysis of TGF's version, staff replacement would take somewhere between six and nine months. Given TGF's stance that Lonrho failed to establish any causal link between its conduct and Lonrho's customers, TGF did not address what would be a fair and equitable period for an interdict.
- [81] I must also take into account Swart's evidence that Lonrho has taken steps to address its staff crisis and that:

'27 ... in a best case scenario (i.e. assuming the individuals mentioned above are appointed after their probationary periods expire and any new staff required can be appointed within a reasonable time), the effect of [TGF's] unlawful poaching of the applicant's staff will have been normalised early next year.'

[82] Taking all of these factors into consideration and adopting a robust approach, it seems to me to be fair and equitable to interdict TGF from approaching Lonrho's main customers and soliciting any further employees until 30 April 2016.

[83] Although TGF returned and/or destroyed the stolen confidential information when the interim interdict was granted, Lonrho nonetheless seeks confirmation of that part of the interim order. There is no reason why it should not be confirmed, given that there can be no prejudice to TGF.

Conclusion

[84] **In the result the following order is made:**

- 1. The first respondent is interdicted and restrained, until 30 April 2016, from providing air freight forwarding services in respect of perishable products being exported from Cape Town to the applicant's customers identified on the list headed "Customer Listing" and which forms part of Annexure DS10 to the founding affidavit of Mr Swart (hereinafter referred to as *'the applicant's customers'*);**

2. The respondents are interdicted and restrained, until 30 April 2016, from approaching, directly or indirectly, or assisting any other person in approaching directly or indirectly, the applicant's customers and/or the representatives and/or employees of those customers, with a view to soliciting or canvassing air freight forwarding business from them in respect of perishable products being exported from Cape Town;
3. The respondents are interdicted and restrained until 30 April 2016 from communicating with any of the applicant's employees, directly or indirectly for the ultimate purpose of soliciting them to terminate their employment with the applicant;
4. Paragraph 1.2.2 (inclusive of paragraphs 1.2.2.1 – 1.2.2.3) of the rule *nisi* issued on 5 June 2015, which pertains to the use of the applicant's confidential information, is made final;
5. The respondents are interdicted and restrained, until 30 April 2016, from utilising, communicating or publicising any of the applicant's confidential information to any third parties, including the information referred to in paragraph 1.2.2 (inclusive of paragraphs 1.2.2.1 – 1.2.2.3) of the rule *nisi* issued on 5 June 2015, as well as the computer file (and any printed copies thereof) named '*Cape Town Business Plan ver 5.xlsm*' and referred to in paragraph 81 of the founding affidavit of Mr Swart and any previous iterations of such plan; and
6. The respondents shall pay the costs of this application, such costs to be paid jointly and severally, the one party paying, the other to be

**absolved, including all reserved costs orders as well as the costs of two
counsel where employed.**

J I CLOETE