

REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10/21704

DATE: 20/01/2011

In the matter between:

STRIKE PRODUCTIONS (PTY) LTD

Applicant

and

BON VIEW TRADING 131 (PTY) LTD

First Respondent

DREAM SETS (PTY) LTD

Second Respondent

JACOBS, MAURITZ MATTHEW

Third Respondent

THE NEVERMACHINE (PTY) LTD

Fourth Respondent

J U D G M E N T

SALDULKER, J:

INTRODUCTION

[1] No person can be unreasonably prevented from earning a living in the public domain. The right to trade and practice a profession is highly prized. In the workplace, restraint of trade agreements have become valuable tools in the hands of employers, protecting the circulation of their identifiable confidential information and trade secrets by employees post-employment. However, where employees are not bound by an appropriate acknowledgement of confidentiality, the question whether employers have

some protection against the use of confidential information by ex-employees raise issues that are not always easily resolved.

[2] In this application, the applicant, Strike Productions (Pty) Ltd , claims a final interdict restraining the first respondent, Bon View Trading 131 (Pty)Ltd from employing the third respondent, Mauritz Matthew Jacobs (Jacobs) as a lighting technician on the M-Net IDOLS television reality show. Additionally, Jacobs is interdicted from working on or being employed as a lighting technician on IDOLS. The IDOLS programme commenced in South Africa in 2002. It is a singing competition in which contestants all over the country participate and where judges (and television viewers), ultimately select the best singer and performer.

BACKGROUND

[3] The applicant was founded in 1982 and specialises in Technical Event Support. It provides Technical Sound, Lighting, Visual and Staging services in the Events and Television Production Industry and offers a 'turnkey' solution for all technical and design aspects required by the Events and Conferencing Industry in South Africa, 'the SADC and Sub-Saharan Africa'.

[4] The applicant was responsible for part of the technical production of the M-Net IDOLS television programme from 2002 to 2009. From January 2010 to May 2010, the applicant was also involved in the preparation for the 2010 IDOLS programme and its negotiations, with Nevermachine.

[5] Jacobs was employed by the applicant from 1 July 2002 until 30 April 2010. During such employment, he was involved in the provision of technical services to the IDOLS production, initially as a lighting technician and thereafter as the senior lighting technician.

[6] On or about 4 March 2010, the management of the applicant issued new contracts of employment which contained restraint of trade agreements to Jacobs and to all members of the applicant's staff. The restraint *inter alia* prohibited Jacobs from working for any company doing business in

competition with the applicant. It is common cause that Jacobs refused to sign the new contract of employment, resigned on 23 April 2010, and left the applicant's employment on 30 April 2010. Thereafter Jacobs became employed with Bon View, as a lighting technician, and during June 2010, began working on the IDOLS production which started at 'Sun City' during May 2010. It is not disputed that Jacobs' job description at Bon View is identical to his job description with the applicant.

[7] Bon View was established during the period between January 2010 to April 2010. It was a shelf company purchased by Sean Mitford Hoey (Hoey) in April 2010, and Hoey became its director on 16 April 2010. Hoey is both a director of Bon View and the second respondent, Dream Sets (Pty) Ltd. The latter is a Set and Stage Design manufacturing company that provided stage construction to the applicant on the IDOLS production, and on other events, handled by the applicant since 2006.

PRINCIPAL SUBMISSIONS

[8] The applicant relies on a series of e-mails sent by Jacobs to various persons, in support for its contentions that whilst the applicant and Nevermachine were preparing for IDOLS 2010, Jacobs, who was then still in the employment of the applicant, attempted to 'hijack' the applicant's business, using the 'Applicant's IDOLS Intellectual Property', with the intention of taking over the applicant's customer base, to further his plans for 'IDOLS' and to continue doing so 'even after the 2010 IDOLS production'.

[9] The applicant contends that it invested considerable time and resources into creating the intellectual property of the IDOLS production since 2002, while Jacobs was in its employ. The applicant asserts that Jacobs, his ex-employee is using its confidential information for the benefit of Bon View, his new employer, in competition with the applicant. It contends that Bon View was established by Hoey in collaboration with Jacobs and that Jacobs conspired with Hoey to set up Bon View specifically in order to 'hijack' the applicant's business with Nevermachine, using the applicant's business connections. Accordingly, the applicant states that Jacobs, unlawfully and

wrongfully used his employment at the applicant as a 'springboard' to take the applicant's 'IDOLS business' with him to Bon View. He secretly invited quotations on work to be done, sent an e-mail to his wife, containing the applicant's confidential contact list, 'boasted' of his efforts to damage the business of the applicant and succeeded eventually in 'poaching' the provision of technical services to the M-Net IDOLS production from the applicant to Bon View.

[10] The respondents' *riposte* to the foregoing is that the applicant has failed to establish that it has confidential information or trade secrets worthy of protection by law.¹ In addition, the respondents contend, that Nevermachine followed Jacobs to his new employer, Bon View, for the quality of the service that it provides. In this regard the respondents submit that the law protects Jacobs' freedom to take his personal knowledge and skills, which he acquired in the course of his employment with the applicant, to his new employer, and, in the absence of a restraint, to compete with his ex- employer, as it is in the public interest to protect such freedom.

[11] The respondents deny that the applicant has confidential information regarding the IDOLS programme or that Jacobs has any knowledge of such confidential information. The respondents state that the IDOLS programme requires 'little original artistic input', all of which is done by Gavin Wratten, the series and executive producer of IDOLS, and under whose direction Jacobs has been doing the lighting on IDOLS since 2002.

[12] As Nevermachine has indicated that it will not use the applicant again for IDOLS, the respondents contend that the interdict sought by the applicant is academic, and should not be granted. A damages claim is, in the circumstances of this case, an appropriate remedy.

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623(A), at 634H-I; *Advtech Resourcing (Pty) Ltd v Kuhn* 2007 (4) ALL SA 1386, C, para 51; *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A); *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at 493 para [10], p495 para [14].

Brief Overview of Some Legal Principles

[13] Central to the issues in this matter, is the fact that Jacobs is not bound by a restraint of trade agreement with his former employer, the applicant. Principles governing employer/employee relationships and the obligations arising therefrom are to be found in the judgment of Stegmann J in *Meter Systems Holdings Ltd v Venter and Another*,² where the following was succinctly stated:

“...When the fiduciary relationship is not based on contract, it is necessary to look to the law of delict, and in particular to the principles of Aquilian liability, in order to ascertain the extent of the legal duty to respect the confidentiality of information imparted or received in confidence...”.³

And at p430:

“In the English case of *Faccenda Chickens Ltd v Fowler and Others; Fowler v Faccenda Chickens Ltd* [1985] 1 All ER 724 (Ch), it was held that, as between employer and employee, all information for which confidentiality is usually claimed can be classified into three categories. I quote the passage in the judgment of Goulding J from 731 b -732 e :

'Let me now deal with the alleged abuse of confidential information. I must make it clear that anything I say about the law is intended to apply only to cases of master and servant. In my view information acquired by an employee in the course of his service, and not the subject of any relevant express agreement, may fall as regards confidence into any of three classes. First there is information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to impart it during his service or afterwards to anyone he pleases, even his master's competitor. . . . Second, there is information which the servant must treat as confidential, either because he is expressly told it is confidential, or because from its character it obviously is so, but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment

² 1993(1) SA 409, at 426E-427B; see also *Knox D'Arcy Ltd and Others v Jamieson and Others* 1992 (3) SA 520.

³ *Meter Systems*, p426, I to J.

continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master...The following passage from Maugham LJ's judgment in *Wessex Dairies Ltd v Smith* [1935] 2 KB 80 at 89, [1935] All ER Rep 75 is also material:

"First, after the employment terminates, the servant may, in the absence of special stipulation, canvass the customers of the late employer, and further he may send a circular to every customer. On the other hand, it has been held that while the servant is in the employment of the master he is not justified in making a list of the master's customers, and he can be restrained, as he was in *Robb v Green*, from making such a list, or if he has made one, he will be ordered to give it up. But it is to be noted that in *Robb v Green* ([1895] 2 QB 315, [1895-9] All ER Rep 1053) the defendant was not restrained from sending out circulars to customers whose names he could remember. Another thing to be borne in mind is that although a servant is not entitled to make use of information which he has obtained in confidence in his master's service he is entitled to make use of the knowledge and skill which he acquired while in that service, including knowledge and skill directly obtained from the master in teaching him his business. It follows, in my opinion, that the servant may, while in the employment of the master, be as agreeable, attentive and skilful as it is in his power to be to others with the ultimate view of obtaining the benefit of the customers' friendly feelings when he calls upon them if and when he sets up business for himself. That is, of course, where there is no valid restrictive clause preventing him doing so."

Goulding J then continued at 732 *d* :

"Third, however, there are, to my mind, specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's....."(my emphasis).

[14] Legal principles governing unlawful competition have been elaborated upon in a number of decisions.⁴ In *Waste Products Utilisation (Pty) Ltd v Wilkes & Another* 2003(2) SA 515 at 571, the court stated as follows:

“The particular forms of unlawful competition complained of by the plaintiff, and which have found recognition in our legal system, are the unfair use of a competitor's fruits and labour, and the misuse of confidential information in order to advance one's own business interests and activities at the expenses of a competitor” (my emphasis).

And at 573:

“In a non-contractual context the English authorities say that the obligation not to use unfairly a competitor's fruits and labour or to misuse confidential information is based on the equitable doctrine relating to confidential communications...

Confidential information can be protected by means of an interdict and/or a claim for damages. To succeed with such relief, the following must be established. The plaintiff must have an interest in the confidential information, which need not necessarily be ownership. The information must be of a confidential nature. There must exist a relationship between the parties which imposes a duty on the defendant to preserve the confidence of information imparted to him, which could be the relationship between the employer and employee, or the fact that he is a trade rival who has obtained information in an improper manner. The defendant must have knowingly appropriated the confidential information. The defendant must have made improper use of that information, whether as a springboard or otherwise, to obtain an unfair advantage for himself. Finally, the plaintiff must have suffered damage as a result.”

[15] In *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* 1960 RPC 128 (CA), as referred to in *Multi Tube Systems (Pty) Ltd v Ponting and Others* 1984 (3) SA 182 (D) at 189B-I, the court stated as follows:

"As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in

⁴ *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 at 570F-J; *Nampesca (SA) Products (Pty) Ltd and Another v Zaderer and Another* 1999 (1) SA 886 (C) at 894; *Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 at 627. See also *Spur Steak Ranches Ltd and Others v Saddles Steak Ranch Claremont and another* 1996(3) SA 706 (C) at 714 H-715B; *MultiTube Systems (Pty)Ltd v Ponting and others* 1984(3) SA 182(D) 189B-I; *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* 1960 RPC 128(CA)

confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public... Therefore, the possessor of the confidential information still has a long start over any member of the public."

[16] In *Knox D'Arcy Ltd and Others v Jamieson and Others*, the court stated that a distinction should be drawn between two classes of confidential information:

- “(a) "trade secrets", in a broad sense, being confidential information of an employer to which an employee may have access and which is of such a nature that the employee may never use it except for the benefit of the employer, and which the employee remains bound to keep secret at all times after leaving the employer's employ; and
- (b) other confidential information of an employer which an employee must guard as confidential as long as he remains employed by the employer, by virtue of his general implied duty of good faith to his employer (a duty, the extent of which varies according to the nature of the contract), but which is of such a nature that "it is inevitably carried away in the employee's head after employment has ended", and which the employee then remains free to use for the benefit of himself or others provided that he has not, whilst still employed by that employer, broken his duty of good faith by, for example, making or copying a list of that employer's customers or deliberately memorising such a list.”

[17] In *Hirt v Carter*⁵ the following was stated:

“[57] In my view, for an employer to succeed in establishing that trade secrets and confidential information is an interest justifying protection by the restraint, it should demonstrate in reasonably clear terms, that the information, know how, technology or method, as the case may be, is something which is unique and peculiar to the employer and which is not public property or public knowledge, and is more than just trivial. (my emphasis)

⁵ [2007] 4 All SA 1423 (D) at para [57]-[58].

[58] In the light of the challenge to specify the precise nature and details of this confidential information and trade secrets relied upon by it, it was incumbent upon the Applicant, in my view, to identify what the specific information was, the reason why it was regarded as confidential and a trade secret, how and when it was developed and who developed it and the period of its expected existence. The more so, because, until the Applicant found the need to impose a restraint upon the First and Second Respondents, no restraint was deemed necessary to restrict its former employees from using such alleged confidential information or trade secrets when these ex-employees sought greener pastures in the photographic industry.” (my emphasis)

[18] In *Printers & Finishers Ltd v Holloway*⁶, the plaintiff company employed a manager and instructed him to preserve the secrecy of the printing process, but took no covenant from him to restrict him from working for competitors when he left them. The court held that in such circumstances no injunction should be granted to restrain the manager from using information that he had acquired while working for the plaintiff company. The basis for the decision was that it would put the manager in an impossible position if, after leaving the plaintiff company and starting to work for a rival concern, he was to be obliged to refrain from making use of information or skills that he had acquired while working for the plaintiff company. If the defendant was free to work for a rival concern, it was unrealistic to say that he must not use his stock of knowledge of methods of work, even if he had acquired much of it while working for the company (my emphasis).

[19] In the absence of a restraint of trade agreement, it is difficult for an employer to monopolise the services of its employee. The old case of *Triangle Film Corp. v. Artcraft Pictures Corp*⁷ expresses what is still the majority rule in regard to the hiring of competitors’ employees:

⁶ Referred to in *Thomas Marshall (Exports) Ltd v Guinle* [1978] 3 ALL ER , p 208, A-C; [1964] 3 ALL ER 54, [1965] 1WLR1; See also *Premier Medical and Industrial Equipment v Winkler* 1971(3) SA 866, at 868 B-C.

⁷ *Triangle Film Corporation v Artcraft Pictures Corporation* 250 F. 981, 982 (2d Cir. 1918) 33.

“Nobody has ever thought, so far as we can find, that in the absence of some monopolistic purpose everyone has not the right to offer better terms to another’s employee, so long as the latter is free to leave. The result of the contrary would be intolerable, both to such employers as could use the employee more effectively and to such employees as might receive added pay. It would put an end to any kind of competition.

In the absence of contract, an employer has no vested right in the continuity of its employees’ services which will protect it from a competitor’s efforts to persuade its workers to quit. Furthermore, inducing another’s employee to terminate a contract which is terminable at will is not unlawful, if the actor’s purpose is merely to recruit skilled employees. If an employer expects to enjoy a ‘vested right’ in labour, it must be anchored by a contract which is not terminable at will. And this is a true for independent contractors as it is for employees.”

[20] A party that seeks to protect its confidential information, its trade secrets, and intellectual property must show that the information, know-how, technology or method is unique and peculiar to its business and that such information is not public property or that it falls within the public’s knowledge⁸. Furthermore the party must show that the interest that it has in the information it seeks to protect, is worthy of protection.

[21] Trade secrets are clearly a species of confidential information.⁹ Courts have recognised many categories of confidential information¹⁰: there are trade secrets that may never be used by an employee, either during or after employment; there is information that does not constitute trade secrets but that, it must be treated as confidential by an employee in the discharge of his duties. However, in certain circumstances, information may be used after termination of employment. As was stated in *Knox D’Arcy v Jamieson & Others*:

⁸ *Hirt Carter (Pty) Ltd v Mansfield and Another* 2008(3) SA 512 (D) at para [57].

⁹ *Aranda Textile Mills (Pty) Ltd v Hurn and Another* [2000] 4 ALL SA 183 (E) at 190 para [29].

¹⁰ *Meter Systems*, p428; *Waste Products*, p571-577; *KnoxD’Arcy*, p526.

“to the extent that, it is inevitably carried away in the employee’s head after the employment has ended, it may then be freely used for the benefit either of himself or of others”.¹¹

[22] For the applicant to succeed in this case it must establish that it has trade secrets, confidential information and intellectual property worthy of protection and which is ‘proprietary’ to it, which Jacobs is allegedly using. The claim to confidentiality must be made on reliable facts. It is not sufficient for a party to merely state that it has ‘intellectual property’, ‘know-how’, ‘*modus operandi*’ or that certain aspects of its business are secret or confidential.¹²

[23] The mere fact that a party chooses to call something secret does not per se make it so.¹³ In *Saltman Technicianing Co Ltd and Others v Campbell Technicianing Co Ltd*¹⁴, Lord Greene MR stated that, to be confidential, the information concerned must ‘have the necessary quality of confidence about it, namely it must not be something which is public property or public knowledge’.¹⁵

[24] In *Advtech Resourcing (Pty) Ltd v Kuhn*¹⁶, it was stated that to qualify as confidential information the information must comply with three requirements:

[24.1] It must involve and be capable of application in trade or industry; that is: it must be useful

[24.2] 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 close circle.

¹¹ *Knox D’Arcy Ltd v Jamieson and Others* 1992 (3) SA 520 (W) at 526 E and at 528 G; *Printers and Finishers v Holloway*, fn 6.

¹² *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007(2) SA 271 (SCA) at 281 B-D; *Basson v Chilwan* 1993 (3) SA 742 (A); *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* 1999 (1) SA 472 (W).

¹³ *Telefund Raisers CC v Isaacs and Others* 1998 (1) SA 521 at 528 E-G.

¹⁴ [1948] 65RPC 203 (Ch), at 215.

¹⁵ *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and Another* 1967(1) SA 686 (W) at 691B; *Van Castricum v Theunissen and Another* 1993(2) SA 726(T) at 731F-H.

¹⁶ 2007(4) ALL SA 1386, C para [51].

[24.3] The information objectively determined must be of economic value to the person seeking to protect it.

[25] The relationship between the applicant and Jacobs was a fiduciary one, as between employer and employee. Generally, these relationships are either governed by restraint of trade covenants or not. Parties to such contracts have the freedom to determine the extent of the protection to be enjoyed by the confidential information, as defined by them, against the use or disclosure by a party to the contract during its subsistence and after the termination of the contract. Restraint of trade agreements are sometimes regarded as 'instruments of oppression'.¹⁷ However restraints are valid and enforceable unless they unreasonably restrict a person's right to trade or work and are in conflict with section 22 of the Constitution, Act 108 of 1996. As was stated in *Reddy v Siemens Telecommunications (Pty) Ltd*¹⁸:

"...all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common law but also constitutional values."

[26] Thus the party seeking to escape their contractual undertaking of a restraint of trade agreement must show that they are unreasonable and thus contrary to public policy.¹⁹ In *Reeves & Another v Marfield Insurance Brokers CC & Another*²⁰, Scott JA stated as follows:

"An employee who by virtue of his employment would be in a position to exploit on his own behalf his employer's customer connections is free on leaving his employment, subject to certain limitations, to compete with his erstwhile employer for the business of the latter's customers unless restrained by contract from doing so."

¹⁷ *Home Counties Dairies Ltd and another v Skilton and Another* [1970] 1 ALL ER 1227 at p1229.

¹⁸ 2007(2) SA 486 (SCA) at 496 para [15]; see also *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A).

¹⁹ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para [10], 493 G-494A; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *J Louw and Co (Pty) Ltd v Richter and Others* 1987(2) SA 237 (N) at 243B.

²⁰ 1996 (3) SA 766 at 772 D-G.

[27] In *Sunshine Records (Pty) Ltd v Frohling & Others*²¹ Grosskopf JA stated as follows:

“...In determining whether a restriction on the freedom to trade or to practise a profession is enforce-able, a court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions-or, expressing this differently, that it is detrimental to society if an unreasonable fëtter is placed on a person's freedom to trade or to pursue a profession. In applying these two main considerations a court will obviously have regard to the circumstances of the case before it. In general, however, it will be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade.”

[28] In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*:²²

“Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it be enforced.

Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the onus of proving that the enforcement of the condition would be contrary to public policy. The Court would have to have regard to the circumstances obtaining at the time when it is asked to enforce the restriction. ”

[29] In *Arthur Murray Dance Studios of Cleveland Inc v Witter*²³, it was stated as follows:

²¹ 1990 (4) SA 782 at 794 B-E.

²² 1984 (4) SA 872 at 875 G-I.

²³ 105 N.E. 2d 686, 709-710 (Ohio C.P., 1952), quoted in Heydon *The Restraint of Trade Doctrine* at 106-107; See also *Herbert Morris Ltd v Saxelby* 1960 1.A.C. 688 at 711-712.

“You can’t have vanilla ice cream without having ice cream. You can’t have business or trade secrets without secrets. You don’t make the multiplication tables a secret merely by calling them a secret ...

(All the plaintiff has said is) ‘I taught Clifford Witter my method of teaching’. How does that prove secrecy? All of us have ‘our method’ of doing a million things – our method of combing our hair, shining our shoes, mowing our lawn. Labelling it ‘my method’ does not make it secret ...

... In self-serving ‘Whereas’ clauses an employer cannot state that he is going to confide something unique and hush-hush, and then merely disclose the A.B.C.’s or Mother Goose rhymes, and make that the basis of irreparable injury.”

[30] Central to the issues in this matter is also the applicant’s right to practice his trade with skills and abilities which are “part of himself”. In *Aranda Textile Mills (Pty) Ltd v Hurn and Another*²⁴, it was stated that:

“A man’s skills and abilities are part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-how or skills. Such know-how and skills in the public domain became attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman’s ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy.”²⁵

²⁴ [2000] 4 ALL SA 183(E) at 192 para [33].

²⁵ *Aranda Textile Mills (Pty) Ltd v Hurn and Another* [2000] 4 ALL SA 183 (E) at para [33].

[31] In *Highlands Park Football Club Ltd v Viljoen and Another*,²⁶ it was stressed that a man's aptitude, skill cannot be shackled by a restraint of trade agreement:

"... a man's aptitudes, his skill, his dexterity and his manual and mental ability are not his master's property but his own. They are himself. The master cannot buy them other than during the period of service."

[32] In order to succeed in this matter the applicant must satisfy the requirements for a final interdict; the applicant has to establish a clear right, an injury committed or reasonably apprehended, and that there is no satisfactory alternative remedy. As this is an application for final relief, the applicant can only succeed if the respondents' version justifies the relief sought.²⁷ An interdict is an inappropriate remedy when the infringement has already occurred and there is no fear that it will be repeated. In *Condé Nast Publications Ltd v Jaffe*²⁸ the court held that:

"As stated in *Maeder v. Perm-Us (Pty) Ltd.*, 1938 C.P.D. 208 and by van der Linde in his Institutes 3.4.7, an interdict is not the proper remedy where there is no fear that the wrong formerly committed will be repeated. In this case I can see no grounds upon which there can be any apprehension that the infringement complained of will be repeated. The grounds upon which interdicts are granted in copyright matters are exactly similar to those upon which interdicts are granted in other matters. See Halsbury (Hails. Ed., Vol. 7, p. 588, sec. 913). I am, therefore, of opinion that applicant has failed to prove one of the essential requirements for interdict and is therefore not entitled to the interdict claimed."²⁹

ASSESSMENT

[33] The applicant contends that it has trade secrets, confidential information and intellectual property, worthy of protection. It claims that its

²⁶ *Highlands Park Football Club Ltd v Viljoen and Another* 1978 (3) SA 191 (W) at 198F-G.; *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and Another* 1977(1) SA 316 (T) at 326.

²⁷ *Plascon –Evans Paints Ltd Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634 H to I.

²⁸ 1951 (1) SA 81 (C) at 86H-87A.

²⁹ *Condé Nast Publications Ltd v Jaffe* 1951 (1) SA 81 (C) at 86H-87A.

intellectual property is that it is 'the developer and owner, *inter alia*, of the detail design, concepts of the staging, audio production and lighting production for the IDOLS show, together with all trade secrets, sources of supply, business methods, client information and costing of IDOLS as developed and executed by the applicant for IDOLS from 2002 to 2009'.

[34] Throughout the papers, the applicant has laid claim to its alleged 'IDOLS Intellectual property'. For the applicant to succeed in its claims, there must be a genuine and legitimate interest that needs protecting.³⁰ As was stated in *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner and Others*³¹:

"It seems to me highly unlikely that the applicant had any proprietary interest to protect by a restraint. There is a good deal of talk in the papers about unique product demonstrations, special sales methods, confidential information and that sort of thing but nothing to show why or how these are secret or confidential. It is trite law that one cannot make something secret by calling it secret. Facts must be proved from which it may be inferred that the matters alleged to be secret are indeed secret." In the nature of things it seems to me that it is unlikely that the applicant will operate in a way that is markedly different from the way in which its numerous competitors operate. There is nothing to show what is so unique about the products demonstrations or what is so special about the sales methods. Nor is there anything to show why the information said to be confidential can properly be regarded as confidential" (my emphasis).

[35] It is not known in which way the applicant is 'the developer and owner', *inter alia* of the intellectual property relating to the IDOLS programme. The applicant has not specified the precise nature and detail of the confidential information and trade secrets relied upon it in regard to these claims. The applicant did not provide any particulars as to how it invested its considerable time and resources in creating the alleged 'IDOLS intellectual property' that constitute its confidential information relating to the IDOLS programme since 2002. It was incumbent upon the applicant to establish the facts on which it

³⁰ *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767G-H; *Kwik Kopy SA (Pty) Ltd v Van Haarlem and Another* 1999 (1) SA 472 (W) at 484 B-E.

³¹ 1984 (3) SA 850 (W) at 858 E-G.

relies, to prove that it has trade secrets or confidential information or the intellectual property relating to IDOLS. The applicant has not shown how any of its purported trade secrets *inter alia*, its records, business plans and its 'know-how' are so unique, or so peculiar that they are worthy of legal protection. The applicant has failed to provide specific information as to why it regarded the intellectual property relating to IDOLS as confidential and a trade secret, and as to how it was created and developed. Without any specific information or sufficient particularity in regard to these claims, this court must accept that the applicant has no unique nor any confidential business plans, trade secrets or intellectual property relating to the IDOLS programme worthy of protection. The case made out by the applicant falls far short of establishing that there is a protectable interest in the form of confidential information or trade secrets worthy of legal protection.

[36] The applicant claims that IDOLS in South Africa is based on the British programme Pop IDOLS. In contrast, the respondents contend that it is prescribed by the American IDOLS programme. In my view, this dispute, in regard to the origins of the IDOLS programme, emphasises that IDOLS was not developed in South Africa, did not have its origins in this country and that therefore, as Jacobs contends, 'its production requires little original creative designing, conceptualising of the staging, designing and planning of the audio and lightning production', as 'it is a formatted programme which has been tried, tested and proven'. It is not disputed that M-Net has the 'rights' to produce and televise the IDOLS programme in South Africa since 2002. On the applicant's version, it was responsible for only 'part of the technical production of IDOLS from 2002 to 2009'. The applicant has also conceded that it was not alone in providing these services. Two other entities, Matrix Sound and Joi Design provided the Audio Production and the Staging services.

[37] Trade and customer connections form part of the intellectual property of any business and contribute to the goodwill established by it. Goodwill, trade and customer connections have been regarded as a protectable interest in circumstances where the former employer has built a relationship with a

customer to the extent that the customer will be easily induced to abandon the business of the former employer and follow the employee to his new business³². The observations by the court in *Automotive Tooling Systems (Pty) Ltd v Wilkens & Others*³³ are significant in this regard. In this case, the court stated that the dividing line between the use by an employee of his own skill, knowledge and experience which he cannot be restrained from using, and the use of his employer's trade secrets, or confidential information or other interest, an employee which he may not disclose if bound by a restraint, is often very difficult to define. However, the court held that the interest must be one that might be properly described as belonging to the employer rather than to the employee, and in that sense 'proprietary to the employer'. The court further held that the mere fact that a former employee took up employment with a competitor did not in itself entitle the former employer to any relief if all that the ex-employee was doing was applying skills and knowledge acquired whilst in the employ of the former employer.

[38] The applicant has not shown that it has any 'proprietary interest worthy of protection', in respect of the IDOLS programme.³⁴ Nor has the applicant been able to persuade this court that, it is the developer, or the owner of any 'IDOLS intellectual property. In the absence of anything to the contrary, the statement by Anneke De Ridder of Nevermachine that Freemantle Media are the owners of the proprietary interest in the IDOLS programme must be accepted. The applicant cannot claim any entitlement to the 'IDOLS Intellectual property'. The information which the applicant in respect of IDOLS is, in my view, not confidential information worthy of protection by the law.

[39] The same criticism can be levelled against the applicant's claims that Jacobs had full access to *inter alia*, its records, software and property including *modus operandi*, profit margins, business plans and in particular to the applicant's 'IDOLS intellectual property'. The applicant has not elaborated

³² *David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828(LC), 1839 at para [22]; *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 at 541; *Basson v Chilwan and others* 1993 (3) SA at 742 at 769.

³³ 2007 (2) SA 271 SCA at 279 para [10].

³⁴ *Automotive Tooling Systems (Pty) Ltd v Wilkens & Others* 2007 (2) SA 271 SCA at 277 G – 278A-279D, para [8], [9].

nor provided any detail in regard to these claims nor has it been able to show how Jacobs, a lighting technician would have had access to the applicant's business plans.

[40] Exactly what the applicant's 'intellectual property', relating to IDOLS is, that Jacobs is alleged to have 'poached' and 'hijacked' is not discernible from the applicant's contentions. It is the applicant's case that the e-mail that Jacobs sent on 24 February 2010 to Ms Debby Schulman of Nevermachine, was sinister as it was to solicit a meeting with Gavin Wratten of Nevermachine, to discuss 'IDOLS', and it was an attempt to 'hijack' and 'poach' Nevermachine as a client by using the applicant's trade secrets and confidential information and business connections, with Nevermachine as a 'springboard' to compete unlawfully with the applicant. The applicant contends that Jacobs' subsequent invitations for quotations on work to be done were an attempt to further the interests of his new business, Bon View. According to the applicant, what Jacobs planned to discuss with Nevermachine was taking the IDOLS production away from the applicant using the 'applicant's IDOLS intellectual property', using the applicant's established 'goodwill' as a 'springboard' to divert the applicant's business to his new employer, Bon View. In my view the applicant's inferences are speculative, unfounded and devoid of any merit. I am not persuaded of any sinister motive on the part of Jacobs in sending an e-mail to arrange a meeting with Gavin Wratten, with whom he had been working, on the IDOLS programme at the time, as its lighting technician. It is also not disputed that Gavin Wratten is the series director and executive producer of IDOLS since its inception in 2002. Jacobs openly requested a meeting to discuss IDOLS with Wratten, this request was direct and not disguised.

[41] The applicant's assertions that Bon View and Jacobs conspired as early as February 2010 to hijack the provision of technical services by using the applicant's 'IDOLS intellectual property' as a springboard³⁵ is unsubstantiated. The applicant contends that Jacobs in collaboration with

³⁵ *Waste Products Utilisation (Pty) Ltd v Wilkes & Another* 2003 (2) SA 515, at 582 F-J, where Lewis J stated as follows: 'Springboarding' entails not starting at the beginning in developing a technique...but using as a starting point the fruits of someone else's labour'.

Hoey, a director of Bon View and Dream Sets enabled Jacobs' present employer Bon View to 'poach' the contract away from the applicant. In my view these allegations are farfetched and unconvincing. According to Jacobs, Dream Sets supplied the sets to the applicant's clients as a subcontractor of the applicant. Hoey, who was the managing director of Dream Sets, became aware that the applicant was losing clients, and that it was under threat of losing business, and so the 'idea germinated with Sean Hoey to start his own company' supplying technical services, and so Bon View was born. This is a plausible explanation.

[42] During early March 2010 Jacobs and other members of the applicant were forwarded new contracts of employment which contained a restraint clause. Despite discussions, Jacobs refused to sign the new contract of employment. It was during this time, at the end of March 2010, that he was contacted by Hoey enquiring whether he would be interested in taking up employment with a company to be established to provide technical services. For obvious reasons including the fact that he was unhappy with the new management, Jacobs responded positively. According to Jacobs, he was offered the job because Hoey knew he had the skills to provide the services that prospective clients would demand and that such skills would attract clients such as Gavin Wratten of Nevermachine, with whom Jacobs had worked for a number of years on the IDOLS production. This explanation is candid and plausible. His subsequent e-mails to Hoey 'boasting' of his plan for IDOLS, clearly indicates that he was openly and not secretly as the applicant infers, furthering new business interests. I am not persuaded that Jacobs was intent on 'sabotaging' the applicant, as he also 'boasted' about the technical services he would provide for 'IDOLS' upon his resignation, to Hossy, a director of the applicant. As Jacobs was not contractually bound to his employer, he could seek 'greener pastures' if he wished to.

[43] Jacobs' assertions that 'The applicant had to compete against the first respondent for my services to be able to continue providing the lighting services on IDOLS. It lost the contest', are in my view credible, candid and convincing. The parties work and trade in a competitive industry. Jacobs

accepted the offer to work for Bon View, as a result of which Bon View was able to successfully compete against the applicant for such the contract to provide the technical services and equipment on IDOLS. In my view all of the foregoing explanations by Jacobs, in response to the applicant's allegations, are dispositive of the applicant's suspicions of a conspiracy between Bon View and Jacobs to 'hijack' Nevermachine as its client. Furthermore there is nothing surreptitious about Jacobs, conduct nor does it demonstrate an appreciation of the confidential nature of the applicant's business. The applicant has not shown that Jacobs was in possession of any secret or confidential information which would have been of economic value to Bon View or any other competitor, and detrimental to the applicant. In *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another*³⁶, the court held that the following dictum of Lord Denning's in *Seager v Copydex Ltd*³⁷ in regard to the 'springboard doctrine' was no doubt correct in regard to information which was indeed a secret and could be used in a way which is detrimental to the company:

"As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the persons who made the confidential communication..."

[44] The applicant has clearly failed to establish a conspiracy between Jacobs and Hoey. Jacobs' explanation that Hoey had approached him with a job offer in March, but that he did not want to disclose this, makes sense if one has regard to the fact that he had his wife and two children to support, and he could not run the risk of losing his employment before securing a new one. Jacobs was at all times aware that the applicant had the right to terminate his employment on one month's notice. The 'conspiracy theory' of the applicant clearly flounders if one takes into account that Hoey, totally unsolicited, tested Jacobs' interest in taking up employment with a new company to be formed by Hoey, but appeared to have made him a firm job

³⁶ 1971 (3) SA 866 (W).

³⁷ *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another* 1971 (3) SA 866 (W) at 869 G-H: Seager, [1967] 2 ALL ER 415 (C.A.); see also *Waste Products*.

offer only on 23 April 2010, which he accepted, and only then resigned as an employee of the applicant.

[45] Jacobs' explanation that he was not prepared to agree to the provisions of the restraint, as he was not prepared to make it more difficult for him to leave the employment of the applicant by signing a covenant prohibiting him to work for any company doing business in competition with the applicant, for 6 months after his resignation, particularly as he was the sole bread winner of his family, is convincing. Furthermore, there is nothing unreasonable about Jacobs' explanation that it was not only because of the applicant's insistence that he sign the restraint that caused him to terminate his employment with the applicant, but also the fact that Jacobs was dissatisfied with the new management of the applicant. Thus Jacobs' explanation that he had been seeking new employment since March 2010 cannot be rejected if one takes into account that it was during March that the employees of the applicant were offered new contracts of employment. His explanation that he was aware that if he resigned, then, Nevermachine would follow him to his new place of employment, is candid. He was not secretive about this as he also informed the director of the applicant David Hossy, via e-mail that "Gavin said, they go where Mo goes". Clearly Nevermachine which was responsible for the production of the IDOLS programme required the particular services of a lighting technician which Jacobs could provide. Nevermachine had been involved with Jacobs on the IDOLS programme and was aware of the distinctive service that Jacobs could offer in the form of his individual skills as a lighting technician.

[46] Jacobs' denials that he was involved with the costing for IDOLS, is not unconvincing, if one has regard to an e-mail dated 20 January 2010, addressed to Ms Justine Schrimpling by Jacobs, where Jacobs is requesting a quotation in respect of the equipment he would need for the IDOLS show later in the year. From this, it is clear that Jacobs was not involved in the costing or the preparation of quotations for the applicant nor in any negotiations with Nevermachine but that Ms Schrimpling was, and who in turn negotiated contracts on behalf of the applicant with Anneke de Ridder, who

was a producer of the IDOLS programme and was also employed with Nevermachine. Jacobs' explanation that the nature of his work as a lighting technician with the applicant was limited to its job cards is not unconvincing. That the nature of his work caused him to be out of the office 'most of the time' is not unreasonable.

[47] According to the applicant, when Jacobs invited quotations for a 'gig' in during 'August, September and October', he was deliberately disguising the fact that it was for the IDOLS programme. Further e-mails followed thereafter, which were indicative of Jacobs' intention to take over the applicant's customer base, before he had even left the employ and further his 'plans for IDOLS', thus using the applicant as a springboard to compete unlawfully. In my view these inferences are far-fetched and unreasonable. Jacobs' response to these inferences is convincing. Jacobs explained that the applicant had quoted Nevermachine R2,3 million for the IDOLS event. As Nevermachine had complained about the figure being too high, Jacobs then sought to obtain comparable quotations in support of his argument with Nevermachine, that the applicant was unable to provide the services required for less than R1,7 million in respect of the 2010 IDOLS programme. In my view, this appears to be a reasonable explanation. I am not persuaded that Jacobs' conduct in obtaining the comparable quotations was surreptitious. The applicant's inferences of unlawful competition from the foregoing must be rejected.

[48] According to the applicant, Jacobs forwarded to his wife *via* e-mail ,its confidential list of contact details of parties that the applicant interacts with in its business operations and which could be of great value to any competitor of the applicant. According to Jacobs this was a list of mainly suppliers of the applicant, with their contact details, which was not exclusive to the applicant, and that David Hossy, a director of the applicant, permitted the use of such list by others in the industry. Jacobs contends that at the time he made a copy of the list, he bona fide believed that it was not unlawful to do so. Since then he

had received legal advice that his conduct may have been unlawful and he deleted the list from his computer.³⁸

[49] The question is whether the contact list is confidential and deserving of legal protection. In my view, the applicant's attitude towards this list is ambiguous as it does not dispute that others in the industry have a copy of it, and therefore the names of the suppliers do not appear to be exclusive to the applicant. In my view, in these circumstances the applicant could not have regarded a list that had been circulated in the industry, as confidential. It does not appear to have been intimated to Jacobs either orally or in writing that the list was of a confidential nature. Furthermore, it has also not been shown that the list in the hands of Jacobs would be detrimental to the applicant's interests and beneficial to his new employer Bon View or to any of its competitors³⁹, to enable them to gain an advantage over the applicant. In my view the applicant's belief that the list was confidential is not reasonable in the circumstances. These considerations clearly lead me to the conclusion that the information contained in the list is not of a confidential nature and not worthy of legal protection.

[50] Jacobs was not contractually bound by a restraint of trade agreement during the period of his employment with the applicant. Had their fiduciary relationship been governed by a restraint, the obligation to respect the confidentiality of any information imparted or received in confidence in regard to the applicant's business secrets in respect of its alleged "IDOLS intellectual property", would have been in all probability subject to such terms in the restraint.

[51] The question, whether an employee, in the absence of a restraint of trade agreement, can use his employer's customer connection with impunity

³⁸ *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another* 1971 (3) SA 866 (W) at 870.

³⁹ *Freight Bureau (Pty) Ltd v Kruger and Another* 1979 (4) SA 337 (W); *Marks v Luntz and Another* 1915 CPD 712; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981(2) SA 173 (T); *Meter Systems Holdings v Venter and Another* 1993 (1) SA 409 (W) at 426 E-I.

and in direct competition after the termination of his employment,⁴⁰ appears to have been answered in *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another*,⁴¹ where it was held that, where a written contract of service is in existence the court will not readily read into it an implied covenant in restraint of trade. In this case, while the first respondent was the managing director of the applicant company, which carried on business as importers and exporters of medical suppliers, he formed and registered the second respondent company which was in direct competition with the applicant. The first respondent wrote to the applicant's suppliers persuading them to terminate their agency contract with the applicant and award it to them. The applicant applied for an order restraining the respondents from continuing their activities. The court held that there was nothing in the first respondent's contract restraining him from soliciting the customers and suppliers of the applicant. The knowledge of the identity of the suppliers was not confidential information. The court said that although there were pricelists in existence which could be regarded as confidential, the first respondent had stated that although he had been in possession of these lists, but had destroyed them and the applicant had no option but to accept this statement. The court also held that though the first respondent's conduct had been illegal during the time when he was still employed by the applicant, for persuading the applicant's suppliers to transfer their allegiance to him, damages were an adequate remedy in the circumstances.

[52] Clearly, what occurred in this matter, is that the applicant was unable to negotiate a new contract of employment, which contained a restraint of trade agreement, with Jacobs, and it was therefore unable to compete for his services in the industry. Thus the applicant lost the competition against Bon View for Jacobs' skills. As the applicant lost Jacobs, it also lost its capacity to supply to Nevermachine the skills and services needed for the IDOLS programme. Nevermachine moved its business to Bon View which it was entitled to do and the applicant lost the contract to provide technical services. It was the technical skills of Jacobs as a lighting technician that was being

⁴⁰ Restraint of Trade, Heydon, p91, p106-107; *Wessex Dairies Ltd v Smith* [1935] 2 K.B.80; *Sanders v Parry* [1967] 2 All E.R. 803.

⁴¹ 1971 (3) SA 866 (W), at 868 para B-C.

sought after by both Bon View and Nevermachine. It has not been shown that Bon View and Nevermachine were after any 'proprietary interest' of the applicant or that Jacobs had access to or been exposed to protectable information confidential to the applicant that would be useful to them. In these circumstances, no danger exists that Jacobs could disclose any to Bon View. Thus Jacobs' employment with Bon View does not constitute a threat to the applicant.

[53] The skills that Jacobs acquired in the course of his employment with the applicant as a lighting technician are his own. Jacobs has been involved with the lighting on IDOLS for a long time, his skills being recognised in the industry in which he chooses to practice his trade and by those who produce the IDOLS show, including the applicant, who even after Jacobs terminated his employment sought to hire him on a freelance basis and utilised his services on 'overflow work'. Both the applicant and Wratten had associated with Jacobs for a long time on the IDOLS programme and they had recognised his skills and expertise as a lighting technician. Jacobs certainly did not carry either of them 'in his pocket'.⁴²

[54] Clearly, there are certain practical skills and knowledge that an employee acquires in the course of working for his employer.⁴³ These skills do not belong to the employer but to the employee and may be used by him for the benefit of future employers. The knowledge and skills that Jacobs acquired in the course of his employment with the applicant are 'part of himself' and which he can utilise in a freemarket economy. More importantly he is not contractually bound by a restraint of trade agreement with his ex-employer, thus the applicant, a former employer, has no monopoly over his services. To prevent him from doing so would be against public policy. These

⁴² *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541 where the following was stated: "Heydon *The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that the 'customer contact' doctrine depends on the notion that 'the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket'."

⁴³ *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and Another* 1977 (1) SA 316 (T) at 326H-327E.

skills are not something that the applicant 'can claim ownership' of. In *Herbert Morris Ltd v Saxelby*, the court held that:

".....a man's aptitudes, his skill, his dexterity ... –all these things which in sound philosophical language are not objective, but subjective – they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and expand his powers is advantageous to every citizen, and may be highly so for the country at large."⁴⁴

[55] As there is no restraint of trade agreement between Jacobs and the applicant, the latter does not enjoy any contractual power to restrain Jacobs from using his skills in the free economy. It must follow therefore, that a new employer is free to poach an employee, in the absence of a restraint, as long as the employee is free to leave. Jacobs is therefore free to choose whom he should work for, without hindrance.

[56] In the absence of being contractually bound, the applicant cannot claim its pound of flesh from Jacobs.⁴⁵ The applicant's inability to convince Jacobs to sign a restraint, was to its own detriment. Jacobs had specialised skill which his ex-employer was unable to appropriate to its benefit with a restraint. What the applicant has tried to do in this matter is to imply a restraint of trade agreement into Jacobs' contract of employment where a restraint clearly does not exist. Jacobs cannot be prevented from exploiting his own skill and knowledge. No contract exists between the applicant and Jacobs, precluding him from using his expertise as a lighting technician for any entity, including a competitor of the applicant. He is free to choose his employer and cannot be restrained from taking up employment with Bon View.

[57] In my view the reliance by the applicant on the various e-mails for its contentions are devoid of merit, vague and unsubstantiated. The applicant's

⁴⁴ *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026(CA) at 1033 C-D; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 714.

⁴⁵ *BHT Water Treatment (Pty) Ltd V Leslie and Another* 1993 (1) SA 47 (W) at 57.

inferences drawn from the e-mails are unfounded. Jacobs' explanations in response to the applicant's contentions are credible, convincing and persuasive and dispose of the applicant's claims.

CONCLUSION

[58] The applicant has failed to establish that Jacobs attempted to 'hijack' the applicant's business using its 'IDOLS intellectual property' with the intention of taking over the applicant's customer base to further his plans for 'IDOLS' and to continue doing so after the 2010 IDOLS production. The applicant has failed to establish that it has any trade secrets, confidential information or intellectual property relating to the IDOLS programme worthy of protection.

[59] An interdict is a remedy providing protection against future conduct. The relief claimed by the applicant is limited to IDOLS. According to Jacobs, Nevermachine will 'never' use the applicant again for the IDOLS programme or any other show. Jacobs is no longer in the employ of the applicant. Nevermachine has followed Jacobs to Bon View. This must mean that Nevermachine's relationship with the applicant has been severed. The interdict claimed by the applicant will not restore it. An interdict in these circumstances is an inappropriate remedy as the infringement has already occurred, and there is no fear that it will be repeated. The applicant is therefore not entitled to the interdicts sought. The applicant has not satisfied the requirements for the granting of a final interdict.

[60] The applicant has been able to estimate its gross revenue in respect of IDOLS and other events. Thus, a damages claim will not be difficult to quantify. A damages claim in the circumstances of this case, is an appropriate alternative remedy.

[61] This matter initially commenced on 13 July 2010 as an urgent application. It is just and equitable that any award for costs, include the costs incurred by the respondents for 13 July 2010.

[62] The following order is made:

[62.1] The application is dismissed with costs, including the costs of two counsel.

[62.2] Costs to include the costs of the urgent application on 13 July 2010.

H SALDULKER
JUDGE OF THE SOUTH GAUTENG HIGH COURT

ATTORNEY FOR THE APPLICANT:	FREDERICK P. RALL ATTORNEYS
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DATE OF HEARING:	30 JULY 2010
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