IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 4093/2024

In the matter between:

PIKA CHEMICAL & TECHNICAL (PTY) LTD t/a AFRITECH	Applicant
and	
JAMES STEPHEN NOLTE	First Respondent
JSN CHEMICAL ENTERPRISES CC t/a BAYCHEM	Second Respondent
SOUTHERN OIL (PTY) LTD	Third Respondent
CHEMTOLL PETROCHEMICALS (PTY) LTD	Fourth Respondent
PIONEER FOODS (PTY) LTD	Fifth Respondent

Coram: Acting Justice B Manca

Heard: 28 August 2024

Delivered: 30 August 2024

JUDGMENT

MANCA AJ:

[1] In this matter the applicant seeks an interim interdict restraining the respondents from using its formulation for a fruit drying oil ("FDO") known as *'Pylene FDO'.*

[2] The applicant produces and supplies chemical compounds of various applications and has done so since 1997. The applicant's sole director is Mr Dorian Overberg. The first respondent is Mr James Nolte. He is a chemist of some considerable experience and he and Mr Overberg founded the applicant.

[3] The applicant's right to the relief which it seeks is founded on the contention that it developed and manufactured (and still manufactures) Pylene FDO which is used to aid the drying of *inter alia,* raisins and sultanas. It has supplied Pylene FDO to, *inter alia,* Safari Dried Fruit in Upington for some time. This has been highly lucrative for the applicant.

[4] The applicant contends that the formulation of Pylene FDO is proprietary to it and is confidential. It claims that the formulation of Pylene FDO is known only to a handful of people and is of significant economic value to whomsoever is in possession thereof.

[5] Mr Nolte, who is the first respondent, developed Pylene FDO whilst a director of the applicant. He did this by reverse engineering an FDO manufactured by an Australian company known as Victoria Chemicals. Victoria Chemicals is the leading brand of fruit drying oil and has dominated the local market. It was able to do

so as it is able to produce and offer its drying oil to the market at a competitive rate.

[6] Victoria Chemicals' ability to do so, and how and why it was able to do so, is what interested Mr Nolte. According to him, he managed to discover how this was done by Victoria Chemicals by researching the FDA requirements for FDO's. According to Mr Nolte, *'he discovered that the emulsifying system they* [Victoria Chemicals] *used was the answer'* and it was on *'the back of this discovery that the applicant managed to regain the fruit drying oils market since I was able to produce the product at a cheaper rate which still yielded the requisite results'.*

[7] I pause to mention that the sale by the applicant (and any of its competitors) of dried fruit oil to the South African fruit dried industry is a once-a-year event. Orders are placed in October for delivery in the early part of the following year. I should also point out that Mr Nolte is the sole member of the second respondent which trades as Baychem and produces fruit drying oil. Although not specifically addressed in the affidavits it would appear that Baychem itself does not produce fruit drying oil in large quantities, if indeed it still produces fruit drying oil at all.

[8] This application was precipitated by communications between Mr Overberg and representatives of the fifth respondent, originally cited as Pepsico South Africa (Pty) Ltd. It turns out that Pepsico is a trade name used by Pioneer Foods (Pty) Ltd. The citation of the fifth respondent has been amended to that of Pioneer Foods (Pty) Ltd pursuant to a notice delivered in terms of rule 28(1) to which there was no opposition. For the sake of convenience and bearing in mind the correspondence and the references in the affidavit are all to Pepsico, I will continue to refer to the fifth respondent as Pepsico.

[9] On 5 October last year Mr Overberg enquired from Pepsico whether it

intended to place any orders for Pylene FDO for the upcoming year. He was surprised to hear that Pepsico did not require Pylene FDO as it had found an alternative supplier in the form of the third respondent, Southern Oil (Pty) Ltd ("SOILL").

[10] SOILL is an oil extractor and edible oil refinery located in Swellendam. It has approximately 515 employees and is the leader in the growing South African canola oil market and produces 100% of the South African canola crop with its production of, *inter alia,* its B-well canola oil products. It has a product development division and has since 2015 embarked upon developing an FDO to take to market. The order it received from Pepsico in October last year was its first foray into this market.

[11] Be that as it may, Mr Overberg was surprised to hear that SOILL had sold an FDO to Pepsico as, to his knowledge, it had never done so before.

[12] Also in October last year, in fact on the day after Mr Overberg learned Pepsico did not require the applicant's FDO, Mr Overberg had occasion to speak to a SOILL account manager by the name of Wendy Dzviti. The primary purpose of the call was to place orders for canola oil with SOILL. In the conversation, however, Ms Dzviti confirmed that SOILL had recently added an FDO to its product offering and that it had sold its first consignment to Pepsico. Ms Dzviti appeared to think that Mr Overberg was associated with the fourth respondent.

[13] The fourth respondent is Chemtoll Petrochemicals ("Chemtoll"). It is a chemical manufacturer and was appointed as SOILL's contract manufacturer and packer for SOILL's FDO. Chemtoll uses the raw material supplied to it by its customers (in this case SOILL) and the proprietary information supplied to it by its customers in relation to the manner in which the raw materials are to be used (in this case SOILL). Chemtoll performs the same task for the applicant.

[14] On hearing of Chemtoll's involvement in this process and because he assumed that Chemtoll was using the applicant's formulation to produce an FDO for SOILL without the applicant's consent and in contravention of its non-disclosure agreement, Mr Overberg met with Mr Theunissen of Chemtoll. During that meeting Mr Overberg was told, for the first time, that Mr Nolte was involved in what Mr Overberg referred to as *'the scheme'* and that Mr Nolte was *'an agent or consultant of some sort'* to SOILL.

[15] As a consequence of this, and other information such as the applicant's data sheets stored on Mr Nolte's erstwhile drop box folder on the applicant's computer system, Mr Overberg concluded that SOILL was using the applicant's FDO formulation to produce its competing product and that it did so with the assistance of Mr Nolte and Baychem.

[16] Accordingly, he consulted with the applicant's attorneys DG Gerntholtz Inc ("Gerntholtz") and letters of demand were sent by Gerntholtz to SOILL, Chemtoll and Pepsico, requesting from each of them an undertaking that, without the applicant's consent, they would not: in Chemtoll's case produce SOILL's FDO; in Pepsico's case that it would not purchase SOILL's FDO; and in SOILL's case that it would not trade in that FDO.

[17] They all responded to the letters of demand.

[18] Chemtoll took the view, expressed in a letter written to Gerntholtz by Mr Theunissen, that it was a toll manufacturer that manufactures chemicals for various companies including the applicant. Mr Theunissen advised that it had not shared any of the applicant's information to any third party and declined to give the undertaking sought.

[19] Pepsico advised that it had shared the contents of the letter of demand received by it with SOILL and disavowed any knowledge of wrongdoing on its part. It took the stance that the applicant would *'need to prove the allegations contained in your letter'* and as the applicant had not shared any proof of those allegations, it declined to give the undertaking.

[20] SOILL replied through its attorneys, Werksmans Attorneys ("Werksmans"). Werksmans advised that its instructions were that:'

> 20.1 Canola oil is the main ingredient in a specific type of fruit drying oil imported from Australia and widely used within the fruit drying industry in South Africa;
>
> 20.2 SOILL had been working on developing a local version of the imported product since 2015 ("the product");
>
> 20.3 The product is produced by way of a process that is accepted as a standard process;
>
> 20.4 Mr Nolte acts as a consultant to SOILL with a view to assisting it with, *inter alia, 'development of the product';* and
>
> 20.5 Chemtoll assists SOILL in the manufacturing of the first batch of SOILL's product which would be sold to Pepsico in due course.

[21] It too refused to give the undertaking sought.

[22] The letter from Werksmans confirmed the information given to Mr Overberg

by Mr Theunissen at their meeting: Chemtoll was manufacturing an FDO at the request of SOILL and Mr Nolte was acting as a consultant to SOILL. It went further by advising the applicant that Mr Nolte's consultancy role encompassed assisting SOILL to develop its product.

[23] Although Gerntholtz's letters of demand sought undertakings by noon on 15 November 2023 failing which interdictory proceedings would be launched in the High Court, these proceedings were only instituted as a matter of some urgency on 28 February 2024.

[24] The relief sought in the notice of motion was the following:

> *'1. Pending the final determination of the action referred to in paragraph 2 below, interdicting and restraining the First to Fifth Respondents from making use of or in any manner dealing with, directly or indirectly, including by disseminating or taking possession of, the Applicant's fruit drying oil formulations or any products derived therefrom, without the Applicant's consent.*
>
> *2. Directing the Applicant to issue out an action against the First to Fifth Respondents, including for relief restraining the First to Fifth Respondents from making use of or in any manner dealing with, directly or indirectly, the Applicant's fruit drying oil formulations or any products derived therefrom without the Applicant's consent, within 15 court days, failing which the abovementioned interim interdictory relief shall lapse.*
>
> *3. Directing the First, Second and Third Respondents, and any other Respondents who may oppose the application, to pay the costs of the application, jointly and severally.*

4. Granting the Applicant such further and/or alternative relief as the Court may deem meet.'

[25] Notice was also given that if the application was opposed the matter would be set down for hearing in the motion court for an order postponing the application for hearing on the semi-urgent roll on a date to be arranged with the registrar together with a timetable regulating the further conduct of the matter.

[26] The application was (and is) opposed by Mr Nolte, Baychem and SOILL. Chemtoll and Pepsico have played no active role in the proceedings (save that Chemtoll's attorney appeared at the hearing to confirm that his client did not oppose the application) and both abide the Court's decision. The matter came before me pursuant to an order which was agreed to by the parties and as foreshadowed in the notice of motion. Urgency is not an issue in this application although *Ms Vaughan,* who appeared for SOILL, submitted that the delay in launching the application was a factor which I should consider when exercising my discretion to grant or refuse the interdictory relief sought. This is a matter to which I will return when dealing with whether I am satisfied that the applicant is entitled to the relief sought.

[27] As already indicated the applicant relies on its claim to own the formulation of the FDO being produced by Chemtoll on behalf of SOILL for the relief sought by it against all the respondents.

[28] In relation, however, to Mr Nolte the applicant also relies on Mr Nolte's breach of his fiduciary duty (as a previous director of the applicant) not to use information confidential to the applicant for his own benefit.

[29] I agree with *Mr Farlam,* who appeared for the applicant, that this duty

remains with a director after his resignation and is breached if it involves the use of confidential information that is worthy of protection. It is accordingly necessary, in relation to the relief sought against all the respondents to first enquire whether the applicant's formulation of Pylene FDO is confidential to the applicant and is worthy of protection. It is to this question that I now turn.

[30] The defence common to Mr Nolte, Baychem and SOILL is that the formulation of Pylene FDO is not confidential and, if not freely available, is easy to access. Allied to this is the contention that the FDO that SOILL uses was developed by SOILL itself and is not a copy of the Pylene FDO formulation.

[31] In regard to this defence, *Ms Vaughan* submitted that having regard to the fact that Pylene FDO is not the subject of a patent, that there are a number of FDO formulas available which do not constitute trade secrets and that all FDOs only have three main components, the applicant's formulation of Pylene FDO is not confidential to it.

[32] It was also submitted by SOILL that because the applicant failed in its founding affidavit to state the precise makeup of its formula, or to put it differently explain how it is different to other formulations freely available, is fatal to the applicant's case. In the absence thereof, so it was submitted, SOILL is unable to even determine whether its formulation is the same as the applicant's formulation. Added to this is the contention that SOILL developed its own formulation before engaging Mr Nolte on a limited basis to assist and advise on the production process (not the formulation) of SOILL's FDO.

[33] In determining factual disputes in applications of this nature I must consider those facts set out by the applicant together with those set out by the respondents which the applicant cannot dispute. Once the facts are established on that basis I

should then determine whether, having regard to the inherent probabilities the applicant could obtain final relief. If serious doubt is thrown on the applicant's case it cannot be granted interim relief. However, if those facts have *prima facie* established an entitlement to the relief, the relief may be granted even if open to some doubt.

[34] While it is correct that SOILL has been in the process of developing an FDO since 2015 it was unable to do so effectively until it engaged the services of Mr Nolte and Baychem. As I have already indicated Mr Nolte set about investigating what gave Victoria Chemicals its advantage and he did so while studying the formulation of Victoria Chemicals' fruit drying oil together with his further research in relation to FDA requirements. It was on the back of the discovery that the difference was in relation to the emulsifier used, that he was able to produce the product at a cheaper rate and which still yielded the required results.

[35] I agree with the applicant's submission that what gave the applicant its competitive advantage enabling it to be the only local manufacturer of an FDO capable of competing with Victoria Chemicals for price and quality was its formulation for Pylene FDO. Indeed, and perhaps tellingly, Mr Nolte admitted that he is one of only a handful of people who know the formulation of Pylene FDO. This admission in my view, is sufficient to establish, *prima facie,* that the applicant's formulation of Pylene FDO is confidential to the applicant.

[36] That being so, the next question is whether the formulation of the FDO being used by SOILL, was produced by it without the assistance of Mr Nolte.

[37] As of February 2022 SOILL had not yet developed an FDO which was capable of being taken to the market.

[38] On 7 February 2022, Ms Tersia Joubert, the lead research and development

technologist for SOILL, sent Mr Nolte an email. He was unknown to her at the time. In the email she told him that she had received his contact details from someone at Pepsico and hoped that he could assist. She told Mr Nolte of the progress made by SOILL in developing the product and advised that although they had done some small lab scale trials the additional chemicals added are important and the minimum order quantities were large so they had not progressed much further. She informed Mr Nolte that the representative from Pepsico had told her that Mr Nolte *'might be able to assist with a more achievable formulation'.*

[39] Mr Nolte replied to Ms Joubert by email on 11 February 2022. He told her that this was a complicated situation as he was a manufacturer and supplier of FDO's and that if SOILL was going to enter the limited market they would be in direct competition with each other. He told Ms Joubert that he is *'still the only person locally who has the knowledge of the oils being supplied at present. The other local manufacturer is Afritech of which I was a 50% shareholder up until 2 years ago. They are using my formulation and knowhow. So in effect I own the local technology'.* Co-operation was accordingly not feasible.

[40] Whilst Mr Nolte may have subjectively believed he owned the technology, on the information before me and bearing in mind the test to be applied in evaluating the facts, my conclusion is that *prima facie* the technology is owned by the applicant.

[41] Despite Mr Nolte's initial rebuff of SOILL's overture, Mr Nolte appears to have had a change of heart and a business relationship of some sort was established between Mr Nolte, Baychem and SOILL. This appeared to take the form of some sort of joint venture in terms of which Mr Nolte, Baychem and SOILL would co-operate and that such co-operation would result in SOILL having the ability able to produce FDO in far greater quantities than Mr Nolte and Baychem could ever have achieved having regard to their limited resources. Moreover it is inherently

improbable that Mr Nolte, having expressed dismay at the possibility of SOILL entering the limited market and being a competitor of his, would nevertheless have a change of heart if there was not an insubstantial commercial advantage to him. After all, he was told by SOILL that they needed his assistance in order to achieve a workable formulation.

[42] Unsurprisingly SOILL did not attempt to disavow any exchange of information between it and Mr Nolte. What it did do, however, was contend that Mr Nolte's technical input was related only to the production process and not the formulation of the FDO. Whilst this may ultimately be demonstrated at a trial in due course, it does no more than cast some doubt on the *prima facie* case established by the applicant in relation to the proprietary nature of the formulation presently used by SOILL. In addition, the letter from Werksmans in response to the Gerntholtz letter of demand did not advise the applicant that Mr Nolte was assisting in the production process. On the contrary, it specifically referred to Mr Nolte assisting in the development of the product.

[43] I am accordingly satisfied that the applicant has established, *prima facie,* that Mr Nolte disclosed the applicant's formulation of Pylene FDO to SOILL and that such conduct is a breach of his ongoing fiduciary duty not to disclose information confidential to the applicant and which is worthy of protection in the hands of the applicant.

[44] *Ms Vaughan,* however, submitted that in relation to SOILL, the applicant must also establish that SOILL must have knowingly appropriated confidential information in order to obtain interdictory relief against SOILL.

[45] The submission was that I could not find, on the papers, that SOILL had knowingly misappropriated the confidential information and that the interdictory relief

against SOILL could not be granted.

[46] In making this submission reliance was placed on certain dicta made by Lewis J (as she then was) in *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W).

[47] The *Waste Products* matter concerned an action based on unlawful competition in which damages were claimed. The claims were formulated in contract, alternatively delict.

[48] *Mr Farlam* dealt with this submission on two bases. Firstly, at a factual level he contended that there was sufficient evidence to conclude, *prima facie,* that SOILL was aware of the confidential nature of the information imparted to it by Mr Nolte even though there may be some doubt in regard thereto. Secondly, *Mr Farlam* submitted that the requirement that SOILL must have had knowledge of the confidential information relates to the element of unlawfulness necessary to establish the delict of unlawful competition as opposed to requirements to be met for an interdict seeking to restrain a third party such as SOILL from using the applicant's confidential information.

[49] In my view, the submissions made by *Mr Farlam* both in relation to the facts and the legal position are such that they do not disentitle the applicant to the interim relief claimed.

[50] I am accordingly satisfied that the applicant has established, *prima facie,* that it owns the formulation of Pylene FDO and that the formulation thereof is confidential to it. I am also satisfied *prima facie* that those rights of ownership and confidentiality are being infringed by Mr Nolte, Baychem and SOILL. It follows that Chemtoll and Pepsico would also be infringing those rights if, in the case of Chemtoll

it continued to produce SOILL's FDO and, in the case of Pepsico, if it continued to purchase SOILL's FDO.

[51] That being said the further issue is whether the applicant has established the other requirements for an interim interdict.

[52] Based on my finding in relation to the applicant's proprietary right I agree with the applicant's submission that the harm which it suffers is not difficult to comprehend. It is so that the applicant must share a limited market with competitors who compete with it lawfully and every sale it loses to SOILL and/or Baychem and/or Mr Nolte is a sale that it cannot get back. According to the applicant the loss of turnover caused by the production of the SOILL FDO and the sale thereof by SOILL is very significant, amounting to almost half of the applicant's business. A small enterprise such as the applicant will not be able to sustain such losses for any period of time and without interim interdictory relief there is a very real prospect that it will close down with devastating effects for all concerned including its employees.

[53] The applicant must also establish that the balance of convenience is in its favour. This aspect is a no contest as far as Mr Nolte and Baychem are concerned as they do not challenge these aspects at all.

[54] This applies with equal force to Chemtoll and Pepsico who do not contest the interdictory requirements at all.

[55] The challenge to the applicant's case in Mr Nolte's answering affidavit is aimed fairly and squarely at the primary issue in relation to the proprietary nature of Pylene FDO and its confidentiality. No submissions were made in relation to balance of convenience and an alternative remedy and there is nothing more to be said in that regard in respect of the relief sought against Mr Nolte and Baychem. Mr Nolte

made oral submissions before me but did not address any of these issues in his oral address.

[56] SOILL complains of its wasted expenditure, lost profit and reputational damage as factors which indicate that the balance of convenience favours it. What SOILL loses sight of however is that, by its own admission, its nascent fruit drying oil business is a small element of its large business. That being so the inconvenience the applicant seeks to impose on SOILL will have little economic impact on it. The consequence thereof is that the balance of convenience must favour the applicant.

[57] As regards an alternative remedy I agree with the applicant that it cannot be expected to endure unlawful conduct pending the outcome of an action that is likely to take a number of years to finalise. This is particularly so when one has regard to the fact that if this conduct persists the probabilities are that the applicant's enterprise will collapse.

[58] As alluded to earlier *Ms Vaughan* contended that even if I were to find that the applicant had established the requirements for an interim interdict I should, having regard to my residual discretion, refuse the interdict because of the applicant's delay between November 2023 and February 2024 in launching the application. I do not agree. The production of fruit dried oil is a once off process that occurs on an annual basis. The threatened interdict did not prohibit SOILL from producing its product and selling it to Pepsico. The fact that SOILL has produced the product and has sold it to Pepsico does not lead one to the ineluctable conclusion that the confidential nature of the formulation will inevitably come to be known amongst the wider manufacturing community in Southern Africa. On the contrary, Chemtoll has concluded NDAs with both Afritech and SOILL and it is highly improbable that the formulation of Pylene FDO will soon become public knowledge. I am thus of the view that such delay as there was does not militate against me

granting the interim relief sought by the applicant.

[59] The last string to *Ms Vaughan's* bow was that due to the unfortunate delays experienced in matters coming to trial that the relief, if granted, will be final in effect. The lengthy delays in matters coming to trial do not have any effect on the nature of the relief sought. The relief will only endure until such time as the trial has ended.

[60] As regards costs I am satisfied that it is appropriate to award the applicant its costs in bringing this application. As regards counsels' fees there can be little doubt that the matter is of considerable importance to the applicant and that the costs of two counsel, where employed, is justified and that such costs should be taxed on scale C.

[61] **In the result I make the following order:**

1. **The first to fifth respondents are interdicted and restrained from making use of or in any manner dealing with directly or indirectly including by disseminating or taking possession of, the applicant's fruit drying formulations or any products therefrom without the applicant's consent.**

2. **The interdict is to endure pending the final determination of an action to be issued out of this court by the applicant against the first to fifth respondents for relief including restraining the first to fifth respondents from making use of or in any manner dealing with, directly or indirectly, the applicant's fruit drying formulations or any products derived therefrom without the applicant's consent.**

3. **The applicant is directed to issue out the aforesaid action within 15**

(fifteen) court days from the date of this Order failing which the interim interdict will lapse.

4. **The first, second and third respondents are to pay the applicant's costs jointly and severally, such costs to include the costs of two counsel where so employed and to be taxed on scale C.**

ACTING JUDGE B J MANCA

For the applicant: Adv P **Farlam** SC (The heads of argument having been drawn by Adv CJ **Quinn**

Instructed by: Mr O Gerntholtz, Gerntholtz Attorneys

For the 1st and 2nd respondents: (attorneys withdrew) Mr J S Nolte in person
Instructed by:

For the 3rd respondent: Adv **B Vaughan**
Instructed by: Werksmans Attorneys (Jhb)

For the 4th respondent: Mr W **Jacobs** (Willem Jacobs and Associates)

For the 5th respondent: no appearance