

# OVERVIEW OF NATIONAL AND REGIONAL TRADE SECRET SYSTEMS

## SOUTH AFRICA

### 1. Sources of Law

In South Africa, there is no specific legislation regarding trade secrets. Various statutes deal with trade secrets in the broadest sense. Additionally, the common law grants a general action in the case of unlawful competition based on the principles of *Lex Aquila* i.e.: The action was unlawful, the damage was caused intentionally or negligently and by a positive physical action.<sup>1, 2</sup>

### 2. Definition of a trade secret

According to established case law, trade secret protection may be obtained when the potential trade secret:

- relates to and is capable of application in trade or industry;
- has the necessary quality of secrecy or confidence, is not in the public domain and is known only to a restricted number of persons; and
- has economic value to the proprietor.<sup>3</sup>

In addition, the trade secret holder needs to demonstrate that reasonable measures to identify, protect and maintain confidentiality were in place.<sup>4</sup>

The nature of the information that can obtain trade secret protection seems to be rather broad, according to South African court decisions. For example,

- information relating to products or processes still under development;
- optimized systems and processes that have been developed by the proprietor;
- technical information and specifications;
- manufacturing techniques and instruction manuals;
- designs (including circuit diagrams, blueprints and electronic artwork);
- source code for computer programs;
- unpublished trademarks;
- database information;
- samples;
- devices;
- demonstrations;
- product formulae; and
- information concerning materials, marketing and business information generally, including customer and supplier lists, customer or trade connections, credit records, price lists, tender prices and business discussions.<sup>5</sup>

As to know-how, courts defined it as factual knowledge not capable of precise, separate description but which, when used in an accumulated form, after being acquired as the result of trial and error, gives to the one acquiring it an ability to produce something which he/she

---

<sup>1</sup> Alan Lewis in Trade Secrets Throughout the World (2022), Chapter 34. South Africa, § 34:4.

<sup>2</sup> This document aims to provide an overview (June 2024). It is not a complete review of the legal situation and case law. For further information, interested readers may consult: Kleyn, Madelein and Harmelen, Joanne van, Trade Secrets - South Africa (April 22, 2021). *les Nouvelles* - Journal of the Licensing Executives Society, Volume LVI No. 2, June 2021, Available at SSRN: <https://ssrn.com/abstract=3832194>; Alan Lewis in Trade Secrets throughout the World (Jager *et. al.*), 2023, Chapter 34. South Africa.

<sup>3</sup> Madelein Kleyn and Joanne van Harmelen, *loc. cit.*, p.137.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, p.137.

otherwise would not have known how to produce with the same accuracy or precision necessary for commercial success.<sup>6</sup>

### 3. Scope of trade secret protection

Trade secret protection may include:

- acts of unlawful competition relating to a breach of confidence including unfair use of confidential information (such as “springboarding”);
- the use of confidential information to advance one’s own business interests and activities at the expense of the proprietor of the confidential information;
- unlawful conduct of present or former employees, whereby the enforcement of restraint of trade on employees and the duty not to disclose trade secrets and confidential information belonging to the employer has been recognized by South African courts;
- unlawful conduct of competitors;
- misuse or misappropriation of confidential information by third parties (which include competitors and former employees);
- indirect infringement of trade secrets by a person who induces or procures another to commit the infringing act. In this instance, knowledge or intent on the part of the defendant is required to show wrongful conduct.<sup>7</sup>

### 4. Exceptions

Any enforcement is subject to constitutional provisions that guarantee individual rights. South African courts have relied on principles such as public interest as well as reasonableness, public policy, legally recognizable interest, and/or proprietary interest worthy of protection as core factors in reaching their decisions when asked to adjudicate and enforce the protection of trade secrets and know-how.<sup>8</sup>

### 5. Civil remedies

A contractual or fiduciary obligations forms the legal basis for the protection of trade secrets and know how in South Africa.<sup>9</sup> South African law provides for civil remedies. The trade secret holder may prevent use, disclosure or continued use or further disclosure of a misappropriated trade secret through a claim for injunctive relief. A preliminary injunction is possible, whereby the court weighs, amongst other things, the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted (the balance of convenience).<sup>10</sup>

It is possible for a plaintiff to apply for an order for delivery-up or destruction of goods.<sup>11</sup>

Damages may be awarded for proven actual or prospective losses relating to a reduction in a person’s financial position that is sustained by the proprietor through the breach of the trade secret. It is possible to obtain compensation for an indirect damage such as loss of goodwill of the business, whereby the probability, including any uncertain future loss that might be suffered, is balanced. For the calculation of the damage, courts may consider, for example, profit made by the defendant and reasonable royalty that would otherwise have been payable by a licensee or sub-licensee.

---

<sup>6</sup> Alan Lewis, *loc.cit.*, § 34:7; for examples of court cases concerning know-how also see: § 34:5, § 34:6.

<sup>7</sup> Madelein Kley and Joanne van Harmelen, *loc. cit.*, p.139.

<sup>8</sup> *Ibid.*, p.138.

<sup>9</sup> *Ibid.*, p.137.

<sup>10</sup> *Ibid.* p. 139 with further references.

<sup>11</sup> *Ibid.*, p 140.

It may be possible to claim unjustified enrichment due to trade secret misappropriation, whereby South African courts have described the following general requirements for any action based on unjust enrichment:

- The respondent was enriched;
- The applicant was impoverished;
- The respondent's enrichment was at the expense of the applicant;
- The enrichment was unjustified.<sup>12</sup>

## 6. Criminal sanctions

In general, only movable, corporeal property available in commerce can be stolen but not intangible information.<sup>13</sup> However, there seems to be a debate whether stealing of confidential information may be considered as theft under South African criminal law.<sup>14</sup> In addition, criminal penalties may apply under several South African Statutes, such as the Cybercrimes Act 19 of 2020 or the Medical Schemes Act 131 of 1998, if certain trade secrets are released.<sup>15</sup>

## 7. Trade secret protection in judicial proceedings

*In camera* proceedings are possible, and confidential information may be protected, including by allowing the court to prevent disclosure of the secret by an expert witness, by requiring the witness to maintain secrecy, or by issuing a protective order stating that the trade secret may not be disclosed or may be disclosed only under certain conditions and circumstances.<sup>16</sup>

## 8. Procedural provisions

### *Competent Courts*

Actions related to civil remedies of trade secret misappropriation generally are in the jurisdiction of the High Court (or if applicable the Labor Court) where the cause of action arises.<sup>17</sup> As to criminal matters, will be dealt with as a criminal matter before the lower courts of the Republic of South Africa.<sup>18</sup>

### *Burden of proof as to civil remedies*

A claimant would need to prove: (i) its interest in, or ownership of, the information; (ii) the confidential nature of the information; (iii) an obligation to maintain the secrecy of the information; and (iv) unlawful acquirement and use of the information. For a damage claim, it must prove a causal damage as the result of the breach.<sup>19</sup>

In order to obtain a preliminary injunction, *prima facie*, a well-grounded apprehension of irreparable injury and absence of ordinary remedy would need to be proved by the plaintiff.<sup>20</sup> For a final interdict, a clear right, as opposed to a *prima facie* right, has to be established, whereby the plaintiff must prove a continuing act of infringement and the absence of any other satisfactory remedy. The procedure is generally by way of action proceedings with oral evidence.<sup>21</sup>

---

<sup>12</sup> *Ibid.* with further references.

<sup>13</sup> Alan Lewis, *loc.cit.*, § 34:8.

<sup>14</sup> Madelein Kleyn and Joanne van Harmelen, *loc. cit.*, p.140.

<sup>15</sup> See with further details: Alan Lewis, *loc. cit.*, 34:9.

<sup>16</sup> Madelein Kleyn and Joanne van Harmelen, *loc. cit.*, p. 140.

<sup>17</sup> See with further details, Alan Lewis, *loc. cit.*, § 34:21.

<sup>18</sup> See with further details, Alan Lewis, *loc. cit.*, § 34:12.

<sup>19</sup> Madeleine Kleyn, *loc. cit.*, p. 138 with further references.

<sup>20</sup> *Ibid.*, p. 139.

<sup>21</sup> *Ibid.*

*Statute of limitation*

According to the South African Prescription Act of 1969, a legal action of trade secret misappropriation may only be initiated within three years from the date that the cause of action arose.<sup>22</sup>

---

<sup>22</sup> *Ibid.*