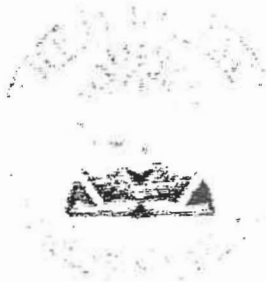


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case no: 2020/13296

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
7 March 2022	
DATE	SIGNATURE

In the matter between:

WHOLESALE MONITORING SERVICES (PTY) LTD

Applicant

And

WM DIGITAL SOLUTIONS (PTY) LTD

1st Respondent

WADE MOSTERT

2nd Respondent

ULTRA LIQUORS (PTY) LTD

3rd Respondent

ROBINSON LIQUORS (PTY) LTD

4th Respondent

Delivered: This judgement was prepared and authored by the Judge whose name is reflected herein and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 3 March 2022.

JUDGMENT

BEZUIDENHOUT AJ:

[1] In this matter the applicant sought to enforce a restraint provision included in the Alliance Partner Network Agreement (the agreement) concluded between the 1st respondent and the applicant. The applicant also demanded that the 1st respondent account to it on the disgorgement of secret profits the 1st respondent is alleged to have made. The applicant further sought to recover damages that it allegedly suffered because of the 1st respondent's breach of the agreement.

BACKGROUND

[2] The applicant described itself as an off-site CCTV monitoring solutions company. Its main business is the sale of monitoring and surveillance equipment to businesses and households and off-site CCTV camera monitoring and perimeter detection services. The applicant describes the 1st respondent business as similar if not identical to that of the applicant.

[3] The 2nd respondent described the 1st respondent's business as consisting of the sale, installation and maintenance of CCTV systems. This entails the provision of CCTV cameras, with or without hardware and software but does not include off-site monitoring and perimeter detection services. The 2nd respondent stated that the applicant would not sell and install CCTV camera's if the customer was not interested in off-site monitoring and perimeter detection services as well. According to the 2nd respondent the difference in the services the applicant offered when compared to the 1st respondent was that the 1st respondent did not offer off-site monitoring and perimeter detection services.

[4] According to the 2nd respondent when the applicant thus approached the 1st respondent with an offer that the 1st respondent refers its clients to the applicant who required off-site monitoring and perimeter detections services against the applicant paying the 1st respondent a commission, it made commercial sense and the 1st respondent accepted the offer.

[5] It is common cause that the applicant and 1st respondent concluded a written Alliance Partner Network Agreement on 10 February 2017 (the agreement). In terms of the agreement, the applicant appointed the 1st respondent as a non-exclusive independent sales representative of the applicant for the purpose of selling the applicants off-site monitoring solutions to potential customers in the Republic of South Africa.

[6] According to the 2nd respondent, after entering into the agreement, the applicant and 1st respondent each continued to service its customers within the ambit of the services it rendered prior to the conclusion of the agreement but in addition the 1st respondent started marketing and selling the applicants off-site monitoring and perimeter detection services; the installation and set up of the off-site monitoring and perimeter detection services were done by the applicant.

BREACH

[10] According to the applicant it came to its attention during or about June 2019 that the 1st respondent had started selling its own off-site monitoring solutions by offering the same or similar products and services as the applicant offered at a significantly reduced rate while still being bound by the terms of the restraint contained in clause 6 the agreement.

[11] In support of this allegation the applicant alleged that the 1st and 2nd respondents had:

[11.1] approached existing clients of the applicant and has solicited their business by offering the same services as the applicant and undercutting the applicants prices;

[11.2] Copied and are using the applicant's intellectual property and marketing material and placing this copied material on the 1st respondent's website;

[11.3] Used the applicant's propriety information in order to springboard themselves and gain an unlawful advantage in competing with the applicant; and

[11.4] Solicited and persuaded the applicants customers into doing business directly with the 1st respondent rather than with the Applicant, which is a breach of the agreement.

[12] The applicant's attorney addressed a letter of demand to the 1st respondent in June 2019, demanding that the 1st and 2nd respondent provide it with an undertaking to adhere to the restraint within 5 business days of demand, failing which the applicant would be required to take further legal action.

[13] According to the applicant, on 19 August 2019, a director of the applicant met with the Managing Director of the 3rd respondent (the 3rd and 4th respondent was according to the applicant two of its customers) as it has come to his attention that the 1st respondent had entered into an agreement with the 3rd respondent to offer him the same services as the applicant offered. The applicants Managing Director alluded the 3rd respondents' Managing Director to the agreement concluded between the applicant and 1st respondent and after the meeting, provided him with a copy of the agreement.

[14] On 23 August 2019, the Managing Director of the 3rd respondent notified the applicant that it would “follow through” with the agreement with the 1st respondent to provide off-site monitoring services¹ to the 3rd respondent.

[15] On 24 August 2019, the applicant cancelled the agreement with the 1st respondent.

[16] On 23 January 2020, the applicant received an email from the 3rd respondent indicating that it wanted to terminate 3 of the 3rd respondent’s agreements with the applicant.

[17] On the same date, in an effort to improve its services, the applicant requested the 3rd respondent to provide it with its reasons for the termination of its agreements. The 3rd Respondent responded by stating that it had a new service provider that would attend to the installation, maintenance and monitoring of its sites. The 3rd respondent identified the 1st respondent as the “new” service provider.

[18] The 2nd respondent pleaded that the 3rd and 4th respondents were the 1st respondent’s customers and the applicant in reply conceded that historically they were. The 2nd respondent stated that the 3rd respondent was dissatisfied with the

¹ It needs be noted that the applicant did not plead that the 1st respondent terminated any agreements at this stage. It is only at par 71 that the applicant attaches annexure FA 10 to quantify its damages where cancellation dates appear in the schedule, but the 1st and 2nd respondents indicated that they took issue with par 71. From the schedule it is evident the 3rd respondent cancelled 11 of its 14 agreements with the applicant in August 2019.

services the applicant rendered and that they drew the applicant's attention thereto. The 3rd respondent approached the 1st and 2nd respondents with a request that they refer them to a different off-site monitoring and perimeter detection service provider. The 1st respondent referred the applicant to an entity known as WM Surveillance (Pty) Ltd which was registered on 27 June 2019 and changed its name to TTK Surveillance (Pty) Ltd on 2 July 2020. According to the 1st and 2nd respondents they have no ties to either TTK Surveillance or WM Surveillance.

ISSUES TO BE DECIDED

[18] According to the applicant the issues for determination are whether:

[18.1] The applicant is entitled to accounting as set out in prayer 7 of the notice of motion; and

[18.2] Whether the 1st respondent has breached the agreement by soliciting the custom of the applicants' customers (without deciding the quantum which must be referred for oral evidence).

[19] According to the 1st respondent the issues to be decided are the following:

[19.1] Whether a clear right to the interdictory relief exists and whether there is an injury committed or apprehended;

[19.2] Whether the applicant has a right to receive an account; and

[19.3] Whether there was a breach of the agreement for which the 1st and 2nd respondents could be held liable for damages, or which could cause damages.

INTERDICTIONARY RELIEF

[30] With regard to the interdictory relief the applicant indicated that it accepted the 1st respondents tender and that it was therefore entitled to the relief as prayed for in prayers 1, 3 and 4. The applicant indicated that it did not persist with relief as prayed for in prayers 2, 5 and 6 of the notice of motion.

[31] The 1st respondent argued that the clear right on which the applicant depended for its interdictory relief would have terminated though the efflux of time at the end of August 2020 and as such the applicant would not have been entitled to the interdictory relief beyond the 12-month period.

[32] The Court is mindful of the fact that the 1st and 2nd respondents had tendered and consented to the interdictory relief in their answering affidavit and that the applicant has accepted same. However, the applicant is seeking a final interdict without any termination date.

[33] Having had regard to the papers, the applicant in its founding affidavit did not motivate why it wanted to deviate from and extend the 12-month period for the protection of its confidential information and non-circumvention clause beyond what the parties had agreed upon and recorded in the agreement. In the agreement the parties recorded a 12-month period which would commence to run from date of termination of the agreement for whatever reason.

[34] The agreement was cancelled in August 2019; therefore the 12-month period would have terminated in August 2020. When the matter was argued in October 2021, the applicant had the benefit of the 1st and 2nd respondents undertaking for a period in excess of 12-months, there is no justification in seeking that the undertaking run for another 12-month period from date of the granting of the order.

[35] Having said that, the applicant's Counsel indicated that the applicant will not be seeking prayer 2 any longer, which meant that the interdict would be a perpetual restraining order. This is drastic relief which will not be granted lightly, and the applicant has not made out a case for such drastic relief in its papers.

[36] The Court therefore decline to make the 1st and 2nd respondents tenders an order of Court and issue no order with regards to prayer 1,3 and 4 as the relief has become academic due to the 12-month period the parties had agreed upon in the agreement having terminated in August 2020 and there on the affidavits filed of record not being any reason why the period must be extended further than the agreed upon 12 months from date of termination of the agreement.

DAMAGES AND BREACH OF THE AGREEMENT

[37] The applicant bases the breach of the agreement on clause 6 of the agreement.

[38] Clause 6 reads as follows:

'6. Confidentiality and Non-Circumvention

6.1 For the duration of this Agreement and for a period of 12 (twelve) months following termination thereof by either Party and for whatever reason:

6.1.1.

6.1.2 The Alliance Partner hereby undertakes, not at anytime, whether directly or indirectly to:

6.1.2.1 endeavour to or actually circumvent WMS in relation to the provision of good and / or services, similar to the Product; and / or

6.1.2.2 save as provided for in this Agreement, negotiate directly or indirectly, with any of WMS's suppliers, customers and/or business contracts or partners whose details are disclosed as a result of this Agreement or with whom

the Alliance Partner might have become acquainted with in the course of the implementation of this Agreement; and/or

6.1.2.3 take any action which would result in the dealing with any of WMS's suppliers, customers and business contacts or partners to the exclusion of WMS.'

[39] In clause 1.1 customer is defined as: '.... potential customers in the Republic of South Africa'.

[40] In clause 2.1 of the agreement it stipulates that: 'the Alliance Partner shall, in terms of this Agreement, on a non-exclusive basis, actively market the Product to the Customers with the aim of securing as many new Customers as possible for the benefit of both parties.'

[41] At paragraph 21 of the founding affidavit the applicant pleaded that: 'The First Respondent was provided with a confidential customer list in order to facilitate the sale of the Applicant's products and services to customers of the Applicant.' The applicant did not plead who provided this list to the 1st respondent or when it was provided to it. The 2nd respondent denied that the applicant ever provided the 1st respondent with a customer list.

[42] The applicant then pleaded that the 2nd respondent as the 'face' of the 1st respondent performed in terms of the agreement by actively marketing and selling the applicant's product to customers and received commission.

[43] The applicant proceeded and stated that the 1st and 2nd respondents had access to the applicant's customers and developed a relationship of trust with these customers.

[44] The applicant pleaded that the 1st and 2nd respondents had access to the order history of each customer of the applicant². The applicant then stated that the 1st and 2nd respondents approached existing clients of the applicant and have solicited their business by undercutting the applicant's prices.

[45] The applicant stated that the 3rd and 4th respondents was one of the applicant's key customers, it sold monitoring equipment and rendered services to various of its outlets.

[46] The breach of the agreement is then described as follows: in June 2019 it came to the applicant's attention that 1st and 2nd respondents had started selling its own off-site monitoring solutions by offering the same or similar products and services as the applicant at a significantly reduced rate while still bound by the terms of the restraint

² FA par 25.2 p 001-16

as contained in the agreement. According to the applicant this constituted a clear breach of the terms of the agreement.

[47] Although the applicant did not plead the cancellation of the agreement in the founding affidavit the agreement was cancelled in August 2019 by the applicant.

[48] In January 2020 the 3rd respondent gave notice of the termination of the (the last) 3 agreements of its outlets (11 agreements having been cancelled in June / August 2019).

[49] One of the applicant's defences to the applicant's allegation of breach of the agreement is that it had not breach the agreement as the 3rd respondent was not a customer as defined in the agreement. To this end the argument was that only new customers to both the applicant and 1st respondent could fall under section 6 if the definition of customer is read with clause 2.1 and 6.1.2.3.

[50] Having regard to the background facts as pleaded by the 1st respondent, with which it does not appear the applicant took issue with, both parties continued to run their respective businesses with the 1st respondent having to market and sell the applicant's products in addition. The applicant retained its databases, suppliers and customers and the 1st respondent it's databases, suppliers, and customers. There was no amalgamation of businesses.

[51] Having regard to the way the applicant pleaded its case in the founding affidavit, the applicant was concerned with the protection of its customers, suppliers and databases which on its version was made available to the 1st respondent and to which the 1st respondent had access to.

[52] Having regard to clause 6 it would also appear that the aim of this clause was to protect the applicant's confidential information and to afford the applicant protection against interference from the 1st respondent as it does not afford the 1st respondent any protection from interference by the applicant or abuse by the applicant of the 1st respondents' confidential information.

[53] In order then to determine who were WMS customers as referred to in clause 6 it is not necessary to interrogate clause 1.1 and 2.1 as the 1st respondent admitted to it referring the 3rd respondent to the applicant post the conclusion of the agreement and being entitled and or paid commission.

[54] For convenience sake clause 6.1.2.2. was rearranged so it makes reference to the applicant and 1st respondent and read as follows: For the duration of this agreement and for a period of 12 months following termination hereof by either party and for whatever reason, the 1st respondent hereby undertakes, not at any time, whether directly or indirectly, save as provided for in this agreement, to negotiate directly or indirectly, with any of the applicant's suppliers, customers and/or business contracts or partners whose details are disclosed as a result of this agreement or with

whom the 1st respondent might have become acquainted with in the course of the implementation of this agreement.

[55] As the 3rd respondent was historically the 1st respondent's customer and not the applicants the 1st respondent did not become acquainted with the 3rd respondent due to any of the 3rd respondent's details being disclosed to it as a result of the agreement, neither has the 1st respondent become acquainted to the 3rd respondent in the course of the implementation of the agreement. It was the applicant who became acquainted with the 3rd respondent and its details were disclosed by the 1st respondent to the applicant as a result of the agreement. Therefore clause 6.1.2.2 does not find application in this instance.

[56] Doing the same with clause 6.1.2.1. it would thus read as follows: For the duration of this agreement and for a period of 12 months following termination hereof by either party and for whatever reason the 1st respondent hereby undertakes, not at any time, whether directly or indirectly, save as provided for in this agreement, endeavour to or actually circumvent WMS in relation to the provision of good and / or services, similar to the product.

[57] Neither party has address me on the meaning or interpretation of the word circumvent. From consulting the dictionaries, the description of 'to avoid something by managing to go around it' or 'manage to get around especially with ingenuity and stratagem' appears to be the most fitting definition of what circumvent in this instance would mean.

[58] In line with the above it is also the applicant's case that the 1st respondent met with the 3rd respondent, offered it the same or similar product to that of the applicant and undercut the applicant's prices (the applicant depends mainly on hearsay evidence and documentary evidence which has not been properly introduced in its founding affidavit to support these allegations).

[59] The 1st respondent denied that it offered the 3rd respondent the same or similar product to that of the applicant and that it undercut the applicant's prices. On the 1st respondent's version, the 3rd respondent was dissatisfied with the applicant's services, the 1st respondent notified the applicant of same, the 3rd respondent was going to terminate its services with the applicant and as such it asked the 1st respondent, to refer it to a different service provider, which the 1st respondent then did. The 2nd respondent denied that the 1st respondent rendered or offering to render off-site monitoring and perimeter detection services and having any ties to the entity it referred the 3rd respondent to.

[60] There is a material dispute of fact which cannot be resolved on the papers.

[61] The applicant requested that only the issue of the quantification be referred to trial. A piece meal adjudication of the issue of the breach and damages is not desirable for a variety of reasons one of it being that motion proceedings were not designed for the adjudication of these types of disputes, and two that there is a real possibility that

evidence might come to the fore during oral testimony which might impact on the merits and so forth. The whole of the issue of breach and quantification of the agreement will thus be referred to trial.

[62] In addition, the applicant seeks to hold the 2nd respondent personally liable on what appears to be fiduciary grounds. The applicant and 1st respondent's relationship arise out of the agreement concluded between the applicant and 1st respondent. The applicant pleaded that 1st respondent owed the applicant a fiduciary duty arising out of the principal agent relationship, and I will deal with this further on in this judgment. The applicant did not plead any contractual relationship between the applicant and 2nd respondent. The applicant seems to base its claim for damages against the 2nd respondent on the fiduciary relationship between the applicant and the 2nd respondent, but it is unclear what the legal basis for that is. The 1st and 2nd respondent were in an employment relationship and a fiduciary duty existed between the two of them and the 1st respondent would ordinarily be liable for the acts of its employees however the applicant does not seem to base its cause of action thereon.

AGENCY AND ACCOUNTING

[63] In terms of prayer 7 of the notice of motion, the applicant demand of the 1st respondent that it account to it with regard to of all profits earned by the 1st respondent on CCTV camera's, perimeter detection and off-site monitoring solutions and all off-site monitoring and perimeter detection services rendered.

[64] The applicant's demand for an account arises in the context of the allegation that the 1st respondent made a secret profit to which the 1st respondent, as the applicant's agent, was not entitled to. The secret profits the 1st respondent would have appropriated stems from the allegation that the 1st respondent poached the applicant's customers. In the event of the 1st respondent having poached the applicants' customers, the applicant aver it would have suffered losses.

[65] It would thus appear that the applicant's demand that the 1st respondent account to it, is to verify whether the 1st respondent had breached the agreement and to what extent the 1st respondent has benefitted therefrom if it has breached the agreement.

[66] Prior to ordering the 1st respondent to account for profit made it must be established whether the 1st respondent had indeed poached the applicant's customers. The applicant would not without be entitled to demand an account for secret profits made without and allegation of untoward conduct by the 1st respondent.

[67] In *Any Name 451 (Pty) Ltd v Capespan (Pty) Ltd* (9922/2005) [2011] ZAWCHC 570 (23 September 2011) Binns Ward J stated that: 'There is, however, no general principle of law that when one party does not know how much he is owed by another he can call upon the latter to render an account.' And referred to the matter of *Rectifier and Communication Systems (Pty) Ltd v Harrison and Others* 1981 (2) SA 283 (C) at 287 fin – 288B in this regard.

[68] At paragraph 6 he dealt with the requirements for a statement as follows: 'In order to establish an entitlement to a statement of account, as claimed, the plaintiff had to prove either (i) that the defendant had been obliged in terms of a relevant fiduciary duty to account the companies in the manner sought, or (ii) that the defendant was contractually bound to the companies to render such an account, or (iii) that there was a statutory obligation on the defendant to render the account.' and referred to the matters of *Absa Bank Bpk v Janse Van Rensburg* 2002 (3) SA 701 (SCA) at para 15; *Maitland Cattle Dealers (Pty) Ltd v Lyons* 1943 WLD 1 at p. 19 (per Millin J).

[69] He then stated that: 'No magic attaches to the expression 'fiduciary duty'. The existence of a fiduciary duty, and its nature and extent, are questions of fact to be adduced from a thorough consideration of the substance of the applicable relationship and any relevant circumstances which affect the operation of that relationship. Furthermore, the existence of a fiduciary relationship can be an incident of a contract - agency affords a typical example – and thus there is scope for an overlap between categories (i) and (ii) aforementioned. The terms of a contract may therefore create and define the nature and extent of a fiduciary relationship or duty, including the extent of any attendant duty to account. In the current matter the plaintiff relied on the contractual relationship between the companies and the defendant – broadly characterised by it during the trial as one of agency, or of 'trust' – as the basis for the alleged duty on the defendant to provide an improved accounting. The focus was therefore on the identification of the applicable contract(s) and the pertinent terms thereof."

[70] The applicant and 1st respondent's relationship were also an incidence of a contract and that in this case categories (i) and (ii) will overlap and that the terms of the contract may therefore create and define the nature and extent of the fiduciary relationship and or duty.

[71] At paragraph 60 of the same judgment he also dealt with the issue of 'agent and agency' and I quote: 'The defendant's counsel emphasised the distinction between the loose sense in which the word 'agent' is often employed and its connotation in law. They supported their submissions in this respect with the following quotations from De Villiers & Mackintosh The Law of Agency in South Africa 3rd ed., which are apposite: '[An agent is] a person who has authority to act for and on behalf of another (called the principal) in contracting legal relations with third parties; the agent represents the principal and creates, alters, or discharges legal obligations of a contractual nature between the latter and third parties.' and 'The specific characteristic of agency in the legal sense is the authority conferred on the agent to make binding contracts on behalf of his principal. An agent is sometimes defined as one who has authority to act for another, but while such a definition may describe persons who do not possess the distinguishing characteristic referred to and are nevertheless popularly termed 'agents' (such as, for example, the 'estate' or 'house agent'), it is for legal purposes inexact. A person who has authority to act for another cannot be regarded in law as an agent unless that authority covers the creation of contractual obligations between his principal and the third party. To the extent to which an 'agent' is required to perform non-juristic acts (i.e. acts which do not have the effect of bringing

his principal into legal relations with third parties), he ceases to be an agent and becomes a servant or independent contractor... From this point of view an agent may be defined as a servant or independent contractor who brings his principal into binding legal relations with third parties. His capacity as agent exists in law only for the time during which he is representing his principal in the formation of contractual obligations with third parties.'

[72] Despite the 2nd respondent not taking issue with the applicant's allegation that the 1st respondent was its agent, there is not much in the founding affidavit which tends to support the notion that the relationship between the applicant and 1st respondent was indeed one of principal and agent as the existence, The scope of the 1st respondents mandate was not fully canvassed in the founding affidavit and the agreement itself contains clauses which impacts on the principal agent relationship which the applicant has not dealt with in its founding affidavit. In the 1st paragraph of the agreement the 1st respondent is identified as and independent contractor, which seems to suggest a purely contractual relationship.

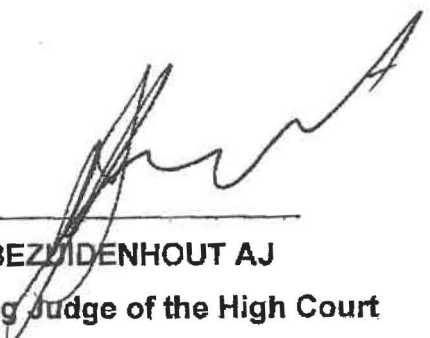
[73] The facts and evidence placed before this Court with regard to the issue of agency and accounting demand that this matter be referred to trial alongside the issue of the breach to trial so that the issues can be properly thrashed out in pleadings and the different phases leading up to the trial.

COSTS

[74] Costs is best reserved to be dealt with at trial.

WHEREFORE THE COURT ORDERS THAT:

1. Prayers 7, 8, 9 and 10 pertaining to the issues of breach of contract and damages and the rendering of an account, statement and debatement and disgorgement of profit are referred to trial.
2. The applicants Notice of Motion shall stand as a simple summons and the 1st and 2nd respondents notice of intention to oppose stands as a notice of intention to defend. The applicant is ordered to file its declaration within 30 days of this order, and thereafter the normal times for filing of all subsequent pleadings and notices will apply as per the Rules of Court.
3. Costs reserved.



J M BEZUIDENHOUT AJ
Acting Judge of the High Court

APPEARANCES:

DATE OF HEARING

: 21 October 2021

DATE OF JUDGMENT

: 07 March 2022

APPLICANT'S REPRESENTATIVE

: Adv LM Spiller

APPLICANT'S ATTORNEY

: Witz Inc

1st and 2nd RESPONDENTS REPRESENTATIVE

: Adv HP van Nieuwenhuyzen

1st and 2nd RESPONDENTS ATTORNEY

: Eugene Marias Attorneys