IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 16343/2022P

In the matter between:

INDWE RISK SERVICES (PTY) LTD	**APPLICANT**

And

CHANTAL COYNE	**FIRST RESPONDENT**
SURELINK CC	**SECOND RESPONDENT**

JUDGMENT

P C BEZUIDENHOUT J:

[1] The application was filed at court on 24 November 2022. The answering affidavit by First and Second Respondent's was filed on 16 of January 2023 and the replying affidavit was filed on 6 February 2023. The matter was on the opposed roll on 1 November 2023. On 20 October 2023 various documents were filed by Respondents which included a supplementary index, a confirmatory affidavit by one M Gosman and Respondents heads of argument.

[2] At the commencement of the hearing Applicant objected to the confirmatory affidavit by Mr. Gosman on the basis that it was not merely a confirmatory affidavit but that it contained more and appeared more like a supplementary affidavit and that there was no application for condonation for the late filing of the said affidavit. It was further submitted that there was no material dispute of facts, that if the confirmatory affidavit of Gosman was allowed it could create a dispute of fact. It was prejudicial to Applicant and should therefore not be allowed.

[3] In response it was submitted on behalf of Respondents that Gosman was referred to in the affidavit of Second Respondent and that all that was required was an affidavit from him that he had read the affidavit and confirmed what was said relating to him. Paragraphs 4 to 8 of his affidavit can therefore be struck out and it would then merely be a confirmatory affidavit.

[4] As set out the confirmatory affidavit of Gosman was filed approximately 9 months after that of First Respondent. No reason was provided in the affidavit as to why this was so, nor was there any application for condonation for the late filing thereof. In my view it would not be prudent to exclude certain paragraphs of Gosman's affidavit and due to the fact that it was merely filed when there was ample time to file an application for condonation or to provide an explanation at least as to why it was filed at such a late stage nor even an oral application for condonation that the affidavit of Gosman should be excluded in the determination of these proceedings.

[5] The relief which is being sought is: Firstly, that First Respondent be interdicted and restrained form misappropriating or exploiting for her own or Second Respondent's benefit confidential information of Applicant. Secondly that First Respondent be restrained from canvassing, recruiting or soliciting Applicant's existing short term insurance clients and accepting short term insurance form Applicant's existing client base or accepting appointment as broker of Applicant's existing clients. Thirdly that First

Respondent surrender to Applicant all confidential information, databases, etc. in her possession. Fourthly that First Respondent be ordered to comply with the undertakings contained in the revised restrained and confidentiality agreement signed by her on 16 June 2015. Fifthly that Second Respondent be restrained form using or accessing Applicant's confidential information, intellectual property records, customer and clients lists, etc. and Sixthly that Second Respondent surrender to Applicant all Applicant's confidential information documentation, customer lists, etc. that it may have in its possession. Seventhly that costs be paid on an attorney and client scale.

[6] From the relief being sought and what was submitted on behalf of Applicant it is not seeking any relief prohibiting First Respondent from being employed by Second Respondent or working with Second Respondent, but the relief sought is to prevent First Respondent admitting existing clients of Applicant and using any client lists, etc. or confidential information which First Respondent may have in her possession resulting from her employment by Applicant.

[7] It is common cause that First Respondent was employed by Applicant for a considerable period of time and had been promoted to a managerial position in 2015. For reasons, which are not relevant at this stage, she was later demoted and thereafter resigned and the matter ended up in the CCMA where it was settled between the parties. The basis for the referral to the CCMA was that of constructive dismissal. No further information in this regard has been provided.

[8] it is also common cause that thereafter she commenced working for Second Respondent, either as an agent or as an employee, which was one of the issues raised by Applicant in these proceedings.

[9] It was submitted on behalf of Applicant that there was an existing restraint of trade, that First Respondent has misappropriated confidential data to enable her to work in direct competition with Applicant. It was submitted on behalf of Applicant that First and Second Respondent failed to provide undertakings not to solicit clients and that Applicant has suffered loss due to the relocation of clients as set out in the replying affidavit at page 208 of the record. The terms and duration of the restraint of trade undertaking is set out in paragraph 4 of the Restraint and Confidentiality agreement (2015).

[10] In her answering affidavit, Fist Respondent set out that certain clients had followed her when she moved namely a Mrs. Van Staden, a personal friend and Mr. Gosman in respect of his personal assets and also that of his business, Amlec. First Respondent in her answering affidavit states that she destroyed all confidential information of Applicant she had on the advice of her attorney. It was submitted by Applicant that the least that was required was an affidavit form the attorney confirming this. Although First Respondent alleges that it was destroyed, Applicant has lost 3 clients which First Respondent contends, independently and on their own account moved their short term insurance to Second Respondent.

[11] Applicant submitted that the contract which First Respondent refers to between her and Second respondent is on a reading thereof, an employment contract and not an agency agreement and that this was indicative that First Respondent was acting in bad faith. It was submitted that First Respondent works from the premises of Second Respondent and that she only mentioned Ms. Van Staden and Mr. Gosman in her affidavit, but failed to mention Colour Displays and Enermous Investments (Pty) (Ltd), which also moved their business to Second Respondent. It was noteworthy that there were no confirmatory affidavits from these two entities. It was submitted that there was no material dispute of fact and that letters had been addressed to First and Second Respondents to desist from their conduct but that they refused to do so and accordingly that a punitive costs order is warranted against First Respondent.

[12] It was submitted on behalf of Applicant that they did not wish to prevent First Respondent form being employed by Second Respondent, but that Respondents were not allowed to use confidential information and customer lists to solicit clients of Applicant to transfer their policies to Second respondent. It was submitted on behalf of Applicant that there was no breach of the restraint of trade if a present client of Applicant transfers its business to Second respondent as long as First Respondent did not deal with that specific client. Accordingly, if an existing client of Applicant transferred its business to Second Respondent, then someone else employed there, and not First Respondent, must deal with that specific policy.

[13] It was submitted on behalf of Respondents that the information set out in the affidavit of First Respondent which deals with the resignation from Applicant was necessary to address paragraph 16 of Applicants founding affidavit, where it specifically mentioned that First Respondent sought and misrepresented that she wanted to take early retirement when she had already taken up employment with Second Respondent. It is submitted that there is no longer any confidential information and documentation, as it has been destroyed and some is also attached to the founding affidavit of Applicant. First Respondent has set out that she has deleted all information that she had.

[14] It was submitted by Respondents that there was a material dispute of fact and if Applicant does not want to refer the matter for oral evidence the application must be dismissed. Respondents main argument was for this relief although it mentioned that the restraint of trade policy was against public policy and not enforceable.

[15] It was submitted by Applicant's counsel that the conversations between First Respondent and clients, such as Mrs. Van Staden, were grey areas. There was no evidence to show that these previous clients were solicited by phoning them or doing

anything to attract them to move their business. It was not to determine which version was more probable. It was submitted by Respondents that Applicant did not allege that the clients had been solicited and therefore there was no case for First Respondent to answer. It was immaterial whether it was an agency or employment agreement. It was further submitted that there were indeed various responses by the attorney acting on behalf of First Respondent as set out in pages 178 to 180 to the letters which Applicant has submitted were sent to First Respondent prior to the launching of the application. There was no allegation that there is a client list or confidential client list which was in the possession of Respondents.

[16] It was submitted on behalf of Applicant that soliciting was taking away and by merely approaching someone was a breach of the restraint.

[17] It is common cause that First Respondent had been employed by Applicant for a considerable period of time and thereafter moved to the employ of Second Respondent. It is also common cause that at least four previous clients of Applicant have for various reasons moved their business across to Second Respondent. It was stated by First Respondent that she had destroyed all confidential information due to the advice of her attorney. It is therefore clear therefrom that when she moved across from Applicant to Second respondent that she indeed did take with her certain confidential information of Applicant and only did so once advised to do so by her attorney. She knew she had signed a restraint of trade agreement and must have understood its terms having been in the insurance business for long time.

[18] It was submitted on behalf of applicant that Applicant did not wish to prevent First Respondent from being employed but that she had to abide with the restraint of trade agreement which she had entered into in 2015 which was termed the revised restraint of trade agreement. It is common cause that she signed the said agreement and First Respondent during argument has not challenged the terms of the said agreement but

stated that there is a dispute of fact relating to the clients who have moved to Second Respondent and that the matter therefore has to be referred for the hearing of oral evidence. There are no allegations in the papers of any direct soliciting of clients by First Respondent but it is indeed so that certain clients have moved across with her. Although First Respondent states that she has destroyed all the confidential information that she had taken with her, there is no proof exactly as to what it entailed and what she destroyed except a bold statement to that effect.

[19] In the event of Applicant choosing to argue the matter on the papers and not accepting that there is a dispute of fact then it is trite that Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd 1984 (3) SA 623 (A) is applicable. On behalf of Respondents reliance was placed on the judgment in the matter of Indwe Risk Services (Pty) Ltd v Sure Insurance Brekas (Pty) Ltd and other (25300/2007) [2008] ZAGPHC 291 (14 March 2008), especially paragraphs 15 and 16. This deals with the referral of evidence when there is a dispute of fact but it is also noteworthy that in that case the order that was sought relating to the confidential information etc. was granted. It is common cause that clients have moved across and, in my view, there is accordingly not a dispute of fact in that regard. There is nothing that Respondents have placed before this court that there was any soliciting, phoning or any form of pressure placed on these individuals to move their insurance across. Accordingly, there is no dispute of fact that necessitates the matter to be referred for the hearing of oral evidence.

[20] In considering a restraint of trade such as the present it must firstly be considered whether there is a protectable interest, if there are trade secrets such as customer lists, operating procedures etc. Secondly, if they were not being enforced if there would be serious or potential harm to Applicant. And thirdly, is it reasonable in the circumstances. A further factor is the employee's right to work. As was submitted on behalf of Applicant they do not wish to stop First Respondent from working but she may not deal with any of the clients of Applicant that had moved across to Second Respondent as set out in paragraphs 4.1.2 and 4.1.3 of the Restraint of Trade Agreement.

[21] The onus lies on the employee to show that the restraint is unreasonable and contrary to public policies. In the case of Magma Alloys and Research SA (Pty) Ltd v Ellis 1984 (4) SA 874 (A) it was held that agreements that were freely entered into between parties should be honoured. However, it further held that everyone should be free to trade. That unreasonable restrictions would be contrary to public policy.

[22] In the case of Reddy v Siemens 2007 (2) 486 (SCA) it was held in paragraph 10 that restraint of trade agreements were valid and enforceable unless the parties seeking to escape, their workings showed that they were unreasonable and contrary to public policy. In paragraph 20, it was held as the appellant had taken up employment with a rival company, in a position similar to the one he had occupied with respondent, the disclosure of confidential information presented on obvious risk to the respondent. This was sufficient for purposes of granting the order that appellant could disclose information if he or she so chose which was the risk against which respondent had sought to protect itself by means of the restraint clause.

[23] The time period of the restraint of trade agreement in this matter, as well as the area it covers as set out in paragraph 4 of the agreement is in my view totally unreasonable and contrary to public policy. In paragraph 4.1 thereof the restraint is for a period of two years after termination of employment and refers to any competition within the Republic of South Africa or any other country where the employer conducts business. Firstly, the period of two years is unduly long and secondly the whole of South Africa makes it virtually impossible for a person to occupy any position to sustain himself or herself.

[24] Clause 4.1.2 refers to accept or take up any short-term insurance business form any client and in 4.1.3 to accept appointment as short-term insurance broker or

intermediary by any client. Paragraph 4.1.4 refers to the confidential information, data, documents, customer lists etc. All these are however subject to the two (2) year period and the area of South Africa.

[25] As was conceded on behalf of Applicant it is very difficult to establish whether any business which is moved to Second Respondent is being done by First Respondent. First Respondent is prohibited form being the broker of any of the previous clients of Applicant, although it was submitted on behalf of Applicant that they did not wish to prevent previous clients form moving their business across to Second Respondent if they so wish as long as First Respondent did not deal with those clients.

[26] As set out in the case of Reddy above the disclosure of confidential information is a risk and is sufficient to grant the order.

[27] Having considered all the above I am satisfied that Applicant has made out a case for the relief sought to except that the period and area is unreasonable and contrary to public policy for the reasons set out above.

[28] In my view considering the facts of this case a punitive cost order is not warranted.

<u>Order</u>

1. That First Respondent for a period of six (6) months from the date of this judgment:
   1.1 Be interdicted and restrained form misappropriating, exploiting and/or utilizing for her benefit and/or the benefit of Second Respondent, Applicant's confidential information, data, intellectual property, records, documentation, customer and client lists, names and contact details of Applicant's trade secrets, trade connections and confidential information, programmes and databases.

1.2 Be interdicted and restrained from canvassing, recruiting or soliciting Applicant's existing short-term insurance clients, accepting short-term insurance from Applicant's existing client base and accepting appointments as a short-term insurance broker or intermediary by any of Applicant's existing clients.

1.3 That First Respondent forthwith surrender to Applicant all of Applicant's confidential information, data, intellectual property, records, documentation, customer and client lists, names and contact details of Applicant's trade secrets, trade connections and confidential information, programmes and databases that may still be in First Respondent's possession and/or control.

2. That Second Respondent for a period of six (6) months form the date of this judgment:

2.1 Be interdicted and restrained from using, accessing and/or misappropriating Applicant's confidential information data, intellectual property, records, documentation, customer and client lists, names and contact details in respect of Applicant's short-term insurance client's and trade secrets, trade connections, confidential information, programmes and databases belonging to Applicant, by through or under the direct and/or indirect assistance, involvement and procurement thereof by First Respondent.

2.2 Forthwith surrender to Applicant all of the Applicant's confidential information, data, intellectual property, records, documentation, customer and client lists, names and contract details of Applicant's trade secrets, trade connections and confidential information, programmes and databases it may have in its possession.

3. First and Second Respondents jointly and severally the one paying the other to be absolved to pay the costs of the application.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED:	**1 NOVEMBER 2023**
JUDGMENT HANDED DOWN:	**28 NOVEMBER 2023**

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