REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 31288/18

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

SIGNATURE .... DATE 06.10.11

In the matter between:

DISCOVERY LIFE LIMITED	Applicant
And	
DEVAN ANDRE DE MEYER	Respondent

JUDGMENT

Windell J

[1] This is an application to enforce certain restraint provisions against the respondent, emanating from a contract of employment that was terminated on 31

August 2018. The application was initially brought as one of urgency, but was struck from the urgent court roll with costs on a punitive scale for lack of urgency on 20 September 2018.

[2] The applicant seeks an order interdicting and restraining the respondent from directly or indirectly contacting, enticing or soliciting away from the applicant or any company in the Discovery Group, any of the clients listed on the annexures attached to the founding affidavit, pending the final determination of an application to be brought by the applicant against the respondent for final relief, which application is to be instituted no later than thirty days from the date of this order. It is common cause that the list of clients annexed to the applicant's founding affidavit constitutes the respondent's client base during the course of his employment with the applicant.

[3] The respondent does not dispute that the contract of employment which had previously existed between the respondent and the applicant contains restraint of trade provisions. The applicant mainly relies on the provisions contained in clause 17.8 of the agreement. In essence, clause 17.8 stipulates the following:

> [3.1] On termination of employment should the respondent take up employment with a competitor or should the applicant for any reason whatsoever refuse to consent to the transfer or linking of the respondent's client base to the respondent or a third party, then:

[3.1.1] the respondent shall not be entitled to the transfer of his client base;

[3.1.2] the respondent would be restrained from directly or indirectly contacting, enticing or soliciting any clients within his client base for a period of twelve months following termination of his employment;

[3.1.3] the respondent would be obliged to immediately return all client records in his possession to the applicant.

[4] It is common cause that the respondent resigned from the applicant's employment on 29 August 2018 with the intention of joining a competitor, MedBond Insurance Brokers (Pty) Limited ("MedBond"). It is further common cause that the respondent refused to consent to the transfer or linking of the respondent's client base to the respondent or to Medbond. In terms of clause 17.8 the respondent was therefore obliged to immediately return all client files in his possession to the applicant. The files were only returned a month later, on 28 September 2018. It is not disputed that these files contain details of the applicant's clients, including the clients' medical records and history, the clients' level of income, the nature and type of the Discovery products that the clients have subscribed to and the clients' entire investment portfolios. The respondent admits that the information contained in those client files is confidential to the applicant.

[5] On the day of his resignation (29 August 2018) the respondent's attorney, ("Steenkamp"), addressed a letter to the applicant's representatives and demanded that the respondent's "*client book in totality*" be transferred to Medbond on or before 28 September 2018 – a failure of which would "*result in swift action*". In response to those demands the applicant's attorneys, Keith Sutcliffe & Associates Inc ("KSA"), addressed a letter to Steenkamp on 31 August 2018 calling on the respondent to return the applicant's assets, information and the like and to confirm that he had not shared with any third party the applicant's proprietary information.

[6] A series of correspondence followed, culminating in a letter from KSA to Steenkamp on 4 September 2018 wherein the respondent was afforded a final opportunity to provide a written undertaking to the applicant that he would not breach the restraint provisions contained in the contract of employment. Steenkamp replied to the letter on 5 September 2018, but the undertaking that KSA had demanded on behalf of the applicant was not given.

[7] The applicant submits that the fact that the respondent had been in possession of the applicant's client files is in conflict with the express provisions of the employment agreement and that the applicant is therefore in breach of those provisions. The applicant subsequently also discovered that the respondent had, over a period of thirty days, including after he had resigned his employment with the applicant, exported to various email addresses, including his wife's email address, thousands of items of information relevant to the applicant's clients. The applicant contends that this information is confidential to the applicant and is an additional

clear breach by the respondent of the restraint. It is further contended that this is a clear indication that the respondent is intended on continuing to trade on the protected client book and to solicit the applicant's clients for that purpose.

[8] The respondent contends that he has never provided cause for the applicant to believe that he intended to breach the terms of the employment agreement and he has in any event confirmed in his opposing affidavit that he had no intention to breach the terms of the agreement between the parties. Proof of this is his resignation letter, attached to the founding affidavit, wherein he set out his esteemed opinion of the applicant and tendered his assistance to the applicant.

Legal principles

[9] It is trite that the applicant need do no more than to invoke the provisions of the contract and prove the breach.[1] The provisions of the contract of employment, incorporating the restraint provisions, which the applicant seeks to enforce, are not disputed.

[10] The applicant alleges that respondent is in breach of the restraint provisions in that he has retained possession of the applicant's client files. The respondent concedes that at the time of the launching of the application he was in possession of the files and that the files were at his home, but contends that he is not in breach of the restraint as those files were returned to the applicant on 28 September 2018.

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[1] *Basson v Chilwan & Others* 1993 (3) SA 742 (A) at 776 H-J.

[11] The respondent was already aware on 24 August 2018 that the applicant will not be transferring the client book. The respondent had therefore, on its own version, breached the restraint provisions by not returning the client files when he resigned on 24 August 2018. He continued to breach the restraint by not returning the files to the applicant when it was demanded from him on 31 August 2018. He also breached the restraint provisions by transferring confidential client information to a private email address. The fact that he returned the files a month later, on 28 September 2018, after the application was instituted, does not remedy the breach or assist the respondent.

[12] Once the applicant has established the agreement and its breach, the respondent, as the party seeking to avoid the restraint, bears the onus of demonstrating, on a balance of probabilities, that the restraint is unenforceable because it is unreasonable[2].

[13] The respondent does not dispute that customer goodwill is an asset of the applicant and that it is a protectable interest capable of protection by way of enforcement of a restraint of trade. I agree with counsel for the applicant that the very purpose of the restrictions imposed on the respondent in the employment agreement, vis-à-vis the protected client base arises from the fact that, as a broker/ financial advisor, the respondent has established close and personal relationships with the client base he introduced to the applicant. The applicant contends that it

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[2] *Experian South Africa (Pty) Limited v Haynes and Another* 2013 (1) SA 135 (GSJ) at [14].

needs to protect its trade connections in circumstances in which the respondent has, admittedly, built-up close relationships with the applicant's customers so that, now that he has left the applicant's employ, he could easily induce the customers to follow him to the new business. It is contended that the aforesaid customer connections and the association that the respondent has established with the applicant's clients legitimately entitles the applicant to the relief that it seeks. [3]

[14] The respondent admitted that he has established close and personal relationships with his client base and that he is a very successful broker and that his success is '*entirely dependent upon the maintenance of these existing client relationships* '. He contends that the relief sought therefore places unreasonable restrictions on his right to practice in the marketplace. He further contends that he will be prejudiced by the relief sought as he will, in effect, have to commence his career afresh having lost the clients that he introduced to the applicant. In the same breath the respondent however asserts that he intends to honour his obligations in terms of the contract of employment and that he will not use the information in the applicant's client base / files and never intended to do so.

[15] The applicant had originally been prepared to accept a written undertaking from the respondent in an attempt to avoid litigation. It was the respondent's failure to give that undertaking that compelled the applicant to approach this court for relief. I agree with counsel for the applicant that given the respondent's prior behaviour and, in particular, his retention of the applicant's client files, the transfer of the clients'

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[3] *Lifeguards Africa (Pty) Limited v Raubenheimer* 2006 (5) SA 364 (D) at [41].

personal data, together with his expressed intention to trade on the protected client base, that the undertakings are not an answer to the application.

[16] In *Document Warehouse (Pty) Limited v Trubody* [4] Salduker J (as she then was) held that: [5]

> "*The applicant should not have to accept Trubody's ipse dixit that she has not or will not disclose the contents of the lists to any third party. The applicant correctly asserts that this constitutes evidence that she has appropriated to herself details of the applicant's customer connections which she is now in a position to disclose and use to her advantage in her employment with Metro File.'*

[17] Similarly, in *IIR South Africa BB t/a Institute for International Research v Tarita* [6] Marais J stated that:

> "*It does not lie in the mouth of the ex-employee who has breached her restraint agreement to say to her ex-employer 'Trust me : I will not break the restraint further than I have already been proved to have done'."*

[18] The very purpose of a restraint agreement is that the applicant does not have to rely on the *bona fides* or lack of retained knowledge on the part of a respondent.

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4 [2010] ZAGPJHC 92 (13 October 2010).
5 At [39].
6 2004 (4) SA 156 (W) at p167A.

Marais J held in *BHT Water Treatment (Pty) Limited v Leslie and Another,* [7] that it cannot be unreasonable for an applicant in those circumstances to enforce the bargain it has exacted to protect itself. The learned Judge stated as follows: [8]

> *"Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings that he has given".*

[19] The respondent's statement that he will not disclose the information contained in the applicant's client files to a third party and his assertion that he will not solicit or engage the protected client base cannot defeat the application to enforce the restraint.

[20] In conclusion: It is common cause that the client files contain information which is confidential to the applicant and which constitutes its customer or trade connections. The risk to the applicant's customer connections and confidential information is self-evident. The respondent's denials of illegality or breach cannot preclude the applicant from enforcing the common cause terms of the contract of employment which seek to protect the applicant's legitimate interests. The applicant's confidential information contained in its client files (and, indeed, any other information that the respondent may retain which is confidential to the applicant) can be protected, pending final determination of the application for final

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7 1993 (1) SA 47 (W).
8 At p 58A-C.

relief, by means of interdictory relief. The interdictory relief will preclude the respondent from using the contents of the applicant's client files, and his customer connections with the protected client base.

[21] In the result the following order is made:

[21.1] The application is granted with costs on an attorney client scale.

[21.2] Draft order marked "X" made an order of court.

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the appellant:	Advocate A. R. G. Mundell SC
Instructed by:	Keith Sutcliffe & Associates Inc
Counsel for the first respondent:	Advocate Kroeze
Instructed by:	Steenkamp Van Niekerk Attorneys
Date of hearing:	22 October 2018
Date of judgment:	26 October 2018

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 31288/2018

JOHANNESBURG, THIS ~~22nd~~ DAY OF OCTOBER 2018
BEFORE THE HONOURABLE MS JUSTICE WINDELL, J

In the matter between:

DISCOVERY LIFE LIMITED Applicant
(Registration Number: 1966/003901/06)

and

DE MEYER, DEVAN ANDRE Respondent
(Identity Number 860803 5175 084)

DRAFT ORDER

HAVING read the papers and having heard counsel representing the parties, the following order is made:

1. interdicting and restraining the respondent from directly or indirectly contacting, enticing or soliciting away from the applicant or any company in the Discovery Group, including but not limited to, Discovery Life Investments Services (Pty) Limited (registration number 2007/005969/07), Discovery Vitality (Pty) Limited (registration number 1999/007736/07), Discovery Health (Pty) Limited (registration number

1997/013480/07) and Discovery Life Collective Investments (Pty) Limited (registration number 2007/008998/07), any of the clients listed on annexures "**NM1**", "**NM2**", "**NM3**" and "**NM4**" hereto;

2. directing that the interdictory relief in paragraph 1 above will be immediately effective on the grant of this order and will endure pending the final determination of an application to be brought by the applicant against the respondent for final relief, which application is to be instituted no later than thirty days from the date of this order;

3. directing the respondent to pay the costs of this application on the attorney and client scale;

4. directing the Registrar to seal the Court file in this matter and only to permit access to that file on at least twenty four hours' notice to the applicant.

BY THE COURT

REGISTRAR