



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 10270/2016

In the matter between:

**OLD MUTUAL LIFE ASSURANCE COMPANY
(SOUTH AFRICA) LIMITED**

Applicant

and

NIGEL LATIMER HENSON

Respondent

Coram: Koen J

Heard: 18 October 2016

Delivered: 28 October 2016

ORDER

1. The Respondent is ordered to hand over to the Sheriff, forthwith upon service of the order on him, all files and records, whether in paper form or on CD disk, including all copies of such files and records, in Respondent's possession or under his control, pertaining to and/or containing particulars of and other information relating in any way to Clients (as defined) to whom Respondent rendered any financial service (as defined under the Financial Advisory and Intermediary Services Act 37 of 2002, as amended) during the period from 1 March 2011 up to and including 30 September 2016 (herein after referred to as 'Clients');

2. The sheriff is authorised to deliver all records, including all copies thereof, handed over to him by Respondent pursuant to paragraph 1 above, to Applicant;
3. Respondent is ordered permanently to delete and destroy all electronic records in his possession or under his control that contained particulars of as other information relating to Clients and/or details of Clients investments.
4. Respondent is ordered not to use any information within his knowledge relating to Clients for any purpose whatsoever, and should any Client make contact with Respondent within two years from the date of this order, Respondent must immediately refer such Client to Applicant's Private Wealth Management Division in Durban;
5. Respondent is ordered not to disclose any Confidential Information (as defined in the Contract of Employment concluded between the parties on 30 January 2013, and including Clients lists, Client particulars and details of Clients Investments) to any third party, including but not limited to BR Wealth Management Services (Pty) Limited, trading as Bill Roberts Financial Planning;
6. Respondent is restrained and prohibited, for a period of two years from the date that this order is made, from contacting, directly or indirectly, any Client (as defined in paragraph 1 hereof) for purposes of rendering Financial Service (as defined under the Financial Advisory and Intermediary Services Act 37 of 2002, as amended) to them and/or enticing them to appoint a Financial Services Provider other than Applicant;
7. Respondent is to bear the cost of this Application on the attorney and client scale.'

J U D G M E N T

KOEN J:

[1] The Applicant launched an urgent application seeking to enforce a restraint against the Respondent. The relief claimed is couched in the form of a rule *nisi* with interim relief to be granted. When the matter first came before me, the interim relief claimed was opposed by the Respondent, albeit that he had not yet had an opportunity to file any affidavit setting out the basis of his opposition. At that first hearing, part of the interim relief claimed was granted and the matter was adjourned to allow for an exchange of affidavits on the full extent of the interim relief claimed by the Applicant. The Respondent subsequently delivered an answering affidavit and has requested that the application be treated as one for final, and not just for interim relief, to bring

finality to the dispute. The Respondent also invited the Applicant to agree to the matter being heard as one for final relief. That invitation was accepted by the Applicant which indicated that it would seek a final order in terms of paragraph 2 of the Notice of Motion. When the matter came to be argued the Applicant however persisted with final relief, in slightly different form, in accordance with the terms of a draft order annexed to its heads of argument, which reads as follows:

- '1. Respondent is ordered to hand over to the Sheriff, forthwith upon service of the order on him, all files and records, whether in paper form or on CD disk, including all copies of such files and records, in Respondent's possession or under his control, pertaining to and/or containing particulars of and other information relating in any way to clients or customers to whom Respondent rendered or was entitled to render and/or to have rendered, any financial service (as defined under the Financial Advisory and Intermediary Services Act 37 of 2002, as amended) during the period from 1 March 2011 up to and including 30 September 2016 as set out in the list annexed marked "A" (herein after referred to as "**Clients**");
2. The Sheriff is authorised to deliver all records, including all copies thereof, handed over to him by Respondent pursuant to paragraph 1 above, to Applicant;
3. Respondent is ordered permanently to delete and destroy all electronic records in his possession or under his control that contained particulars of as other information relating to Clients and/or details of Clients investments.
4. Respondent is ordered not to use any information within his knowledge relating to Clients for any purpose whatsoever, and should any Client make contact with Respondent within 36 months from the date of this order, Respondent must immediately refer such Client to Applicant's Private Wealth Management Division in Durban;
5. Respondent is ordered not to disclose any Confidential Information (as defined in the Contract of Employment concluded between the parties on 30 January 2013, and including Clients lists, Client particulars and details of Clients Investments) to any third party, including but not limited to BR Wealth Management Services (Pty) Limited, trading as Bill Roberts Financial Planning;
6. Respondent is restrained and prohibited, for a period of 36 months from the date that this order is made, from contacting, directly or indirectly, any Client (as defined in paragraph 1 hereof) for purposes of rendering Financial Service (as defined under the Financial Advisory and Intermediary Services Act 37 of 2002, as amended) to them and/or enticing them to appoint a Financial Services Provider other than Applicant;
7. Respondent is to bear the cost of this Application on the attorney and client scale.'

[2] The Applicant claims the relief sought on the basis of a contract of employment concluded between it and the Respondent on 30 January 2013. The salient provisions of this agreement included the following:

- (a) 'Authorised product range' is defined to mean a financial product range in respect of which the employer has a distribution agreement in place with the product supplier and the employee is authorised to render financial services on the employer's behalf as appears from the accreditation records of the employer;
- (b) 'Client' means 'any specific person or group of persons who is or may become the subject to whom a Financial Service is rendered by the Employee in respect of the Authorised Product Ranges';
- (c) 'Financial Services' has the meaning ascribed thereto in FAIS;¹
- (d) The Respondent acknowledged that the Applicant holds certain intellectual proprietary rights and confidential information, as provided in clauses 20 and 21 thereof;
- (e) The relevant portions of clause 24 dealing with the 'Consequences of termination' of the agreement provided that upon termination, the Respondent would *inter alia*:
 - '24.1.1 Immediately cease to canvass applications and render financial services in respect of the authorised product ranges;
 - 24.1.2 Not be entitled to submit any new business in respect of the authorised product ranges.
 - 24.1.3 ...
 - 24.1.4 ...
 - 24.1.5 ...
 - 24.1.6 Return to the employer all client information and/or data concerning the Employer and/or any company in the Old Mutual group and/or the Clients of the Old Mutual group which may have been in, or come into, the possession or control of the Employee during the course of his/her employment, whether or not such were originally supplied by the Employer to the Employee, and all copies thereof, inclusive of paper, electronic, and CD disk in a form acceptable to the Employer or, if the Employer so elects, the Employee shall destroy all copies of the aforementioned information or data;
 - 24.1.7 For a period of three (3) years from the date of termination, be restrained from directly or indirectly contacting the Clients of Old Mutual and/or of other companies in the Old Mutual group for purposes of rendering Financial Services to such Clients and/or enticing such Clients to appoint a Financial Services Provider other than Old Mutual.'

[3] The Respondent has had a long career in the financial services industry. In the early days he was previously employed by the Applicant. He

¹ The Financial Advisory and Intermediary Services Act 37 of 2002, as amended.

left in 1981 to take up employment with the brokerage firm Price Forbes. One year later he joined Stewart and Wrightson Brokers in 1982. He thereafter joined Life and Associate Brokers from February 1984. In February 1986 he formed Nigel Henson and Associates CC and was primarily responsible for conducting the business of that entity. He left that entity to take up employment with the Applicant in March 2011 and remained in its employ until his resignation on 3 October 2016. Prior to joining the Applicant in March 2011, he had been a successful independent broker for some 30 years. He states that he always directed the bulk of his investment work to the Applicant as he considered them a reputable company and found its administrative procedures and policy in relation to Wealth Management to be attractive to the type of client he represented. Dissatisfied with the rigours of reporting and administration brought about by FAIS which places onerous record keeping and other requirements on a single broker, he approached the Applicant in 2011 to conduct his 'business as a broker from home'. For this he maintains he would continue to be paid a basic commission as an 'independent broker', but he would also have the potential to earn free overseas trips as an employee and would be paid a bonus annually based upon performance, but in turn would become liable to pay an administration fee.

[4] Notwithstanding his claim that he was being paid a commission as an 'independent broker' it is clear from the terms of the agreement that he had become an Employee and a representative of the Applicant.

[5] When it came to concluding the agreement in January 2013 on which the Applicant relies, he had been employed with the Applicant for two years, was 62 years old, aware that the Applicant in 2013 had a retirement policy for employees which meant that they retired at the age of 61, was apprehensive that the Applicant might terminate his relationship with the Applicant, and was wanting to secure his future with the Applicant for as long as possible. He states that he had:

'continued to look after the Clients which Nigel Henson and Associates CC had at the time when I became an employee. Prior to becoming an employee

those clients had investments with the Old Mutual which Nigel Henson and Associates CC had brought to the Old Mutual as an independent broker. Nothing was said at the time of the conclusion of the first agreement in 2011 about the fate of those clients should I leave the employment of the Old Mutual.'

He admits that he accepted those parts of the contract which the Applicant relies upon in its founding affidavit. He contends however that the restraint intends to provide for the situation where a new and inexperienced employee wishes to start off as a broker selling the financial products of the Applicant and explains that in that situation the Applicant would provide a wealth of experience and assistance to such an inexperienced new employee. He maintains that it would be perfectly reasonable for the Applicant to provide that should such an employee wish to leave the employment of the Applicant, that he should leave his Clients behind, but that his position was entirely different in 'that the clients that I brought to the Old Mutual were entirely mine and during the period of my employment until my resignation I serviced those clients without the help of the Old Mutual other than in respect of administration and compliance with the FAIS Act.' Hence, the Respondent objects to being required to immediately cease canvassing applications and rendering financial services in respect of the authorised product ranges, and not being entitled to submit any new business in respect of the authorised product ranges.

[6] The relief claimed by the Applicant however does not extend that far and does not seek to enforce the obligations in clause 24.1.1 and 24.1.2 of the agreement. As was stated in the replying affidavit of Mr van Eck:

'What Old Mutual seeks in this application is an order obliging Henson to comply with clauses 24.1.6 (return of Client information) and 24.1.7 (a limited restraint) of the contract. In paragraph 25 of the opposing affidavit, Henson avers that "the restraint contained therein covers the breadth of all the clients of Old Mutual" and further "I have no idea of the number or identity of people that I am restrained from contacting. It is this respect too wide and too vague." This is patently not the case. I refer in this regard to the definition of Clients in the Contract which is limited to "any specific person or group of persons who is or may become the subject to whom a financial services rendered by the Employee in respect of the authorised product ranges".'

Further down in paragraph 10 he states:

‘The restraint in clause 24.1.7 of the Contract and the relief sought in paragraph 2.6 of the Notice of Motion seek to prevent Henson, for a period of 36 months, from having contact with the Clients (as defined in the Contract, namely those to whom Henson rendered (or ought to have rendered²) financial services (as defined in the FAIS Act) during the course of his employment as a representative of Old Mutual). Henson knows exactly who these people are. Neither the clause nor the relief sought prevent Henson from having contact with any other clients of PWM (The Applicant’s Private Wealth Management Business Unit) or any customers who hold financial products issued by Old Mutual (provided he does not use confidential information accessed whilst an employee to do so)...’

This is also consistent with the statement in paragraph 5.7 of the founding affidavit that:

‘Applicant does not seek to restrict Respondent from being economically active or from being employed by a competitor of Applicant, simply to prevent Respondent from infringing Applicant’s contractual rights and proprietary interests in doing so.’

[7] The motivation for restricting the relief claimed thus is apparent, as a restraint would only be competent in respect of a protectable interest such as a risk of damage to its customer connection.

[8] Following that explanation in the Replying Affidavit, Mr *Broster* SC for the Respondent confined his argument to the duration of the three year period during which the Respondent:

- (a) would be restrained from using any information within his knowledge relating to Clients for any purpose whatsoever, and requiring that if any Client makes contact with him, to immediately refer such client to the Applicant’s Private Wealth Management Division in Durban; and
- (b) would be restrained from contacting, directly or indirectly any Client for purposes of rendering financial services to them and/or enticing them to appoint a financial services provider other than the Applicant.

With reference to the broader policy considerations applying in restraint of trade situations, alluded to by Nienaber JA in *Basson v Chilwan and Others*,³ he argued that those restraints would violate the very consideration

² It is unclear where this limitation arises from. It does not seem to me to have any foundation in the agreement.

³ 1993 (3) SA 742 (A) at 767C-E.

mentioned by Nienaber JA namely that 'onproduktiwiteit moet ontmoedig word (al verongeluk dit ook 'n ooreenkoms)', that the enforcing of the restraint against the Respondent would result in such 'onproduktiwiteit', and hence that for policy considerations the restraint should be unenforceable in *toto*, or alternatively that the enforcement of the restraint for 36 months would be unreasonable, and that its duration should be curtailed .

[9] As appears from the extracts quoted from the Applicant's founding and replying affidavit above, the Applicant is not seeking to enforce a restraint which would prevent the Respondent from, for example, referring any new business to the Applicant (on which he can earn an income), or having any contact with any other clients of the Applicant or any customers who hold financial products issued by Old Mutual, other than Clients as defined, being persons to whom a financial service was being rendered by him in respect of the authorised product ranges on 30 January 2013, or who thereafter became persons to whom a financial service was rendered by the Respondent in respect of authorised product ranges. Inherent in and arising from the very limitations in the definition of 'Client' is that it is a limited restraint, which although it practically would have an impact on the possible range of his economic activities, in that he cannot use information relating to those Clients or contact them directly or indirectly for the purpose of rendering any financial service to them or enticing them to appoint a financial services provider other than the Applicant, will nevertheless not result in total unproductivity.

[10] That limitation however appears justified on the basis that irrespective of whether the Respondent initially 'brought' these clients with him, the Applicant has a protectable interest in its customer connection. The specific requirements and preferences of those clients, who he had 'brought' in at the commencement of his relationship with the Applicant in 2001 or secured thereafter, and serviced, and more particularly as their requirements and preferences have changed over time, specifically over the last five plus years, are intimately known to him and he would acquire an attachment and

influence over them.⁴ As was remarked by Nestadt JA in a similar situation in *Rawlins and Another v Caravan Truck (Pty) Ltd*⁵ in relation to an employee who left the employ of his former employer but claimed that he had dealt largely with his own pre-existing following of clients or clients he later found, that:

‘Does this establish that the [former employer] did not have a proprietary interest of the kind under consideration? It is, of course, a factor in [the former employees] favour; but not conclusively so ... Even though the person to whom an employee sells and whom he canvasses were previously known to him and in this sense “his customers”, he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before. Where this occurs, what I call the customer goodwill which is created or enhanced, is at least in part an asset of the employer. As such it becomes a trade connection of the employer which is capable of protection by means of restraint of trade clause.

The *onus* being on Rawlins to prove the unreasonableness of the restraint, it was for him to show that he never acquired any significant personal knowledge of or influence over the person he dealt with as a salesman of [the former employer] over and above that which previously existed.’

[11] Various criteria have been identified, although the list can never be exhaustive, to determine what is essentially a question of fact in each case, and in many, one of degree, as to whether there is such a trade connection which a departing employee can take advantage of to the detriment of his employer’s trade connections. As was stated by Nestadt JA *supra*:

‘Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left...’⁶

⁴ Such an attachment and influence appears *prima facie* to exist from a perusal of the emails attached to the papers and received from Clients whom the Respondent has contacted with a view to them following to the new brokerage he intends joining.

⁵ 1993 (1) SA 537 (A) at 541C-H.

⁶ At page 541 H.

[12] In weighing up the competing interests of, on the one hand, giving effect to the terms of contracts seriously concluded, and on the other, creating a situation resulting in total unproductivity, it has become recognised that it would be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade.⁷

[13] The Respondent has not disputed that the Applicant has an interest that deserves protection after determination of the agreement. Over the past five (almost six) years 'the clients have not been his' clients because he was not a registered financial services provider. They were clients of the Applicant. This gives the Applicant a protectable interest in all files and records and confidential information relating to its clients. The *quid pro quo* for the Applicant's acquisition of the clients and their confidential information was inter alia the Applicant's assumption of the duties imposed upon it as a financial services provider in terms of chapter V of the FAIS Act, which the Respondent wanted to give up.

[14] It was also not disputed by the Respondent that his approach to clients following his resignation threatened the Applicant's interests. He could hardly contend to the contrary. There was also no indication given that he would cease with such conduct. The Applicant therefore reasonably apprehends that if the Respondent's conduct was permitted to continue, it would lose the opportunity of forging a relationship with these clients, with a loss of revenue.

[15] Damages would also not constitute a satisfactory alternative remedy as it is wholly impossible to determine the measure of damages in months to come. It is impossible to identify the degree of influence the Respondent might be able to exert, which might persuade a particular client to take his business elsewhere, and hence to determine future losses. To the extent that business opportunities might be reduced for the Respondent, this is not solely as a result of the enforcement of the restraint of trade clause but in terms of the FAIS Act or the Respondent's own election. There is nothing preventing

⁷ See for example *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) and *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D).

the Respondent from being employed even by a competitor of the Applicant (provided he does not infringe the Applicant's contractual rights), or from marketing Old Mutual products (provided that he does so through an alternative financial services provider and in relation to clients who are not already clients of the Applicant, without using confidential information accessed while he was employed by the Applicant). There is also no bar on the Respondent marketing non-Old Mutual products subject to the same provisos.

[16] If a restraint is unreasonable then the onus is on the Respondent to prove that it has that effect.⁸

[17] In *Rawlins and Another v Caravan Truck (Pty) Limited (supra)* the following was said in this regard:

'The onus being on Rawlins to prove the unreasonableness of the restraint, it was for him to show that he never acquired any significant personal knowledge of or influence over the persons he dealt with as a salesman of the respondent, over and above that which previously existed. In my opinion he did not do so. No allegation that he did not acquire such knowledge or influence is made by Rawlins. Nor do I think that it can be inferred. On the contrary, it would appear to be no less probable that Rawlins's relationship with the customers he dealt with as a salesman after respondent were such as to make it reasonable for the respondent to protect itself. Rawlins worked for the respondent for some 15 months. During this time he received training in the use and marketing of products sold by the Respondent. He was obviously a successful salesman. Taking account of the realities of commerce, it is a fair inference in these circumstances that it was Rawlins' employment with the respondent that gave him the opportunity to consolidate or even strengthen the prior rapport which he had with his customers...

The point is, however, that Rawlins says nothing, along the lines alluded to earlier, about the nature of the relationship that was formed with these customers. In particular, he does not explain how many there were or how frequently or for how long he saw them. Nor, save for a bald statement that he had "intimate knowledge of the identities of buyers and businesses in the automotive industry", does one know how close his previous ties with such buyers were...

It will be recalled that the restraint is for a period of two years. I confess to thinking that this is rather a long time. It must be close to the limit which would be reasonable in this type of case. Rawlins' salary (excluding commission) was a modest one. He had not been long in the Respondent's employ. On the

⁸ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para [10].

other hand he was a salesman that because of his experience had a particular expertise. Furthermore, for the reasons given by Van Rensburg J, and bearing in mind the limited area to which the restraint applies, it would not seem that its enforcement will appreciably inhibit Rawlins' inability to earn a living. On a *conspectus* of all the facts and in the absence of anything in his affidavit alleging unreasonableness of the duration of the restraint, I am not persuaded that a two year period is unfair.

It may be that a referral to oral evidence would have enabled Rawlins to make out his case on the issue under consideration. There was, however, no application to the Court *a quo* that this be done. ... There is no merit in the request if only for the reason that this is a case of a paucity of evidence rather than a case of material dispute of fact. The result is that, the allegations made by Rawlins being insufficient to show either that the respondent was not entitled to protect its trade connections or that, as ordered, the restraint was unreasonably wide, he failed to prove that it was unenforceable. It follows that the sanctity of contract must prevail. The interdict against Rawlins was correctly granted. His appeal must fail.⁹

[18] Likewise *in casu*, the Respondent's opposition has focused mainly on the broad but misconceived effect he believed the restraint would have. In regard to the period of three years he simply submitted 'that it will ruin me financially' and that to the extent that it is found that 'a protectable interest' existed, that the Applicant needed 'no more than 3 months'. He conceded that the Applicant has an interest in protecting the service which he has given to its clients for the past almost six years and that the 'Old Mutual has an interest deserving of protection after determination.' He also did not dispute having sought to approach the clients mentioned in the founding affidavit and the supplementary affidavit and that such approaches threatened the interest of Old Mutual, but contended that it was, 'unrealistic in the extreme to expect me at the age of 65 to begin an entirely new career in the brokering business finding new clients and new financial institutions to invest in.' The latter belief is of course misplaced. He also placed much emphasis on the invidious position he was in when he resigned. Nowhere however, does he deal with the criteria, some of which were referred to in *Rawlins*, on the basis of which an objectively rational limitation with reference to fact can be placed on the three year duration of the restraint.

⁹ From page 542I ff.

[19] Mr *Broster* has however urged me to determine a lesser period than the three years. He placed reliance on paragraph [55] of the judgment in *Den Braven* where Wallis AJ held:

‘In the result the applicant is entitled to confirmation of the rule although on terms narrower than originally formulated. Although no argument was addressed to me in the course of the hearing on the term of the restraint I had some concern about this in the course of preparing this judgment and raised the matter with leading counsel for the parties. It has been said, as noted already, that two years is the outer limit in the case of this type. On consideration I believe that it is simply too long and Mr van Niekerk reminded me that he had said as much in the course of the application for *interim* relief. In my view the period of the restraint should not be any longer than is necessary to enable the Applicant to place a new sales person in the field, enable them to become acquainted with the products and the customers and to make it plain to the latter that they are now the person with whom to deal on behalf of the Applicant. Having regard to the nature of the products, the type of customer to whom they are sold and the number of customers who will need to be contacted I think that a period of eight months is sufficient for those purposes. This was not seriously disputed by Mr *Van Niekerk*...’

[20] Mr *Salmon* SC on behalf of the Applicant, however, in argument disputed the efficacy of any shorter period on the basis that the Respondent had simply failed to discharge the onus of proving any unreasonableness which would justify a shorter period.

[21] I am very mindful of the comments of Wallis AJ in *Den Braven* and even in the absence of any proof (in that case that two years was the outer limit) of any ‘outer limit’ in the context of a representative employed in the industry which the Respondent was, am and remain concerned that three years might be ‘simply too long’. However, I was given no particular details of the products which were sold or held by any of the clients, or being products in the nature of financial services, at what frequency these clients would be serviced by representatives such as the Respondent, to obtain some idea of the frequency of contact or the need of clients to be contacted by a representative such as the Respondent in regard to their financial planning, as to determine what portion of a three year restraint would be unreasonable and go beyond the protection of the Applicant’s trade connections in so far as its Clients are concerned. Thirty-six months might seem to be ‘too long’ but the

determination of a lesser period should not be arbitrary, without an evidential basis, without regard to what might be acceptable norms in the industry and therefore reasonably justifiable. As in *Rawlins*, the situation is one of a 'paucity of evidence' on an aspect on which the Respondent bore the onus. It nevertheless seems to me that my *prima facie* view that three years is too long, albeit only informed by general allegations by the Respondent, nevertheless informs a determination, based on past experience in matters of this nature, that the restraint period should be limited to two years from the date of the grant of this order. As regards any shorter period than two years, the Respondent has simply not discharged the onus of showing to what extent a restraint of two years would be unreasonable. Bald submissions and allegations of unreasonableness are insufficient.

[22] The draft order suggested by the Applicant details the names of the clients to whom the Applicant maintains the restraint should apply. No opportunity had previously been given to the Respondent to comment on that list, specifically as to whether he agrees with the Applicant's inclusion of their names. I am accordingly not disposed to incorporate that list as part of the order. The order will follow the general terms in which the relief was initially claimed. Insofar as the Respondent may be left in any doubt, the reference to the names in the list will no doubt assist him as an indication as to which Clients the Applicant contends the restraint would extend to.

[23] Finally as regards costs, the Respondent has at least since 8 August 2016, namely for two months already, sought to persuade the Applicant's clients to appoint a new financial services provider with which he shall be involved. The Respondent has not been forthright in disclosing all his communications in this regard. The Respondent had opted for a contract 'with restraint' knowing full well that the Applicant would implement client retention procedures on termination of employment. At a time when correspondence was being exchanged regarding some of the very matters forming the subject of this application, the Respondent was communicating with clients and seeking to entice their business away from the Applicant. By communicating with these clients and attempting to persuade them to appoint

an alternative financial services provider, whilst the parties' respective attorneys were corresponding with each other, the Respondent has made himself guilty of conduct of which this court should show its disapproval. That conduct has persuaded me, in the exercise on my discretion on costs, to direct that the costs of this application be paid by the Respondent on the attorney and client scale.

[24] The following order is accordingly granted:

1. The Respondent is ordered to hand over to the Sheriff, forthwith upon service of the order on him, all files and records, whether in paper form or on CD disk, including all copies of such files and records, in Respondent's possession or under his control, pertaining to and/or containing particulars of and other information relating in any way to Clients (as defined) to whom Respondent rendered any financial service (as defined under the Financial Advisory and Intermediary Services Act 37 of 2002, as amended) during the period from 1 March 2011 up to and including 30 September 2016 (herein after referred to as 'Clients');
2. The sheriff is authorised to deliver all records, including all copies thereof, handed over to him by Respondent pursuant to paragraph 1 above, to Applicant;
3. Respondent is ordered permanently to delete and destroy all electronic records in his possession or under his control that contained particulars of as other information relating to Clients and/or details of Clients investments.
4. Respondent is ordered not to use any information within his knowledge relating to Clients for any purpose whatsoever, and should any Client make contact with Respondent within two years from the date of this order, Respondent must immediately refer such Client to Applicant's Private Wealth Management Division in Durban;
5. Respondent is ordered not to disclose any Confidential Information (as defined in the Contract of Employment concluded between the parties on 30 January 2013, and including Clients lists, Client particulars and details of Clients Investments) to any third party, including but not limited to BR Wealth Management Services (Pty) Limited, trading as Bill Roberts Financial Planning;
6. Respondent is restrained and prohibited, for a period of two years from the date that this order is made, from contacting, directly or indirectly, any Client (as defined in paragraph 1 hereof) for purposes of rendering Financial Service (as defined under the Financial Advisory and Intermediary Services Act 37 of 2002, as amended) to them and/or enticing them to appoint a Financial Services Provider other than Applicant;
7. Respondent is to bear the cost of this Application on the attorney and client scale.'

Appearances

For the Applicant: R J SALMON SC

Instructed by: WALKERS INC.

(Ref: B van der Vyver/CW/W38969)

C/O GARLICKE & BOUSFIELD INC.

(Ref.: C Seger/)

Tel: 031 570 5334

For the Respondent:

L B BROSTER SC

Instructed by:

PEARCE, DU TOIT & MOODIE

(Ref: Mr TK Pearce)

Tel.: 031 304 6781