21/06/2013

IN THE NORTH GAUTENG HIGH COURT – PRETORIA
(REPUBLIC OF SOUTH AFRICA)

21/6/2013

DATE: ~~7 May 2013~~

CASE NO: 31878/2013

In the matter between:

EUGENE ANDREW DE VILLIERS VAN ZYL — **1st APPLICANT**

REZANNE OENIE LOUW N.O — **2nd APPLICANT**

and

VIC OELOFSE — **1st RESPOJNDENT**

LOUISE OELOFSE — **2nd RESPONDENT**

MIKI HEGYI — **3rd RESPONDENT**

ANNA-LISE JANSE VAN RENSBURG — **4th RESPONDENT**

CAREN BRINK — **5TH RESPONDENT**

and

TOP COAT PROPERTY INVESTMENTS 10 PTY LTD
T/A FUNDAMEDICAL
[Registration no: 2001/007946/07] — **6th RESPONDENT**

JUDGMENT

N V KHUMALO AJ

[1] Applicants launched an urgent Application seeking an interim interdict restraining the Respondents from:

[1.1] using any confidential information in their possession relating to the clients of the Applicant's business, RUBYCO, including the contact details of the "clients as set out in Annexures Q[2] and R[3] to the founding affidavit, in any manner either directly or indirectly, for the purposes of soliciting the business of RUBYCO'S clients;

[1.2] contacting, dealing with, securing or soliciting the business of the first applicant's clients, as set out in annexures "Q[2]" and "R[3]" to the founding affidavit;

[1.3] representing to any person that the sixth respondent is associated with or has taken over RUBYCO;

[1.4] issuing invoices for the benefit of any of them in respect of appointments made for clients of RUBYCO.

[2] In addition, it is also seeking an order

[2.1] directing the Respondents to keep account of all the invoices issued in the name of any of them in respect of consultations conducted for clients of RUBYCO;

[2.2.] that the relief sought in paragraphs {1.1] – [2.1} above operate as interim interdict pending the finalisation of an action for damages to be instituted by the first Applicant within 30 days from the granting of the order.

[2.3] for costs of the Application.

[3] The Application notwithstanding its urgency status consisted of bulky and cumbersome affidavits due to parties attempting to argue their positions in the affidavits. The delivery of a speedy judgment became a challenge.

FACTUAL BACKGROUND

[4] 1st Applicant's late brother, Jan Hendrik Stadler van Zyl, a general medical practitioner who passed away on 8 January 2013 conducted a business he called RUBYCO ("the business"). He conducted this business in two provinces, in Gauteng and the Western Cape. He conducted the business in Gauteng in partnership with 1st Applicant and in the Western Cape with Johan Huisamen ("Huisamen"). On his passing away the business was legally dissolved and 1st Applicant continued with the daily management of its operations in Gauteng.

[5] Second Applicant is the sister of the late J H S van Zyl and the executrix of his estate appointed in terms of his will of which two of his minor children are beneficiaries and as such have an interest in the business.

[6] The business' undertaking is to facilitate the procurement by attorneys, (who formed part of its client base) of medical reports mainly for Road Accident Fund, ("RAF") medical negligence and risk assessment. Such undertaking entails the

coordination of facilities that includes medical consultation with doctors and specialists and obtaining medical reports for compilation and to be forwarded to the attorneys at a fee. The business in turn pays the medical doctors, specialists and their assistants at the facilities used.

[7] 1st and 2nd Respondents, husband and wife orthopaedic surgeons were part of the panel of medical doctors and specialists whose services and expertise the business utilises as "service providers" and the only orthopaedics in Gauteng used by the business. 1st Applicant credits that to the long relationship between his family and the Oelofse.

[8] 4th and 5th Respondent, nurses at Arwyp Hospital where the practice of the 2nd and 3rd Respondents is situated, assisted and worked closely with the 2nd and 3rd Respondents. The business worked with them to arrange and co-ordinate the medical appointments with the required specialist. During that process, they will pre-assess the client and complete the required questionnaire.

[9] The business will on receipt of the medical report issue the attorney with an invoice. The report is then released to the attorney on payment of the invoice.

[10] 1st Applicant's responsibility included marketing, liaising and maintaining the good business relationship with the attorneys.

[11] Following the passing away of 1st Applicant's brother, 2nd Respondent had a meeting about the business with the 1st Applicant and his parents at 1st Applicant's house, in the course of which 2nd Respondent made an offer to the family to take up 50% interest in the business. The offer was still to be considered by the 1st Applicant and his parents.

[12] 2nd Respondent subsequently introduced 3rd Respondent to 1st Applicant as her business contact and suggested that he be employed by the business. In a follow up meeting that took place in April 2013, 2nd and 3rd Respondents presented 1st Applicant with a business plan that now suggested a formation of a new business under the name FUNDAMEDICAL that was to be operated within a company called FUNDAMEDICAL (Pty) Ltd with registration number 2001/007946/07) ("6th Respondent") and 1st and 3rd Respondents are its directors.

[13] According to that plan the software of the existing business (developed by Huisamen) was to be incorporated into the new business. Applicant and the minor children were offered a shareholding in the new business of 15% and 10% respectively. The 3rd Respondent's wife was going to take over the duties of the 1st Applicant at a salary of R30 000 whilst 1st Applicant was now going to be paid only a commission of between R1000 to R1500 on each and every case that he refers to the new business. Of the remaining shareholding 50% was allocated to 1st and 3rd Respondent and 25% to 2nd Respondent.

[14] In a further meeting held on 1 May 2013, 1st Applicant made a counteroffer of a minimum of 25% of the shares to himself and also demanded to be a director on a basic salary of R40 000 per month. The 3rd Respondent undertook to consider and rethink the plan. In the same meeting it was agreed in principle that a letter was to be sent to the existing clients of the business to inform them of the new business to be operated under the name "FUNDAMEDICAL".

[15] Later that day after the meeting and again on 3 and 7 May 2013, 1st Applicant received requests from 3rd Respondent's wife, Marlette, who is an employee at 6th Respondent, for certain information relating to the business operations. On 6 May 2013, 1st Applicant sent Marlette a service level agreement that is signed by the business and the attorney clients and examples of invoices. He ignored a request of a template of the RAF 4 report received subsequent thereto.

FOUNDING AFFIDAVIT

[16] It is Applicants' assertion that the aforementioned requests whilst awaiting a response to the counter-offer, made him uncomfortable and suspicious of the 3rd Respondent's motive. He therefore on 12 May 2013 contacted 1st, 2nd and 3rd Respondents to find out if his counteroffer was perhaps accepted and none of them was able to clarify the issue. He, as a result withdrew his counter-offer.

[17] He visited 1st, 2nd and 4th Respondents the next day on Monday 13 May 2013 at about 14h00 -15h00 and informed them of his decision to withdraw his counteroffer. He later telephonically informed 3rd Respondent. He then proceeded to purchase Johan Huisamen's ("Huisamen") interest in the Western Cape business and consequently remains the sole owner of the entire business. Huisamen has filed a confirmatory Affidavit.

[18] On 14 May 2013, one of the business's clients from Risaba Attorneys, informed him that they have strangely, received invoices from the 6th Respondent on a number of matters that the business has already billed the practice. The invoices were sent on the evening of 13 May 2013, the day he informed the Respondents of his withdrawal. The invoices were sent with a letter that he alleges creates an impression that 6th Respondent was associated or has taken over the business.

[19] The appointments for Risaba Attorneys' clients to consult with 1st Respondent and a Dr Luc Gordon for which the 6th Respondent had issued invoices were made and facilitated through the business.

[20] The conduct was clearly calculated to deceive or confuse the business's existing clients in order to divert the attorneys to 6th Respondents in an unlawful and deceitful manner. Respondents are expected to compete in a fair and lawful manner.

[21] The worksheets confirming the appointments that were usually sent by the 4th and 5th Respondent also immediately stopped. The last confirmation was for 10 appointments on 13 May, 1 for 15 May and 10 for 17 May 2013. As such 4th and 5th

Respondents are co-perpetrators in the unlawful taking over of the business' clients. There are appointments made well up to the month of June 2013 that are still is to be invoiced for by the business.

[22] The 17 appointments scheduled for 2nd Respondent by the business on behalf of Honey attorneys in Bloemfontein for 17 May 2013 were cancelled and rescheduled with another specialist, as the Respondents were now in direct competition with the business of the Applicant. Honey attorneys and 2nd Respondent were notified. Nevertheless 2nd Respondent proceeded with the appointments as initially scheduled by the business, notwithstanding the notification of cancellation.

[23] He regards the lists of attorneys as in Q^2 and R^3 to be confidential by reason of the fact that the information is useful to the business and known to a few people, sourced and solicited by the business and can be useful to any competitor to gain advantage on the business, having due regard to the uniqueness of the concept.

[24] He alleges the Respondents to have been aware and had a duty not to misuse the information obtained by the 4th and 5th Respondents as it was improperly acquired and would confer an unfair advantage on the Respondents. Contrary thereof the Respondents are using the confidential information in an improper way by soliciting existing clients of the business, forwarding confusing correspondence to the attorney and using the information as a springboard for activities detrimental to the business as well.

[25] He reckons the matter to be urgent on the basis that he would not be afforded substantial redress in a later hearing. So, the intention of the Application is to protect him and the deceased estate from suffering further damages and incurring irreparable harm, having regard to the fact that appointments are booked until the end of June 2013.

[26] He submits that the Respondents recently started with their unlawful activities and persists therewith notwithstanding demand to desist. The interim relief will as a result stop the Respondents and protect him and the business from suffering further irreparable harm. If the interim interdict is refused, the prejudice to be suffered by the Applicants far outweighs the prejudice to be suffered by the Respondents.

[27] He reckons further to have good prospects of success in claiming damages in future.

OPPOSING AFFIDAVIT

[28] The Respondents are vigorously opposing the relief sought on a list of several grounds contained in a 60 page answering affidavit excluding annexures, deposed to by 3rd Respondent.

[29] They broach the following matters, as preliminary issues to defeat the purpose of an interdict, that:

[29.1] whilst not conceding to the need for an interim relief, tender an undertaking to deposit any monies received to which the Applicant lays claim (not including the monies due to the 1st and 2nd Respondents) into the trust account of their attorney of record pending the outcome of the proposed damages claim,

[29.2] the non-joinder of Sanlam Trust Limited that is in terms of the deceased's will appointed to be an executor together with the 2nd Applicant and also as trustee of the trust to be formed; and

[29.3} consider the acknowledgement by the Applicants that they have a damages claim to be fatal to their Application.

[30] On the relief sought, they aver:

[30.1] *in respect of the interim relief Applicants are seeking pending the finalisation of an action for damages to be instituted within 30 days from the granting of the order,* that, due to the delay the action might take to finalise, the effect of the relief will be final and Applicant has thus to meet the requirements of a final interdict.

[30.2] *in respect of the confidential information*, that Applicants failed to identify the confidential information or a propriety interests to be protected and deny that information in annexures Q[2] and R[3] is a protectable interest as asserted by the Applicants. They allege the information to be now in the public domain because it was attached to their Founding Affidavit and is part of the record.

[30.3] *with respect to the involvement of the first Respondent*, they do not deny that the facilitation and procurement of consultations was done by the business however deny that the deceased was responsible for the conceptualisation of the business idea and allege that it was started by 1st Respondent, deceased, Huisamen and Burger with the intention that if successful, each of them will acquire a shareholding in a company to be formed and later the 2nd Respondent.

[30.4] that 1st Respondent is the one paying 4th and 5th Respondents for compiling the claims and reports using software developed by 1st Respondent but 4th and 5th Respondents are owed money by the business.

[30.5] that they do not admit to the existence of the business RUBYCO, and none of the services rendered by the business are unique that they can be considered of propriety interest or confidential to the Applicant as the functions are administrative, facilitating the ease of communication between medical practitioner and attorneys for purpose of compiling the RAF.

[30.6] that the Applicants are seeking to prevent competition and 1st and 2nd Respondent from appointing their own administrator that is FUNDAMEDICAL, to perform the administrative functions.

[30.7] that, they are aware of the money that is owed to 1st Respondent, payment of which is the responsibility of the estate, and axiomatically that of the 1st Applicant. They theoretically agree that 1st and 2nd Respondent would be paid for the work and they did allege that the business owes them substantial amounts as well as the 4th and 5th Respondents.

[30.8] that the invoices and the letter were sent as alleged which was in line with the agreement that FUNDAMEDICAL was to commence business on 1 May 2013 and that 1st Applicant at no stage objected and Respondents did not need his authority.

[30.9] that, any consultations with 1st and 2nd Respondents after 1 May 2013 were, with the 1st Applicant's knowledge, to be made through FUNDAMEDICAL.

[30.10] that 1st Respondent developed the software for the business

[31] They then deny that:

[31.1] they represented themselves as the business RUBYCO as alleged or at all to the business' clients base;

[31.2] they misused any purported confidential information, to the extent that confidentiality exists or has been defined. Alleging that the information available in the Hortors legal diary and the web;

[31.3] Applicants have demonstrated any propriety interests and allege that the information in which propriety interests are alleged was voluntarily shared by the 1st Applicant;

[31.4] they are competing unlawfully and passing off as the business, that the conduct complained of as unlawful conduct of Respondents is unlawful as alleged or at all and that it constitutes passing-off and calculated to deceive or confuse the business's customers;

[31.5] that the letter created the impression suggested by the 1st Applicant but instead informed the addressee that future use of 1st and 2nd Respondent for medico-legal reports should be done through the new business.

[32] Further in the affidavit, in a nutshell 3rd Respondent proceeds to admit that when he was approached by 2nd Respondent he had no clue of the business. He started investigations of his own into the business and its marketability and put together a business plan, after the meeting with 1st Applicant. The plan was indeed presented to 1st Applicant with the shareholding proposals that he stay on in the role that he

played running the logistics of the new business which he did through a separate company. Also confirming that the software used by the business RUBYCO developed by Huisamen, an IT specialist was going to be used for the new business. He subsequently changed his mind to sourcing better and efficient software. He intended to include 1st Applicant, agreed to further meetings having taken place between 1st, 2rd Respondent, 1st Applicant and himself, and they were concerned about the manner in which the business was run with vat and several creditors owed a lot of money. He confirmed offering 1st Applicant's job to Marlette and a salary whilst 1st Applicant was to be paid R1000 to R1500 commission and that a letter was sent off as *per* annexures to the Founding affidavit, informing attorneys to henceforth sent requests to 6th Respondent if they want to use the services of 1st and 2nd Respondents. On 13 May 2013, 1st Applicant informed 2nd Respondent that there were 20 consultations that have been set up by the business for 17 May 2013. The appointments were cancelled but Respondents insisted that they should go ahead. 6th Respondents did issue invoices to Honey Attorneys as well. He did address 1st Applicant's interest.

REPLY

[33] Applicants filed a reply, the significance of which was the proof of prior payments made to the 4th and 5th Respondents for the services rendered to the business and the statement by 1st Applicant that Sanlam renunciated any interest in the executorship or administration of the will. 1st Applicant also denied that the response on the consultations that were arranged by the business on 17 May 2013 was to FUNDAMEDICAL but 2nd Respondents, alleging that 6th Respondent had no right to invoice unless taking over the business.

[34] I found it prudent and more efficient to first deal with preliminary issues as their determination might be destructive of the whole Application or result in the disposal of a substantive defence.

PRELIMINARY ISSUES

Urgency

[35] Respondents Counsel disputed urgency, urging the court to strike the matter from the roll due to lack of urgency and I decided otherwise, finding the matter to be urgent due to an alleged on going or continuation of an infringement of a right making it critical to give the Applicant a reasonable opportunity for a speedy adjudication of the complaint. The Respondents, it seemed have not suffered any prejudice by the abridgement of the prescribed times and an early hearing.

Non joinder

[36] At the time of launching the Application, only 2nd Applicant held the letters of executorship to the deceased estate in terms of the will and the trust was yet to be

formed. The allegations in the Applicant's Reply further explain the issue of non-joinder of Sanlam Trust Limited, so I do not see it fit to pursue the issue anymore that was also in argument not followed or carried further by the parties.

Undertaking & Pending Damages Action

[37] Respondent's Counsel argued that the offer of an undertaking to pay the monies received by the 6th Respondent, to which the Applicant lays claim (not including the monies due to the 1st and 2nd Respondents), into the trust account of their attorney of record pending the outcome of the proposed damages claim takes away the need for the relief sought and proves that the Applicants have an alternative remedy. He further argued that the intended damages claim is under the circumstances fatal to the Applicant's Application. It is apparent then that the offer was made in order to setback or defeat the purpose of an interdict.

[38] In terms of the relief sought the Applicants intention is to prohibit the Respondents from continuing to contact, deal with, solicit and issuing out invoices to the business's clients in respect of appointments made by the business and receiving payments for such appointments, conduct Applicants consider unlawful and harmful and the continuation of which is causing irreparable harm. The interdict sought is prohibitory, intended to stop the Respondent from further infringement pending the action for damages to be later instituted from which Applicants further submit they will not get substantial redress. Taking into consideration that Respondents conceded to having received the monies.

[39] The undertaking as tendered is only remedial of the past conduct and only of one aspect, in respect of monies already received by the 6th Respondent and does not address the alleged continuing conduct that Applicants are seeking the Respondents to refrain from. The position with regard to future infringement, that is, not to persist with the alleged offending behaviour is not guaranteed by the undertaking, which is the relief that Applicant is seeking as *per* Notice of Motion. In that prospect the undertaking is not sufficient to cater for the relief sought and cannot oust the necessity of an interdict; See *Phillip Morris Inc v Marlboro Shirt Co SA Ltd* 1991 2 SA 720 (A). It is settled law that an interdict cannot be remedy for past invasion of rights.

[40] It is also customary practice that the aggrieved party would apply for a prohibitory interdictory relief pending an action for damages whereby the interdict will apply *pendete lite,* particularly in matters were the offending conduct persists. See *Noah v Union National South British Insurance Co* Ltd 1979 1 SA 330 (T).

[41] A damages claim pending or an indication of an intention to institute such a claim can therefore not be fatal against the prohibitory interdict relief sought to immediately stop the on-going infringement pending such an action. It is Applicants' right to mitigate the damages they might suffer and can do so by way of an interdict to prevent Respondents from persisting with the offending behaviour. It is untenable to suggest that by enforcing a right to prevent the continued invasion of a right one

forfeits the right to sue for such damages as may ultimately be proven. The fundamental principle of our law that accords an appropriate and effective remedy for the infringement of a right would be undermined if a litigant was to be precluded from approaching the courts on motion to protect a right; See *Minister of the Interior and Another v Harris and Others* 1952(4) SA 769 (AD) at 781A to D.

INTERDICT

[42] As a remedy, an interdict has been described as extraordinary and of a summary nature, allowed in cases where a person requires protection against on-going unlawful interference/conduct or a threat that such conduct/interference will continue. It is said that it can be granted even when the unlawful conduct has seized at the time the Application is heard by the court. So as long as such conduct might persist the remedy will be granted and all the requirements for such a relief are met.

[43] The test applicable is whether or not a clear right has been established. If only a prima facie right has been established, an interim interdict may be granted provided certain requirements are met. The existence of the prima facie right is established upon inherent probabilities and that such right has been infringed by the Respondent or his conduct threatens to infringe the right. Therefore to succeed with an interim interdictory relief, it is sufficient for the Applicants to establish prima facie, (that might appear on the face of it to be) a right, though open to some doubt; See *LF Boschoff Investments (Pty) Ltd v Cape Town Municipality* **1969 (2) SA 256** (C). The Applicant must also have a well-grounded apprehension of irreparable harm with the balance of convenience favouring granting an interim relief. There should be no satisfactory alternative remedy available to the Applicant. See *Simon No v Air Operations of Europe AB & Others* **1999 (1) SA 217** (SCA) 228G- H.

[44] The prima facie right is enforced for a period of time and at the end of which the interim interdict may be discharged unless a clear right is proven whereupon a final interdict may be granted.

[45] It is Respondents' contention that the relief sought by the Applicants is final as there would be nothing that the Court of first instance will be able to revisit. They aver that the effect of the interim relief sought by the Applicants pending the finalisation of an action for damages to be instituted within 30 days from the granting of the order, will also, due to the delay the action might take to be finalised, be final and Applicant has thus to meet the requirements of a final interdict.

[46] The distinction is critical as the substantive requirement of an interim or final interdict, differ and the success of an application for interdict will often turn on the temporal nature and attendant requirement of the relief being sought.

[47] For a final interdict relief to be granted, the Applicant must have a clear right, with the concomitant injury, reasonably apprehended or real and with no alternative remedy available. The relief cannot be granted if there are disputes of facts (i.e a

genuine dispute), whereby the applicable test and the correct approach to be followed will be as set –out in *Stellebosch Farmers Ltd v Stellenvale Winery (Pty) Ltd Winery* 1957 (4) SA 234 (C) and well explained in B H Water *Treatment (Pty) Ltd v Leslie and Another 1993* (1) SA 47 (W) at 55 A-E. In terms of this approach, a final interdict is to be granted in motion proceedings if the facts stated by the respondent, together with the admitted facts in the applicant's affidavit, justify such an order. The approach now coined the *Plascon – Evans* approach*; Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3)* SA 623 (A) at 634H- 635B.

[48] Respondent's argument that this court as a court of first instance will not be able to revisit the issues to be determined implies that the rights of the parties would have been decided upon, with the order granted being definitive of such rights, whereas an interim interdict does not fully determine rights of the parties. The argument has no merit. In the trial for the determination of the Applicant's claim for damages, the court will have to determine if Applicants indeed had a right and If it was infringed and as a result of such infringement suffered damages that entitle Applicants to be compensated. So the determination of any entitlement to damages claimed will involve the reconsideration of the issues that have been abstractly considered by this court, requiring real substantiation of actual rights and harm, thus interlinked. The effect of the relief will therefore not be final. Even so, being able to revisit the issue cannot be the criteria determining the finality of the relief but the nature of the interim relief sought.

[49] The nature of the interim interdicts is such that they do not have to be reconsidered in the action. In *Nuco Chrome Bophuthatswana (Pty) Ltd & 2 Others v Mogale Alloys (Pty) Ltd Martin Rosenberg* (2008/13094) [2011] ZAGPJHC 12; 2011 (6) SA 96 (GSJ) par 41, Hendricks J stated that:

> "The relief sought in the action although in form is different from the relief sought in the interim interdict proceedings they are interlinked and inter-related and will lapse upon final adjudication of the trial proceedings. They were granted to ensure that the first respondent will, if successful in the main action, receive adequate and effective relief. For this reason, this purpose will be defeated if they are appealable before the final determination of the main action. Hence they are not final in form and effect.

[50] The distinctive feature of the relief sought whether temporal or final depends on its effect on the issues to be determined. If has been unequivocally decided that if it brings finality to the issues, by dealing with the substance thereof and not the form, it is then final in nature as confirmed in *Metlika Trading Ltd & others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA), when held that:

> *"in determining whether an order is final in effect it is important to bear in mind that 'not merely the form of the order must be considered but also, and predominantly, its effect...*

[51] In *South African National Defence Union (SANDU) v Minister of Defence & Others / Minister of Defence & Others v South African National Defence Union & Others* 2007 (1) SA 402 (SCA). In paragraph [33] Conradie JA opined that:

> *"The order is not interim in the sense that its fate depends upon the final resolution of a dispute by the Court that granted it. It is temporary in nature, that is true, intended to fall away on the happening of a certain event, ..., but it is not an interim order in the sense that it governs issues that will arise in the pending action and which entitle the Court which granted it to reconsider it."*

[52] Again dealing with the notion of "revisiting" or "reconsideration" of issues in the interim relief Hendricks J in *Nuco Chrome* on par 40 explains that:

> *"The issue whether or not an interim interdict pending an action to be instituted is final in effect does not depend solely on whether or not a court "will revisit it" in the main proceedings. In this case, if it is found in the action proceedings ...that the First Respondent is not entitled to the shares which are in dispute, the interim interdicts will automatically fall away due to the fact that they were granted on the basis that the First Respondent had established a prima facie right to the shares in dispute, and was thus entitled to interim protection (as foreshadowed in the agreement of sale) pending a decision on whether the First Respondent was entitled to transfer of the shares in question."*

[53] Respondent's further argument that due delay in finalisation of the pending action also makes the relief of final effect is also unconvincing. The interdict is intended to stop the alleged harmful conduct of the Respondents with immediate effect pending the finalisation of the action for damages. I do not agree that based only on due delay the relief sought must be considered final, ignoring the confirmation that the relief is in substance not final. In appropriate cases interim interdicts may be granted for a long period of time or extended to protect a prima facie right until for example an action is finalised. Therefore the delay in finalisation of the pending action will not result in final determination of the parties' rights in respect of the issues between them.

Dispute of fact

[54] In the course of dealing with the Application it became apparent that whilst it is Respondent's argument that there were disputes of fact, it was obvious that there was no genuine dispute of fact on the material aspects of the evidence. The admissions in the latter part of the Respondents answering affidavit as deposed to

by the 3rd Respondent are in agreement with the key allegations in Applicant's affidavit that are vital to the resolution of the matter. The contentions made prior, were without genuine substance and belatedly contradicted to support its own party's claim. In my view, there is little of material importance that remains in dispute between the parties.

Prima facie right

[55] Applicants' Counsel submitted that as indicated the core operations of the business entail facilitating the procurements of medical reports on behalf of attorneys that have signed service level agreements with the business and thus form part of their client base. Applicant alleges that this has resulted in a relationship between the business and the attorneys that needs to be protected ("business interest"). The names and details of the specific attorneys they have a business relationship with are contained in the list mentioned as Q^2 and R^3 that Applicants allege to be confidential and want Respondents to refrain from using unlawfully to harm the business, (therefore protecting its interest). For example soliciting, <u>diverting the attorneys to the new business in an unlawful and deceitful manner</u> and for unfair competition, invoicing such attorneys for services they have not rendered and using it as a springboard to start its business.

[56] Even though the Respondents have admitted to the operations run by the business and to 6th Respondent invoicing for the service rendered by the business, they deny that Applicants have proven any propriety interest that needs to be protected. They challenge the confidentiality of the information that Applicants seek to protect, the list of names of attorneys in annexure Q^2 and R^3 and argue that by mere attaching it to the Founding Affidavit the lists lost their confidentiality. The argument espoused by the Respondent clearly relates to litigation privilege raised against discovery of documents in terms of Rule 35 of the Uniform Rules of the High Court. That is a privilege against production or inspection that protects certain documents obtained with a view to litigation. The waiver of that privilege is implied if the document is referred to in the affidavit or referring documents. Rule 35(12) renders such a document disclosable, if reference is made to it in a pleading. In *Competition Commission of South Africa v Arcelomittal* (680/12) [2013] ZASCA 84 dealing with litigation privilege and confidential information confirmed that disclosing a privileged document in pleading amount to implied waiver.

[57] Respondents are conflating the issue of litigation privilege with 'confidential information' that protect the confidential commercial interests, in the sense of the Applicant wanting to protect the list of the specific attorneys that form the client base of the business that 4th and 5th Respondents had access to due to the working relationship they had with the business. The confidential information so described to be worthy of protection must fall within the ambit of Section 1 of the Competition Act 89 of 1998, which defines it to mean 'trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available or known by others'. The erosion of confidentiality in this instance can only result if

the documents are divulged without the nature of the information being explained with sufficient precision in order to support any subsequent claim that it should not be published or disclosed to anyone else.

[58] Respondents argue that the information can be accessed with ease from the Hortors legal diary and the web. Applicants' Counsel deny that, stating that the names of the specific attorneys that have a particular relationship with the business, are only known by the 4th and 5th Respondent as they finalised the facilitation of the appointments for the clients of these attorneys. Therefore the availability of names of personal injury attorneys in the Hortors or web in general as alleged by the Respondent is not an issue but the information as to which specific attorneys does the business have a relationship forming its client base as contained in 'Q[2] and R[3] with signed service level agreements is privy only to the business, 1st 2nd 3rd and 4th Respondents due to the working relationship they had with the business. This information is not generally known or easily ascertainable. It is therefore not public knowledge and has a particular economic value to the business that forms a protectable interest deserving of protection. They argue that the business has proved a prima facie right to its client base. The Respondent are tempering with such a right and taking advantage of that interest. I agree with the Applicants. The applicants have prima facie,a legitimate right that is deserving of protection against infringement.

Irreparable harm

[59] The Respondents have conceded that 6th Respondents has invoiced Risaba Attorneys, an attorney that is part of the client base of the Applicant's business without having rendered any services to such attorney, for appointments or the procurement of the medical reports facilitated by the business. Consequently the issuing of the invoices by 6th Respondent was unlawful and harmful to the business of the Applicant. Respondents' attempt to justify the conduct of 6th Respondent by alleging that it was agreed on 1 May 2013 that letters will be sent to the attorneys informing them of the new business does not assist them. 6th Respondent was still entitled to invoice and collect money for work that it has not done and after the deal between the 1st Applicant and the Respondents was not established. It was evident that Respondents had intended to proceed as if there was an agreement and that 6th Respondent was taking over from the business of the Applicant when sending the invoice and receiving the payments. The 6th Respondent remains in possession of the money even when it is not questionable that it is not entitled to keep it exacerbating the situation, and has continued to invoice other attorneys which conduct is as alleged by Applicants causing Applicants irreparable harm and financial prejudice. Applicants are justified to seek immediate protection from Respondents' continuance with such conduct.

[60] The Respondents have not denied that worksheets on the appointments scheduled after the breakdown of the negotiations were not sent and conceded to not only sending an invoice to Risaba, but also a letter that informs them that further reports

required from 1st and 2nd Respondent be requested through the 6th Respondent, whilst continuing to invoice appointments scheduled by the business of the Applicants. The conduct indeed points to an intention to take over the operations of the business of the Applicant, unlawfully. To determine if conduct unlawful, the letter should be viewed in the context of it being sent together with an invoice billing the attorney client for services that have been rendered by the business, which establishes motive. *See Woodlands Dairy (Pty) Ltd v Parmalat SA (Pty)* Ltd 2002 (2) p280- SA. Reading the contents of the letter (does not matter that letter does not say so), against the invoice sent under cover thereof clearly sends a message either of co-operation or take over. It is obvious that the Respondents through 6th Respondents were creating a perception that their new business has taken over from the Applicants. It might be denied by the Respondents but that denial is contrary to its own statement where it alleged that 1st Applicant knew about the take-over because he voluntarily divulged information of the 20 appointments that were scheduled for Bloemfontein. Furthermore that Applicant was divulging the information in the knowledge that 6th Respondents will start operating from 1 May 2013 and did not have objections thereto.

[61] Applicant's submission was also that the information that 4th and 5th Respondents have on the appointments, indicating for which attorney client they were booked is used as a springboard by 6th Respondents to solicit clients belonging to the business by sending the invoices and the letter. The argument is fair since it is the 4th and 5th Respondents who have information about the appointments and the reports available, making it possible for 6th Respondent to invoice and send the offending letters. Applicant's Counsel argues that 4th and 5th Respondents had a relationship with the business, that of a mandate. She argues that 3rd and 4th Respondent accepted a mandate to do the processing of appointments and send the worksheets to the business at a fee and have breached that mandate by not sending the worksheets to Applicants but using it to the detriment of the Applicants' business and allowing it to be used unlawfully against the business.

[62] Respondent's Counsel disputed that any relationship was proven between 4th and 5th Respondent and the business. However it is of utmost significance to point out that even though Respondents disputes that 4th and 5th Respondents were paid by the business, Respondents through 3rd Respondents confirm that 4th and 5th Respondents are owed money by either the business or Applicants for work done for the business. Thus admitting that 4th and 5th Respondents had a relationship with the business in terms of which they rendered services to it for a fee as explained by the Applicants, ie, with regard to the worksheets. In that respect Applicant's Counsel is correct that there was an agreement of mandate that 4th and 5th Respondents accepted, to do certain things for the business which justified Applicants expectation that it would be fulfilled diligently. It is trite in our law that a person who has accepted an obligation is bound duly to perform it, whether or not he is to receive remuneration, see *Bloom's Woollens (Pty) Ltd v Taylor* 1962 (2) SA 532 (A.D) at 539G-H. Once 4th and 5th Respondents accepted that mandate they became obliged to

perform its functions faithfully, honestly and with care and diligence (*David Trust v Aegis Insurance Co Ltd* [2000] ZASCA 108; 2000 (3) SA 289 (SCA) par 20).

[63] I therefore find that there is enough evidence set out by the Applicants of a prima facie right against the 4th and 5th Respondents arising from the mandate they had and prove of its infringement causing as alleged in the papers irreparable harm to the Applicants, accordingly the relief sought against them is justified.

[64] Applicants also moved for a motion to amend their notice of motion abandoning prayer 2 and adding the word "unlawful" in paragraph 1 before the word soliciting. The Application was opposed by the Respondent. In Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C) at 112 D-F, Berman J was very informative in his explanation that:

> "Such a prayer can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given), cf *Trustees of the Orange River Land and Asbestos Co v King and Others* 6 HCG 260 at 296-7. Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefor has been fully canvassed, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of "further and/or alternative relief".

[65] The motion was fully canvassed and debated by the parties and am satisfied that the Appellants' affidavits do fulfil the requirement as explained by Bergman J, in particular as referred to in paragraphs [20], [24] and [26] above, and in paragraphs 6.3, 6.6 and 6.16 of the Applicant's affidavit. Applicant's Counsel has also satisfactory lain the basis thereof in argument.

[66] I am also of the view that the grant of the interdict at this stage will not cause any inequity and the balance of convenience favours the granting of the relief as sought, in that the prejudice to be suffered by the Applicants far outweighs the prejudice to be suffered by the Respondents if relief not granted. Respondents have also indicated that the formation of their new business has not even been finalised. I am as well convinced that there is no alternative remedy to adequately protect the Applicants from continued violation of their rights.

[67] In the circumstances I grant Applicant relief in the following order:

> [67.1] Condonation is granted to the Applicants for the non-compliance with the prescribed time limits, forms and service.

[67.2] Leave to amend the Notice of Motion as applied for by the Applicant, abandoning prayer 2 thereof and inserting the word "unlawful" in prayer 1 before the word soliciting, is granted.

[67.3] Respondents are restrained from:

[67.3.1] using any confidential information in their possession relating to the clients of the Applicant's business, RUBYCO, including the contact details of the "clients as set out in Annexures Q[2] and R[3] to the founding affidavit, in any manner either directly or indirectly, for the purposes of unlawfully soliciting the business of RUBYCO'S clients;

[67.3.2] representing to any person that the sixth respondent is associated with or has taken over RUBYCO;

[67.3.3] issuing invoices for the benefit of any of them in respect of appointments made for clients of RUBYCO.

[67.4] Respondents are also directed to keep account of all the invoices issued in the name of any of them in respect of consultations conducted for clients of RUBYCO;

[67.5] the order granted as per subparagraphs [64.3.1] – [64.4] above is to operate as an interim interdict pending the finalisation of an action for damages to be instituted by the first Applicant within 30 days from the granting of the order.

[67.6] Applicant Costs of the Application.

N V KHUMALO

ACTING JUDGE OF THE HIGH COURT NORTH GAUTENG

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