

THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: 15110 / 24

In the matter between:

SIMAH RISK ADVISORS (PTY) LTD

Applicant

and

MICHIEL VAN NIEKERK

First Respondent

ANNELI JONKER

Second Respondent

MOUNTSURE BROKERS (PTY) LTD

Third Respondent

Coram: Wille, J

Heard: 30 July 2024

Order: 30 July 2024

Condonation: 31 October 2024

Reasons: 14 November 2024

REASONS

WILLE, J:

INTRODUCTION

[1] This opposed application came before me as an urgent application. I heard the arguments and determined that the matter was urgent. After that, I granted most of the relief sought by the applicants.¹

[2] In summary, I granted relief against the first and second respondents to enforce certain written confidentiality and restraint of trade undertakings entered into by the first and second respondents to benefit the applicant. In addition, concerning all the respondents, I interdicted them from using the applicant's confidential information.²

[3] I determined that the matter be heard as urgent because (a) the applicant would not be able to seek substantial redress in the ordinary course; (b) the applicant did not delay in bringing its application; (c) the applicant was entitled to enforce the confidentiality and restraint of trade undertakings because the first respondent has breached his confidentiality and restraint undertakings and, (d) the second respondent breached her confidentiality and restraint undertakings.³

[4] In addition, I found that the applicant's protectable interests warranted the enforcement of the confidentiality and restraint of trade undertakings in as much as the third respondent was concerned. Accordingly, I formed the view that the applicant was entitled to the relief sought by it against the third respondent.⁴

URGENCY

¹ A final interdict restraining the first and second respondents from violating the terms of their restraint covenants.

² The third respondent was also interdicted concerning certain ancillary relief.

³ A case was made out for urgency.

⁴ This was also because a good case had been made out against the first and second respondents.

[5] The applicant found itself in a difficult position because it could not seek substantial redress in the ordinary course of litigation. This either by way of a lengthy opposed application in the long form or by initiating action proceedings. I say this because it was demonstrated that several of the applicant's clients (with whom the first respondent and second respondent had dealings) had since abandoned the applicant's services.⁵

[6] This undoubtedly had severe financial consequences for the applicant because 'its' clients had left. Moreover, the applicant with haste investigated the conduct of the first and second respondents, and it sought undertakings from these respondents, which were not forthcoming from either of them.⁶

[7] It was a matter of common cause that the first respondent accepted that the applicant would be unable to seek substantial redress in the ordinary course in that it was conceded that the applicant acted with reasonable speed by launching the application. The second respondent complained that she had insufficient time to file her answering affidavit. The second respondent's complaint must be adjudicated in the correct context. She was timeously provided with a copy of the unissued papers as a matter of courtesy to prepare for the hearing and file her answering affidavit. The third respondent did not engage with the issue of urgency.⁷

CONTEXT

[8] The applicant carries on business as a short-term insurance broker. It acquired this business from another discrete entity. The effective date for implementing this business acquisition was over two years ago. The applicant purchased the short-term insurance business and goodwill from this discrete entity and took over the employees of this entity.⁸

⁵ It was conceded that at least twenty-seven clients left the applicant and became clients of the third respondent.

⁶ The applicant attempted to resolve the matter amicably prior to launching the application.

⁷ I reasoned that the second respondent was given sufficient time to deal with the application.

⁸ The business it acquired was "Indiwe", and it did so "Lock Stock and Barrel".

[9] Thus, the applicant was entitled to enforce the written restraint of trade and confidentiality agreements (the ‘restraint agreements’) concluded with the first and second respondents. This must be so because the applicant acquired the entire business and goodwill of the company that it acquired, coupled with the written cession concluded to the benefit of the applicant. The first respondent had also concluded a separate ‘consultant agreement’ with the applicant.⁹

[10] The first respondent’s restraint agreement provided for the following:

‘...[T]he Employee undertakes in favour of the Employer that the Employee shall not at any time during his employment with the Employer or for a period of three years after the termination of his employment with the Employer for any reason whatsoever and in any manner whatsoever, whether for his own benefit or the benefit of any third party, including, but not limited to, any business, operation, consultancy, organization, individual or any other juristic or natural person, which carries on business similar to and/or in competition with the Employer within the Republic of South Africa or any other country where the Employer conducts business:-

- *Canvass, recruit or solicit any Client with regard to short-term insurance business.*
- *Accept or take up any short-term insurance business from any Client.*
- *Accept appointment as a short-term insurance broker or intermediary by any Client.*
- *Divulge, publish, disclose, copy and/or in any manner and/or in any format, whether electronic or otherwise, the confidential information, data, intellectual property, records, documentation, customer/client lists,*

⁹ Indwe’s predecessor was Mountainview (Pty) Limited.

*names and/or contact details of clients, trade secrets, trade connection confidential to the Employer, or programmes and databases of the Employer...*¹⁰

[11] Under the rubric of confidentiality, the restraint agreement provides as follows:

‘...[t]he Employee shall not during his employment with the Employer or at any time thereafter, use or directly or indirectly divulge or disclose to any other person, other than authorised employees or officers of the Employer, any of the Confidential Information for any reason whatsoever unless that use or disclosure is made with the prior written consent of, or in accordance with the policies and procedures approved by the Employer;

- *any information or other Intellectual Property that is created and/or made and/or captured by the Employee or which comes into possession of the Employee’s period of employment with the Employer, shall be deemed to be the property of the Employer and shall be delivered immediately by the Employee to the Employer on demand and in any event upon the termination of the Employee’s employment for whatever reason;*
- *the Employee shall not retain any copies or extracts of any Information, Intellectual Property or other Confidential Information in any form for any reason whatsoever....*¹¹

[12] Finally, as far as re-employment was concerned, the following:

‘...[S]hould the Employee at any time in the future cease to be employed by the Employer and should the Employee thereafter again become employed on a full time basis with the Employer, then he terms and conditions hearing contain shall apply mutatis mutandis from the date of commencement of such employment save that the non-soliciting period

¹⁰ The actual terms of the restraint covenants was not the subject of any genuine dispute.

¹¹ Again, these terms were not the subject of any genuine dispute.

*and the restraint period shall be for the period that the Employee is employed by the Employer for such full time basis and for a period of 3 (three) years after he ceases be so employed by the Employer for any reason whatsoever....*¹²

[13] In addition to these instruments, the first respondent concluded a separate 'consultant agreement' with the applicant, which was in operation for about a year before the first respondent terminated his business relationship with the applicant. The first respondent then engaged in the business of the third respondent as a consultant through an entity incorporated by the third respondent.¹³

[14] It was alleged that both the respondents:- (a) were privy to and possessed significant confidential information about the applicant's business, (b) had established close and trust-based relationships with the applicant's clients, and (c) knew the history and requirements of the applicant's clients.¹⁴

[15] The applicant took the position that the first respondent actively solicited its clients, which clients then terminated their broker appointments with the applicant and moved their business to the third respondent entity and their business affairs were then managed and transacted upon by the first and second respondents through the entity of the third respondent.¹⁵

CONSIDERATION

[16] The first respondent conceded that he had breached and would continue to breach the core restraints set out in the applicant's restraint of trade covenant. He contends that the applicant's assertion that he was privy to the

¹² The wording and interpretation of this clause was also uncontroversial.

¹³ With effect from 8 April 2024 in a business known as M B Broking Services (Pty) Limited.

¹⁴ It was alleged that the first and second respondents were privy to the applicant's confidential business information.

¹⁵ The first respondent does not deny this. He says he will continue to act in this manner.

confidential protection information rings hollow because this is information which he carried and continues to 'carry with him in his head'.¹⁶

[17] The first respondent also contends that any information he may have been privy to does not assist him or the third respondent in carrying on the third respondent's business. The second respondent advances the same argument. Undoubtedly, the first and second respondents were privy to the applicant's confidential information and could use this information.¹⁷

[18] It was not and is not the subject of any dispute that the third respondent remains a direct competitor of the applicant. Thus, it does not matter whether or not the first and second respondents contacted the clients' of the applicant or whether such clients contacted the first and second respondent as both these forms of conduct amount to solicitation of the applicant's clients' which is impermissible during the period of the restraint covenant.¹⁸

[19] To hold or reason otherwise would render most of the provisions relating to restrictions in restraint covenants dealing with business relationships in the service industry completely worthless. This would undermine the purpose of a restraint covenant and make it very difficult, if not impossible, for an entity in the position of the applicant to demonstrate that the provisions of a restraint covenant have been breached because it is more than likely that the affected clients will support the entity or person/s in the position of the first and second respondent.¹⁹

[20] Self-evidently, the same must apply to confidential information. It would similarly be near impossible to demonstrate that confidential information had indeed been imparted to a third party save in circumstances of direct forensic evidence being tendered in this connection. The risk remains that the first and

¹⁶ The first respondent alleged that the restraint covenants were not binding on him.

¹⁷ Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA) paragraphs [20] - [21].

¹⁸ Experian SA (Pty) Ltd v Haynes 2013 (1) SA 135 (GSJ) at paragraph [52].

¹⁹ This is also known as "indirect" solicitation.

second respondents may give over the applicant's confidential information to the third respondent.²⁰

[21] I am left with the contention by the first respondent that the applicant's predecessors did not previously employ him, but he was instead a consultant. Further, the applicant did not employ him, but he was only engaged as a consultant. His argument is that the applicant cannot enforce the restraint of trade against him as it only applies to the first respondent ceasing to be 'employed' by the applicant. This argument was artificial. I say this because the 'Sale of Business Agreement' read with the 'Cession Agreement' made it abundantly clear from which date the applicant was entitled to enforce the first respondent's restraint of trade independently from the rights that the applicant acquired independently in terms of the first respondent's restraint of trade.²¹

[22] I say this also because the suite of agreements between the applicant and the first respondent unequivocally recorded that the first respondent could not simply provide services to anyone else and required the applicant's consent if he wished to do so.²²

[23] Significantly, at all material times during this dispute, the applicant's attorneys asserted that the first respondent was an employee of the applicant, which was never engaged with by the first respondent's attorneys. This was not the subject of any challenge. In these peculiar circumstances, one would have expected more than silence or inaction from the first respondent on this score.²³

[24] On social media, the first respondent actively advertised that he benefitted from information technology provided by the applicant and possessed an email address and an email signature bearing the applicant's trade name.

²⁰ The first and second respondents admitted they had the applicant's confidential application "in their heads".

²¹ With effect from 3 May 2022.

²² Why would consent be required if there was no covenant of restraint?

²³ *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A): dictum at 10E – F:

Moreover, he stated that he was directed to engage with the applicant's clients in a specific manner and received training from the applicant.²⁴

[25] Turning now to the position of the second respondent. The applicant's predecessor initially employed her in terms of a written employment contract. After that, she entered into a restraint covenant in the same terms as the first respondent's restraint of trade, save that the restraint period was for two years and not for three years.²⁵

[26] Subsequently, she became employed by the applicant as a senior employee. She conceded that she is bound by the restraint of trade covenant to the benefit of the applicant. She resigned from the applicant's employ and gave the applicant the requisite one month's notice. The third respondent employed her as a personal portfolio administrator. She denied soliciting any of the applicant's clients, but the evidence overwhelmingly suggested otherwise. Also, she could not contend that she was not involved with soliciting the applicant's clients, albeit indirectly. Finally, the second respondent attempted to artificially assert that she only did administrative work for the third respondent.²⁶

[27] Turning now to the third respondent. The evidence demonstrated that the applicant possessed confidential information. Given that the third respondent is a competitor of the applicant, the third respondent was and is likely to use the applicant's confidential information for its benefit. Thus, there was and is a strong likelihood that the first and second respondents would impart this information to the third respondent.²⁷

[28] In addition, there could be no dispute that the applicant had established a right not to be faced with unfair competition at the behest of the third respondent, and it had no alternative remedy. The first and second respondent never disputed that the applicant gave them access to its confidential information, which was worthy of protection. Also, what remained undisputed

²⁴ Undoubtedly, the first respondent was employed by the applicant.

²⁵ With effect from 1 November 2019.

²⁶ I found no traction with this argument.

²⁷ The averments by the respondents that this would not occur rang hollow,

was that the first respondent's and second respondent's employment with the third respondent was not permitted regarding the wording of the restraint covenants. The applicant says that the first and second respondents must be held to their agreements.²⁸

[29] The applicant promoted and trusted the first and second respondents with confidential information, and their undertakings should thus be honoured. The first respondent's claims of lack of actual possession of the confidential information (other than in his head) did not render the applicant's motivation behind the terms of the restraint covenants against public policy. I say this because the suite of agreements between the applicant and the first respondent undoubtedly served an acceptable employment purpose to the benefit of both parties when it was concluded and also at the time that the applicant promoted the services of the first respondent.²⁹

[30] The enforceability of the covenants was and is essential for commerce and fair employment practices. Thus, any public policy argument would have to be based on the premise that the first and second respondent would not have constitutionally waived their rights to freedom of employment and that, accordingly, public policy factors weigh against enforcing the restraint covenants in these particular circumstances.³⁰

[31] I was not persuaded that the restraint covenants were inconsistent with public policy in these circumstances. The correct position in our jurisprudence on this score has been recently clearly re-stated. In short, establishing whether a clause should be enforced includes considering whether the parties negotiated with equal bargaining power and understood what they agreed to. In this matter, it is clear that the parties possessed equal bargaining power, and they must have understood what they were agreeing to.³¹

²⁸ This is precisely why these agreements were concluded.

²⁹ There was equal bargaining power between the parties when these agreements were concluded.

³⁰ The first and second respondents failed to discharge this onus on them.

³¹ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC).

[32] The facts demonstrate that the first respondent voluntarily consented to the terms of the subject restraint covenants. This brings me briefly to the public policy considerations. Public policy, in this context, falls to be constitutionally infused. This means that a court may refuse to enforce specific contractual terms of an agreement where that term itself, alternatively, the enforcement thereof, would be contrary to public policy.³²

[33] For obvious reasons, this refusal by a court must be used sparingly. Generally, public policy dictates that parties should be bound by their contractual obligations embodied in a contract. This is primarily where the contract was entered into freely and voluntarily. In this case, the subject matter of the restraint covenants was specific and very limited in effect.³³

CONCLUSION

[34] In summary (in my view), the first and second respondents had breached their respective restraints of trade covenants. Because of the extent of the applicant's confidential information, there were protectable interests warranting the enforcement of the first and second respondents' respective restraint of trade covenants. The applicant had a clear right to enforce the restraint of trade covenants of the first and second respondents and was entitled to the relief it sought against the third respondent. Also, the area and duration of the restraints of trade sought to be enforced by the applicant were not challenged. The applicant satisfied all the requirements for a final interdict.³⁴

[35] The first and second respondents breached and intended to continue to breach, their restraints of trade, and there was and still is, a reasonable apprehension of harm. The applicant had no adequate alternative remedy and was thus entitled to an order regarding its notice of motion.³⁵

³² This was not a core issue to be decided in this application.

³³ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paragraph 70.

³⁴ *Setlogelo v Setlogelo* 1914 AD 221 at 227.

³⁵ I granted the relief sought, save for the order concerning costs against the second respondent.

COSTS

[36] Costs followed the result. The third respondent also opposed the application. An order was granted jointly and severally against the first and third respondents for the applicant's costs of and incidental to the application. Given the position occupied by the second respondent in the exercise of my discretion, I did not make an order for costs against her.³⁶

[37] I have to say something about how the respondents piloted this request for reasons. Initially, I assume as a knee-jerk reaction to my order, the respondents "filed" a "Request for Reasons" and an "Application for Leave to Appeal" the day after my order was granted. The legal representatives for the respondents then leisurely sat back and assumed that some "magical intervention" would bring these documents to my attention.³⁷

[38] Eventually, more than a month later, the respondents' legal representatives brought the court file and these documents to my attention. I struck out the purported "Request for Reasons" and the "Application for Leave to Appeal" because this division's applicable practice directions/ directives were ignored. In response to my striking-out order, the legal representatives of the respondent filed an imaginative application styled " Notice of Further Set Down / Notice of Application in Respect of Leave to Appeal".³⁸

[39] To attempt to regulate these "proceedings", I called a judicial case management meeting. To my surprise, the legal team representing the respondents indicated they were completely unaware of the practice directions/directives that found application.³⁹

³⁶ I believed a joint and several costs order against the first and third respondents was more appropriate.

³⁷ The applicant attempted to settle the matter amicably prior to the launching of the application.

³⁸ The purpose and nature of this application was difficult to understand.

³⁹ I was asked to email the respondents' legal representatives a copy of the current Practice Directives for the WCHC.

[40] The respondents then withdrew all their previous defective notices and the fatally defective ‘application’ and filed a ‘regular’ application for condonation on 31 October 2024. I mention all of this as I will make a costs order to the effect that the respondents’ legal team shall not be allowed to recover any of these costs from the respondents in connection with their defective notices and their defective application.⁴⁰

[41] These are then my reasons for the order granted on 30 July 2024. The following order is made in connection with the condonation application and costs.

1. The application for condonation dated 31 October 2024 is granted.
2. The respondent’s legal representatives shall not be permitted to recover any costs or disbursements incurred in connection with the following process.
 - 2.1 The “request for reasons” dated 31 July 2024.
 - 2.2 The “application for leave to appeal” dated 31 July 2024.
 - 2.3 The “application” dated 16 September 2024.
 - 2.4 The “notice of withdrawal” dated 31 October 2024.

E. D. WILLE
CAPE TOWN

⁴⁰ Strydom and Another v Coomans and Others (M593/2021) [2024] ZANWHC 6 (8 January 2024).