THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J2898/18

In the matter between:

BETTERBOND (PTY) LTD	**First Applicant**
BETTERLIFE GROUP (PTY) LTD	**Second Applicant**

and

ALISTER SMIT	**First Respondent**
MULTINET HOME LOANS	**Second Respondent**

Heard: **20 September 2018**

Delivered: 05 October 2018

Summary: Restraint of trade – no novation cannot be presumed – no intention or evidence that novation occurred – the full terms of the restraint covenant are enforceable.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] This is an urgent application for a final interdict to enforce restraint of trade and confidentiality undertakings contained in the first respondent's (Mr Smit) contract of employment. Mr Smit was employed by the first applicant (Betterbond) on 2 March 2016 as a Home Loan Consultant. He resigned from Betterbond on 25 July 2018 to take up employment with the second respondent (Multinet), a direct competitor of Betterbond.

[2] Mr Smit is opposing the application, firstly, on the basis of urgency and secondly, on several defences on the merits.

Background

[3] The facts in this matter are mostly common cause. Betterbond and Multinet are bond originators. Prior to joining Betterbond, Mr Smit was employed by Green Door Homeloans, also a bond originator. Considerable business of bond originators depends on obtaining referrals from 'lead sources' such as estate agents and developers.[1] According to Mr Smit, when he joined Betterbond, he brought with him eight lead sources. He was not earning any salary but paid on commission.

[4] Mr Smit was not allowed entry into the premises of Betterbond after he had tendered his resignation on 25 July 2018. Betterbond did not oppose Mr Smit's employment with Multinet. However, it insisted that he should sign an undertaking it had drafted with the following terms:

> 'I, the undersigned, Alister Smit, hereby undertakes:
>
> 1) for a period of 6 (six) months calculated from 22 August 2018, restrain from dealing (in whatsoever manner) with Betterbond's

[1] Clause 19.1.4 of Mr Smit's contract of employment defines '**Restricted Lead Source**' as 'each and every entity that continues to be, or has been in the last 12 (twelve) months prior to the Termination Date, a business lead source for Employer and/or the Group in regard to the Business within the Territory, including, but not limited to, any estate agency, estate agent, attorney firm, auctioneer, aggregation franchise that has received or in entitled to receive remuneration from the Employer or Group for the referral of business.'

existing lead sources (including estate agents, developers and closed channel partners);

2) for period of 12 (twelve) months calculated from 22 August 2018, from soliciting or enticing any of Betterbond's employees to terminate their employment with Betterbond.

I hereby undertake not to disclose any confidential information of Betterbond and will furthermore return any copies of such information and/or company equipment which may be in my possession (in whatsoever format that may be) to Betterbond on or before 17h00 on Wednesday, 1 August 2018.'

[5] Mr Smit was not keen to commit himself initially and raised the following concerns:

[5.1] Clause 1 of the undertaking was overly wide and he sought to have it amended to reflect that he would not contact any of the lead sources with the objective of soliciting business away from Betterbond;

[5.2] He had to earn income and would not turn away any prospective business opportunities;

[5.3] If he was approached by any of the lead sources he had dealings with even prior to joining Betterbond, he would not be restrained from dealing with them.

[5.4] Not being able to solicit business from clients he has been dealing with is going to cause a dip in his income;

[5.5] He believes that he should be compensated for the restraint;

[5.6] He requested all commission from the pipeline which he closed prior to his resignation and for as long as those income streams are paid on registration.

[6] After a marathon of correspondence between the parties regarding the enforcement of the restraint and confidentiality undertakings, Mr Smit signed the undertaking on 6 August 2018. However, it was subsequently brought to the attention of Betterbond that Mr Smit was in breach of the restraint and confidentiality undertakings in that he had solicited three of Betterbond's clients away from its business to the business of Multinet and disclosed their confidential details to Multinet.

[7] Mr Smit had been allocated three bond applications of Betterbond's clients to process while he was still in the employ of Betterbond. Mr Smit processed all the three applications through Multinet without any authorisation. Betterbond was alerted about Mr Smit's conduct by the disgruntled clients.

[8] Mr Smith concedes that he took Betterbond's clients with him on his departure. However, he is adamant that his conduct does not offend the terms of the 6 August 2018 undertaking, a narrower version of the restraint agreement. He asserts that he agreed to the terms of the 6 August 2918 undertaking as a compromise since he had forsaken his right to the lead sources he had introduced to Betterbond for the narrower terms than those in the restraint agreement. As such, the undertaking does not restrict him from dealing with restricted parties[2] and Betterbond is attempting to shift the goal post *ex post facto*.

[9] Mr Smith further denies that he had disclosed confidential information to Multinet as the details were merely names of clients and the biographic data and other details required by the banks for a bond application (biographic information). The biographic information does not relate to Betterbond but

[2] Clause 19.1.5 defined '**Restricted Party**' as each and every entity with whom the Employee has interacted with, in the course and scope of his/her employment and/or on behalf of the Employer or the Group and all or any entities with which the Employer or Group participates or proposes to participate in a Restricted Transaction, to the reasonable knowledge of the Employee.'

While clause 19.1.6 defines '**Restricted Transaction'** as 'any business transaction or proposed transaction between the Employer of the Group and any other entity in regard to the Business within the Territory, undertaken or under consideration as at or during the preceding 12 (twelve) months of the Termination Date including, but not limited to, any transaction pursuant to which the Restricted Party will participate in the conduct of the Business with the Employer and/or the Group, whether as a lead source or otherwise.'

rather to the clients and is available to any bond originator in the normal course of business. The mere fact that a person is Betterbond's client could not turn the biographic information into confidential information, so the argument further went.

Whether the restraint of trade and confidentiality undertakings were superseded by the undertaking given by Mr Smit in favour of Betterbond

[10] Advocate Miltz SC, Betterbond's counsel, submitted that it was never Betterbond's intention to novate the restraint of trade and confidentiality undertakings in Mr Smit's contract of employment when it sought the 6 August 2018 undertaking. In any event, Mr Smit failed to make out a case for novation, so it was further argued. On the other hand, Mr Smit is adamant that the undertaking is binding and must have legal consequences, especially since it was authored by Betterbond.

[11] To the extent that Mr Smit's defence is premised upon novation, it is important that I deal with this aspect. The Supreme Court of appeal (SCA) succinctly expounded the principle of novation in *National Health Laboratory Service v Lloyd-Jansen van Vuuren*.[3] It was stated:

> '[15] …There is a presumption against novation because it involves a waiver of existing rights. When parties novate they intend to replace a valid contract with another valid contract. In determining whether novation has occurred, the intention to novate is never presumed. In *Acacia Mines Ltd v Boshoff*,[4] the court held that novation is essentially a question of intention.
>
> [16] In *Proflour (Pty) Ltd & another v Grindrod Trading (Pty) Ltd t/a Atlas Trading and Shipping & another*[5] the court, when determining whether the agreement resulted in a novation, referred to the decision *of*

[3] [2015] ZASCA 20; 2015 (5) SA 426 (SCA) at paras 16 to 17.
[4] *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (A) at 337D.
[5] *Proflour (Pty) Ltd and Another v Grindrod Trading (Pty) Ltd t/a Atlas Trading and Shipping and Another* [2010] 2 All SA 510 (KZD) at para 10.

Electric Process Engraving and Stereo Co v Irwin 1940 AD 220 at 226-227 where the court said:

> ‘The law on the subject was clearly enunciated as far back as 1880 in the well-known case of *Ewers v The Resident Magistrate of Oudtshoorn and Another*, (Foord) 32, where DE VILLIERS, C.J, said: “The result of the authorities is that the question is one of intention and that, in the absence of any express declaration of the parties, the intention to effect a novation cannot be held to exist except by way of necessary inference from all the circumstances of the case.”’

It follows that in order to establish whether novation has occurred, the court is entitled to have regard to the conduct of the parties, including any evidence relating to their intention.’

[12] Turning to the present case, Mr Smit concedes that there was no express intention to effect novation. Also, the communication between the parties preceding the signing of the 6 August 2018 undertaking negates any occurrence of novation. In a letter dated 31 July 2018, Betterbond addressed Mr Smit on his obligations in terms of the restraint of trade and confidential undertakings as contained in his contract of employment. The contents are as follows:

> ‘1 we refer to your contract of employment dated 1 March 2016 (“employment agreement”).
>
> 2 During your employment as Bond Consultant you were exposed to confidential business information including, but not limited to, clients list, company strategy, business methodology and you built up significant client relationships. With a view to protecting our interests we concluded with you a written employment agreement that contained a number of restraint of trade obligations.

3 In terms of the employment agreement you were restrained from, *inter alia*, for a period of 6 (six) months after the termination date of your employment from: –

3.1 conducting any business which is the same or similar to or in competition with Betterbond in regard to any restricted lead source (being an entity that continues to be or has in the 12 months prior to your termination, been a business lead source of Betterbond); and

3.2 be interested in any legal entity that conducts business with any restricted lead source.

4 We attach a copy of the relevant pages of the agreement (annexure "A") – We also attach the names of the relevant restricted lead sources (annexure "B").

5 You tendered your resignation from Betterbond on Wednesday, 25 July 2018 and informed us that you intend to join Multinet (a direct competitor of Betterbond). We hereby accept your resignation. We require that you provide us 4 (four) weeks' notice of termination and accordingly your last working day will be 22 August 2018 ("termination date").

6 During the notice period, we require that you will not attend at the Betterbond offices. In accordance with clause 25,3 of your employment contract, we will pay you commission in respect of transaction that may register on/before the termination date.

7 It is not our intention to preclude you from taking your new position with Multinet, provided that you do not approach, solicit business or provide (whether directly or indirectly) any bond origination service to any of our restricted lead sourced or otherwise breach the confidentiality and restraint undertaking in your employment agreement. Should you not adhere to the provisions stipulated above, all of Betterbond's rights will be reserved fully to enforce the full extent of the confidentiality and restraint undertakings, including in regard to

your employment by Multinet and your servicing of restricted lead sources. Nothing in this letter should be construed in any manner as a waiver of any of Betterbond's rights to enforce each and every aspect of your confidentiality and restraint undertaking.

8 We also note that your agreement includes 12 (twelve) month restriction in respect of soliciting of Betterbond's staff.

9 We hereby demand that you undertake in writing to desist from breaching the restraint and confidentiality undertakings in the employment agreement and that you comply with all the restraint of trade obligations that you owe us.

10 We attach as annexure "C" a draft undertaking for you to sign and return to us and confirm that we require these undertakings as a matter of urgency, but not later than 17h00 on Wednesday, 1 August 2018, failing which we shall institute legal proceedings against you.

11 We await your urgent response. All of the Betterbond's rights are expressly reserved.'

[13] It is evident that Betterbond never intended to waive its rights to fully enforce the restraint and confidentially undertakings. Conversely, Betterbond was indulgent and did not seek to prevent Mr Smit from joining its competitor to the extent that he complied with the restraint and confidentiality undertakings. As such, the 6 August 2018 undertaking did not vary or cancel the obligations imposed by the restraint and confidentiality undertakings contained in Mr Smit's contract of employment.

[14] It follows that novation did not occur.

<u>Are the restraint of trade and confidentiality undertakings enforceable?</u>

[15] Mr Smit concedes that by pocketing Betterbond's clients to Multinet, he breached his restraint and confidentiality undertakings. Accordingly, Mr Smit bears the onus to demonstrate on a balance of probabilities that the restraint

is unreasonable and therefore unenforceable. In turn, the reasonableness of a restraint of trade is determined with reference to public policies that enjoin parties to abide by the contractual obligations and the Constitutional right to freely choose a trade, occupation, or profession and to practice such.[6] Therefore, for a restraint to be reasonable and enforceable, it must serve to protect an interest, which, in terms of the law, requires and deserves protection.[7] The principles are trite and it is not necessary to restate them. What follows becomes apparent when applying those principles to the issues at hand in this application.

[16] Mr Smit's unreasonableness argument is hinged on two issues; firstly, that Betterbond's information is not confidential; secondly, that the eight lead sources mentioned in his answering affidavit are historically his and he should be permitted to pocket them to Multinet.

Confidential information

[17] Mr Smit does not necessarily dispute that Betterbond's key competitive differentiators in the mortgage origination industry are the relationships it holds with its lead sources. It should then follow, as contended by Betterbond, that the lead sources and their agreements with them are not only confidential but the relationship that is fused between Betterbond and its lead sources is proprietary interest.

[18] Accordingly, Mr Smit's submission that the names of clients, their biographical information and other details required by banks for a bond application do not constitute 'client lists' as contemplated in his contract of employment and are publicly available to any bond originators is untenable. The definition of confidential information as contained in his contract of employment includes any other information relating to existing and prospective customers.

---

[6] See: Christie, the Law of Contract in South Africa, 6th Edition, p 554; *Labournet (Pty) Ltd v Jankielsohn and Another* [2017] ZALAC 7 at para 39.

[7] *Labournet supra* at para 41*; Experian South Africa (Pty) Ltd v Haynes and Another [2012] (2013) 34 ILJ 529 (GSJ)* at paras 12 to 19; Basson *v Chilwan and Others* 1993 (3) SA 742 (A) at 7761 I-J; *Aqatan (Pty) Ltd and Aquatan (Pty) Ltd v Janse Van Vuuren and Another* [2017] ZALCJHB 141; (2017) 38 ILJ 2730; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA*); Ball v Bambalela Bolts (Pty) Ltd and Another* (2013) 34 ILJ 2821 (LAC).

[19] The information loosely referred to by Mr Smit as biographic details of clients consists of clients' confidential information, which includes bank statements, monthly earnings, employers' details, etc, disclosed on confidential basis. Mr Smit gained access to the three clients' information solely because he was in a confidential relationship with the clients as a Betterbond employee. Mr Smit has since disclosed and used this confidential information for Multinet's benefit despite his undertaking not to do so.

[20] Clearly, his loyalty is with Multinet hence he did not hesitate to disclose Betterbond's confidential information at his disposal at the given opportunity.

Protectable interest

[21] Mr Smit relies on a further ground in support of his case that the respondent had no trade connections capable of protection. He asserts that Betterbond had no protectable interest in its lead sources, particularly the eight lead sources with whom his relationship predates his employment with Betterbond. That cannot be true as the protection of potential business opportunities as well as the commodity in the form of customer goodwill is also a protectable interest. Pertinently, in *Rawlins and Another v Caravantruck (Pty) Ltd,*[8] the Appellate Division stated:

> 'Even though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense "his customers", <u>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.</u> As such it becomes a trade connection of the employer which is capable of protection by means of a restraint of trade clause.
>
> <u>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</u>

[8] [1992] ZASCA 204; 1993 (1) SA 537 (A) at 542G-H.

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' relationships with the customers he dealt with as a salesman of the respondent were such as to make it reasonable for the respondent to protect itself. Rawlins worked for the respondent for some fifteen 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.' (Emphasis added).

[22] Similarly, in the present case, Mr Smit failed to show that he never acquired any significant personal knowledge of or influence over the eight lead sources he had introduced to Betterbond over and above that which previously existed. On the contrary, Betterbond's assertion that Mr Smit's relationship with the eight lead sources developed and grew during his employment with Betterbond, is highly probable and was never challenged. The confirmatory affidavits from the eight lead sources do not assist Mr Smit in this regard.

[23] In the circumstances, it is reasonable to conclude that the rapport which Mr Smit had with the eight lead sources was enhanced or reinforced during his employment with Betterbond.

Geographical area

[24] The remaining issue is the reasonableness of the geographical area of the restraint which Betterbond seeks to enforce, being Gauteng Province. Mr Smit seeks a reduction of the geographical area of the restraint to Pretoria. He asserts that while in the employ of Betterbond he worked almost exclusively in Pretoria and only 1 to 2 percent of his work was in Johannesburg.

[25] I am not convinced that the geographical area of the restraint is overbroad. Mr Smit concedes that he did work in Johannesburg, despite the extent of the work he did. Betterbond seeks to enforce the restraint and confidentiality undertakings in Gauteng only insofar as protecting its business connections and confidential information in relation to its clients, restricted lead sources, restricted parties, restricted transaction, and current employees. Mr Smit is free to venture into other provinces.

Urgency

[26] It is generally accepted that enforcement of the restraint of trade is inherently urgent. There is no need to overly deliberate on this issue as, having read the papers before me, I am satisfied that the matter is urgent and have treated it as such.

Conclusion

[27] In all the circumstances, the restraint is neither unreasonable nor contrary to public policy.[9] Accordingly, the requirements for the grant of a final interdict have been met. Betterbond successfully demonstrated that it has a clear right which has since been breached (an injury actually committed) and that there is no other appropriate remedy than to hold Mr Smit to his contractual undertakings.[10]

Costs

[28] Even though costs do not follow the result in this Court, this case is an exception. Mr Smit ought to have been advised of the prospects of opposing this application. In fact, he had been offered an opportunity to consent to the order sought in the Notice of Motion but to no avail.

[29] In the circumstances, I make the following order:

[9] *See Experian South Africa supra* at para 19; and *Reddy supra* at para 20.
[10] *Reddy supra* n 6 at para 22.

Order

1. This application is heard as one of urgency and the applicants' failure to comply with the normal time periods is condoned.

2. The first respondent, Mr Alister Smit, is interdicted and restrained in the Gauteng area until 25 February 2019:

   2.1 Either for his own account or as a representative or as an agent for the any third party, from conducting any business, the same as, similar to or in competition with the business of the applicants in regard to any restricted lead sources (as defined in the first respondent's contract of employment);

   2.2 Either for or on his own behalf or on account or as a representative or as an agent for any third party, from persuading, inducing, procuring, soliciting, enticing or attempting to entice away a restricted party (as defined in the first respondent's contract of employment) from the business of the applicants and/or from conducting a restricted transaction (as defined in the first respondent's contract of employment);

   2.3 From acting in any capacity in dealing in any way with a restricted party in respect of any services and/or products which are substantially the same as those services and/or products offered by the applicants to the restricted part in question.

3. The first respondent is interdicted and restrained in the Gauteng area until 25 August 2019 from persuading, inducing, encouraging, procuring or soliciting any current employee of the applicants or who

was employed by the applicants within 6 months from the date of the first respondent's termination of employment with the first applicant to: -

3.1 Become employed by, or have an interest directly or indirectly in any manner whatsoever, in any business which is in competition with the business of the applicants;

3.2 Terminate his/her employment or association with the applicants;

3.3 Furnishing any information or advice, acquired by that employee or consultant as a result of his/her employment or association with the applicants, to any unauthorised person;

3.4 Transfer, divert or refer any of the applicants' customers, business or restricted transactions to any restricted party, whether in a form of leads, confirmed or unconfirmed sales, or any form in any manner whatsoever, whether for gain or not.

4. The first respondent is restrained and interdicted from using the confidential information of the applicants, whether directly or indirectly, for his own benefit or for the benefit of any other person other than the applicants.

5. The first respondent is interdicted from diverting the applicant's clients to the second respondent or any other third party.

6. The first respondent pays the applicants' costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

<u>Appearances</u>

For the Applicant:	Advocate I Miltz SC with Advocate S Swartz
Instructed by :	Cliff Dekker Hofmeyr Inc.
For the Respondent:	Advocate DJ Erasmus
Instructed by:	Theron & Theron Attorneys