



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 194/20

In the matter between:

MEDTRONIC (AFRICA) PROPRIETARY LIMITED

Applicant

and

MARK ADRIAN CAWOOD

First Respondent

BIOTRONIK PROPRIETARY LIMITED

Second Respondent

Heard: 28 May 2020

Delivered: 12 June 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 12 June 2020.

JUDGMENT

PRINSLOO, J

Introduction:

- [1] The Applicant sells medical devices and the First Respondent (Mr Cawood) commenced his employment with the Applicant on 1 September 2014 as a sales representative within the Applicant's spine and biologics department.

- [2] During 2016, the Applicant merged with Covidien and all employees were required to sign new contracts of employment, which Mr Cawood signed in April 2016. The Applicant's 'general terms' were incorporated into Mr Cawood's contract of employment.
- [3] The general terms in Mr Cawood's contract of employment contained restraint of trade and confidentiality undertakings. In essence, Mr Cawood agreed to be restrained for a period of 12 months from the date of termination of his employment with the Applicant from *inter alia*, taking up employment with another entity which develops, designs, manufactures, procures, markets or sells products in South Africa, which compete with the Applicant's products. He further undertook not to disseminate, divulge or disclose the Applicant's confidential information.
- [4] In October 2018, Mr Cawood was appointed as a field and technical consultant in the Applicant's 'cardiac rhythm and heart failure' (CRHF) division. His position entailed that he was required to promote and sell the Applicant's products to the cardiologists at the hospitals he was responsible for. He was based in the Inland South Region.
- [5] The Applicant's CRHF division is divided into various departments and relevant to this application is the pacing department which sells and promotes the bradycardia, tachycardia and heart failure product lines. Bradycardia is a condition where the patient has a slow heartbeat and the condition is treated through the implanting of a pacemaker. Tachycardia is a condition where the patient has a fast heart rate and the condition may be ventricular or atrial. The treatment may vary depending on what type of tachycardia the patient may have and could range from medication to surgery.
- [6] The Applicant and its competitors promote their products, which are often interchangeable and similarly priced, to their customers, being medical specialists who are resident at particular hospitals.
- [7] Mr Cawood resigned from the Applicant's employment in December 2019 and his last day of service was 31 January 2020. He subsequently took up employment with the Second Respondent (Biotronik), a direct competitor of the

Applicant. In taking up employment with Biotronik, Mr Cawood acted in breach of his restraint of trade agreement.

- [8] On 21 January 2020, the Applicant's attorneys sent a letter to Mr Cawood reminding him of his restraint of trade and confidentiality undertakings and to demand an undertaking that he would not act in breach thereof.
- [9] On 4 February 2020, Mr Cawood's attorneys responded and made a tender that he would comply with his undertakings to some extent, which was detailed in the attorneys' letter.
- [10] On 7 February 2020, the Applicant's attorneys indicated that the Applicant was prepared to allow Mr Cawood to continue to be employed by Biotronik and to accept the undertakings he had made, but it was not prepared to accept the duration of the undertakings. The parties could not reach an agreement to settle the matter and the Applicant approached this Court for relief.
- [11] The matter was set down for hearing on the urgent roll of 28 May 2020. Due to the Covid-19 lock down measures, the parties presented arguments via Zoom.

The issue to be decided

- [12] The Applicant accepted that Mr Cawood be employed by Biotronik, notwithstanding the restraint undertaking he had agreed to in his contract of employment to the effect that he would not be employed by a competitor for a period of 12 months after termination of his employment.
- [13] In the notice of motion, the Applicant seeks an order as follows:

'Interdicting and restraining Mr Cawood for a period of 12 months until 31 January 2021 within South Africa from:

1. directly or indirectly, marketing, promoting, selling or providing any technical support or being required by Biotronik to, directly or indirectly, market, promote, sell or provide any technical support in respect of any products that compete with the Applicant's CHRF product range to any of the cardiologists and hospitals listed in "NM1"; and

2. for Mr Cawood's own benefit or the benefit of Biotronik or any other third party, enticing, encouraging, inducing persuading or soliciting any employee of the applicant to leave the employ of the applicant.
3. disclosing, disseminating, divulging, relaying or in any other way conveying the confidential information of the Applicant to any third party including Biotronik.'

[14] It is evident from the papers filed that there is no dispute that Mr Cawood signed a contract wherein he agreed to certain restraint of trade and confidentiality undertakings in favour of the Applicant. Mr Cawood accepted that the Applicant and Biotronik are direct competitors and that the products they promote and sell, are interchangeable. He further accepted that the Applicant has proprietary interests, in the form of customer connections and confidential information.

[15] Insofar as confidential information is concerned, Mr Cawood gave an undertaking not to disclose any confidential information. It is evident from his answering affidavit as well as the undertakings Mr Cawood was prepared to give that he has an intention to comply, to some extent, with the terms of the confidentiality and restraint undertakings, as he had agreed to in his contract of employment. In the tender Mr Cawood made, he undertook to comply with his confidentiality undertakings and not to disclose any confidential information, not to approach or communicate with the Applicant's employees with a view to induce or encourage them to leave the Applicant's employ and not to approach or communicate with any of the Applicant's clients, as per "NM1", for a period of six months, from 1 February 2020 to 31 July 2020.

[16] In his opposing affidavit Mr Cawood tendered not to be involved in any capacity for any visits to the doctors, their replacements and /or additional doctors taking up chambers at the hospitals, as per "NM1" (the relevant doctors), for the period up to 31 August 2020. Mr Cawood increased his initial six-month tender with another month. It is not explained what caused the change of heart and why Mr Cawood tendered an additional month in respect of the restraint.

[17] Mr Cawood does not dispute the existence of a customer connection that is worthy of protection through a restraint. Mr Cawood further did not dispute that where competing and interchangeable products are available, cardiologists elect to use the product promoted by a representative whom they trust and work well with. The fact that Mr Cawood tendered a seven-month period of restraint

in respect of the relevant doctors is a concession that the Applicant has an interest to be protected and that he indeed has customer connections with the relevant doctors.

[18] In short: there is very little in dispute in this matter as Mr Cawood effectively consented to the relief the Applicant seeks. The only contentious issue is the period of the restraint. Mr Cawood's tender not to be involved with the doctors listed in "NM1" is for the period up to 31 August 2020 and the Applicant seeks to enforce the restraint for the period up to 31 January 2021.

[19] The question is therefore whether the period of the restraint that the Applicant seeks to enforce go beyond what is reasonably required to protect its interests relating to customer connections.

Applicable principles

[20] The principles applicable to restraint agreements are well-established. In *Massmart Holdings v Vieira and Another*¹ the Court summarised them as follows:

'Restraint agreements are enforceable unless they are unreasonable (see *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)). In general terms, a restraint will be unreasonable if it does not protect some proprietary interest of the party seeking to enforce a restraint. In other words, a restraint cannot operate only to eliminate competition. The party seeking to enforce a restraint need only invoke the restraint agreement and prove a breach of the agreement, nothing more. The party seeking to avoid the restraint bears the onus to establish, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable (see 2013 (1) SA 135; *Magna Alloys and Research (SA) (Pty) Ltd supra*; *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D)). '

[21] In *Reddy v Siemens Telecommunications (Pty) Ltd*² the Supreme Court of Appeal (SCA) upheld a 12-month restraint against an employee who had joined a competitor (Ericsson). The Court restated the following principles:

¹ Unreported case number J1945-15, ZALCJHB 451.

² 2007 (2) SA 406 (SCA).

'A Court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom in forming the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life.'

- [22] *In casu*, there is no dispute that the contract of employment signed in 2016 is valid and enforceable. It is common cause that Mr Cawood had agreed to the restraint undertakings and that his employment with Biotronik constitutes a breach of those undertakings.
- [23] In his contract of employment, Mr Cawood agreed that he would not, for a period of 12 months after the termination of his employment, render services to any person or entity, in connection with the development, design, manufacture, procurement, marketing or sale of a competitive product in South Africa.
- [24] The point of departure is thus: a restraint of trade agreement is enforceable, unless it is unreasonable.
- [25] The Applicant limited the restraint it seeks to enforce significantly to include only the hospitals and medical specialists as reflected in "NM1" and Mr Cawood accepted the restraint in that regard. Mr Cawood is free to remain in the employ of a competitor of the Applicant.
- [26] Contractually Mr Cawood is restrained for a period of twelve months, but he contends that a period of six months is reasonable and that the restraint should be confined to that. Mr Cawood's position in fact is that the Applicant is not entitled to restrain him, other than in terms of the tender he had made.

Analysis

- [27] The party seeking to enforce a restraint need only invoke the restraint agreement and prove a breach of the agreement, nothing more. A restraint of trade can be enforced and *"it is sufficient for the applicant to show that the*

*customer contact exists and that they can be exploited by the former employee.*³”

- [28] The Applicant has limited the relief it seeks and in short it seeks an order restraining Mr Cawood from contacting the relevant doctors for the period of his restraint, as contractually agreed to. There is no dispute that customer connections had been established with the relevant doctors.
- [29] The Applicant seeks to enforce the restraint of trade, in the limited sense that I have already alluded to, for a period of 12 months. Mr Cawood on the other hand seeks to escape a significant period of his restraint.
- [30] The party seeking to avoid the restraint bears the onus to establish, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.
- [31] It is evident that in the tender he had made and in opposing this application, Mr Cawood seeks to vary the terms of the agreement that the parties concluded, after the fact and unilaterally so, by tendering a six / seven-month restraint, instead of the 12 months that the parties agreed to.
- [32] Effectively, Mr Cawood seeks to renegotiate the terms of the restraint of trade he had agreed to, in circumstances where he had resigned from the Applicant's employ and took up employment with a direct competitor. His case is that the extent and duration of the restraint are unreasonable as six months, as opposed to 12 months, is an appropriate period to sufficiently protect the Applicant's proprietary interests.
- [33] This Court has to decide whether the restraint period of 12 months is, based on the facts, too long and unreasonable. This calls for a consideration of the reasons proffered by Mr Cawood in support of his case that the restraint is unreasonable and should only be enforced for six / seven months.
- [34] In my view, there are three main reasons put forward by Mr Cawood in support of his case and to show that he should be allowed to escape the full duration of the restraint period. I will deal with them in turn.

³ See: *New Justfun Group (Pty) Ltd v Turner and Others* (2018) 39 ILJ 2721 (LC).

- [35] Firstly, it appears that Mr Cawood is of the view that the period of 12 months is unreasonable because he did not build strong relationships with the relevant doctors. This is so because he could only provide technical support on brady products and because he has limited training and qualifications. As he put it, he was not the 'complete package'.
- [36] In support of this, Mr Cawood explained that he had spent 15 months in the Applicant's CRHF division as a technical consultant and his duties included calling on cardiologists and cardiothoracic surgeons, assisting on the product line and providing technical assistance. He is not qualified as a clinical technologist and he has no recognised qualification or training on tachycardia (tachy). He was limited to work only on CRM /bradycardia (brady) operations and procedures.
- [37] Mr Cawood explained that when the Applicant employed him in the CRM division, he was not sent for training and he only had basic training in as far as brady is concerned and he is not deployable for any tachy procedures.
- [38] In my view there is no merit in this argument.
- [39] The Applicant submitted that Mr Cawood developed relationships with cardiologists during his time as a field and technical consultant, through which he was able to promote and sell products. This provided the Applicant with an advantage and by taking up employment with Biotronik, Mr Cawood has the advantage of being able to use the existing relationships he has with the cardiologists to maintain contact with them and to promote Biotronik's products instead of the Applicant's products.
- [40] The reality is that, Mr Cawood was not prohibited from selling tachy products, even though he was not trained on them. The Applicant submitted that during the third quarter of the 2018 financial year, Mr Cawood had sold 47 brady products in the amount of R 1 023 633 and three tachy products in the amount of R 388 430. In 2019 he had sold six tachy products. The brady product line is much cheaper compared to the tachy product line, which obviously enabled Mr Cawood to sell and support more brady products. However, Mr Cawood was able to sell both, irrespective of the fact that he was not trained in tachy.

- [41] Mr Cawood was trained on brady products and he sold those successfully. He cannot show how his 'lesser training' or absence of qualifications impacted on his ability to operate as a sales representative of field and technical consultant. More importantly, his lesser training and qualifications did not impact on his ability to forge relationships and build customer connections.
- [42] Even on his version, he was only trained on brady products, Mr Cawood conceded that a relationship was formed with the relevant doctors. The Applicant seeks to enforce the restraint to avoid the exploitation of the relationship. Having formed the relationship, Mr Cawood indeed acquired a degree of influence over the relevant doctors, which could work in his favour and Biotroniks favour.
- [43] Mr Cawood's argument that he could not form a bond as strong as a representative who is qualified on both brady and tachy products as he is not the 'complete package' does not hold water. His ability to forge relationships and build customer connections is the critical factor and it was not dependent on the type of the products that he sold.
- [44] The Applicant is contractually entitled to an opportunity for Mr Cawood's replacement to develop an equivalent relationship with the relevant doctors.
- [45] Secondly, Mr Cawood is of the view that his expertise ought not to be difficult to replace.
- [46] Mr Cawood stated that the period he tendered (up to 31 August 2020) not to be involved with the relevant doctors, is sufficient to enable the Applicant to introduce a new technical assistant or sales representative into the position he had previously occupied, for the new appointee to see the doctors and to maintain a relationship with them. He emphasized that he could only provide technical support on brady products and due to his limited training and absence of tertiary qualifications, his expertise ought not to be difficult to replace.
- [47] This argument is misplaced. The Applicant seeks an opportunity to find a replacement, to train such a person and to introduce him or her to the Applicant's products and relevant doctors and to establish a relationship. It is not about the replacement of expertise or specifically Mr Cawood's expertise, but rather the

establishment of customer connections and building a relationship with the relevant doctors and being afforded an opportunity to do so.

- [48] Thirdly, Mr Cawood disputed that the training which the Applicant provides is as extensive as set out in the papers before me as he was not trained as extensively by the Applicant. His training at Biotronik will be over in three months, where after he will be able to start building relationships with customers and the same should be possible for the Applicant.
- [49] According to Mr Cawood, it does not take longer than three months to be fully introduced to the role players involved in the ordering of stock and three months, provide ample time to introduce a new technologist or sales representative, for him or her to prove him or herself and to gain the confidence of the relevant medical professionals or procurement officers.
- [50] The period of six months with no contact with the relevant doctors, would provide the Applicant with a minimum of 24 weeks to introduce the new appointee and several opportunities to maintain the Applicant's relationship with them.
- [51] This is disputed by the Applicant.
- [52] In its replying affidavit, the Applicant explained that prior to his transfer to the CRHF division, Mr Cawood was employed as a sales representative in the spine division and his position as a field and technical consultant was similar to a traditional sales representative. While in the spine division, Mr Cawood had already been trained on the basic skills and this enabled his transition into the CRHF division. Mr Cawood had received the GNHC online certification and he underwent fundamentals and core training. This was not disputed by Mr Cawood.
- [53] It is therefore evident that Mr Cawood was trained, albeit in his previous capacity and that there was no need to train him again extensively when he was transferred to the Applicant's CRHF division. The fact that he was not extensively and specifically trained as a field and technical consultant is of no moment, given his prior training.
- [54] The Applicant explained that it provides significant training to its representatives, who are required to undergo extensive training on the products which they will

market, promote and sell. The training is broken up into various modules which are performed as theory based and practical modules. The theory based module is exclusively presented in the classroom with no interaction with cardiologists. The new representative is allocated a coach during the practical aspect of the training and has limited interaction with the cardiologists. Only once the new representatives have been certified by their coach as being ready to work independently, can they attend cases and work independently and it is only then that the new sales representative will be in a position to begin to build meaningful relationships, which generally takes a further six months. The training period is six months and only after this, can the representative begin to develop a relationship with the cardiologists. Given the time it takes to develop those relationships, 12 months is a minimum period for the new sales representative to be trained and familiar with the Applicant's products and to develop the necessary relationships.

[55] The Applicant submitted that it no longer provides training on only certain products therefore Mr Cawood's replacement will be trained on both brady and tachy products. There is no curtailment of the time periods for training based on the notion that only brady training needs to be provided, as that is no longer possible. The new training programme which the new field and technical consultant will be required to undergo, is broken up into various modules and the programme takes nine months to complete. Only between months seven to nine are candidates eligible for final sign-off and are only then able to start the process of building relationships and customer connections. It takes many months before a new field and technical consultant is familiar enough with the products and has a sound enough relationship with the cardiologist to enable the consultant to compete effectively in the market. This was not disputed by Mr Cawood.

[56] Furthermore, it takes time to recruit a replacement to take over Mr Cawood's account in the Inland South Region and at the time that the Applicant filed its replying affidavit, a suitable replacement had not yet been found. Once a replacement is found, he or she will have to undergo induction and training before he or she can service clients independently.

- [57] It was for these reasons that the Applicant rejected Mr Cawood's seven months tender. Based on the training schedule, his replacement would not even begin to build relationships at the stage of seven months.
- [58] The Applicant's case is that a period of 12 months is necessary to provide the protection it needs in order to train a replacement for Mr Cawood and for that replacement to develop his or her own relationships with the relevant doctors, before Mr Cawood re-enters the fray.
- [59] The Applicant submitted that it takes 12 months before a new sales representative is familiar enough with the products and has a sound enough relationship with the cardiologists to enable such sales representative to compete effectively in the market. Mr Cawood disputed this and his version is that his training at Boitronik would be completed within three months and he would be able to render services on his own from month three and form relationships. His case is that to get someone trained to his level, cannot exceed three months.
- [60] Mr Cawood disputed the period of training mainly on the basis that he was not trained extensively by the Applicant and because his training with Biotronik will take place in three months, after which the introduction and relationship building part of the business would take place.

Conclusion

- [61] In my view, a restraint period of 12 months is reasonable.
- [62] I say so for a number of reasons.
- [63] Firstly; The training that the Applicant provides to its sales representatives and technical consultants does not develop the customer connection or build relationships with the medical practitioners, but it rather equips them and propels them to the point where they are able to interact and build such relationships and customer connections. It is not correct to consider the training period as part of the opportunity to develop a relationship and build a customer connection.
- [64] In its replying affidavit, the Applicant explained that it is difficult for a new field and technical consultant to convince a cardiologist to use a product sold by a

competitor where the cardiologist has an established relationship with another field and technical consultant. Conversely; it is easy for a field and technical consultant who has an established relationship with a cardiologist to convince him or her to change the product he or she uses as the products are similarly priced and are often interchangeable. Mr Cawood did not file an affidavit to dispute this statement.

[65] In order to protect its proprietary interest in its relationship with the cardiologists to whom it sells its products, the Applicant needs to afford a new field and technical assistant a period of time within which to be trained and thereafter to build a relationship with the cardiologists in his or her own right.

[66] This is more so where, on Mr Cawood's own version, he will attend training for three months and thereafter will start to build relationships and customer connections. It follows that Mr Cawood would be able to establish customer connections long before his replacement is able to do so and he will have the added advantage of having already established relationships with the cardiologists, when he was still employed by the Applicant. There is a real likelihood that he would be actively marketing products before his replacement is certified and able to do so.

[67] There is merit in the Applicant's concern that if Mr Cawood is only restrained for a period of six months, there is a likelihood that he may be actively marketing products to the relevant doctors before his replacement is certified to do so. In those circumstances the relevant doctors will be faced with Mr Cawood, with whom they have dealt previously, and his unknown replacement, who did not have sufficient time to establish a relationship with the relevant doctors.

[68] In short: the seven months' period tendered by Mr Cawood is wholly inadequate and not sufficient to protect the Applicant's rights, more so where the risk of exploitation of customer connections which were developed by virtue of Mr Cawood's employment with the Applicant, is manifest.

[69] I am satisfied that given the period it takes to recruit and train a field and technical consultant as well as the time it takes to develop relationships and to build customer connections in the field, a restraint period of 12 months is reasonable.

- [70] Mr Cawood is restricted only for a limited period of time from interacting with a limited list of doctors and hospitals. The Applicant is not seeking to enforce a restraint to prevent him from participating freely in his chosen vocation. He can remain in Biotroniks' employ with the only prerequisite that he does not exploit the Applicant's customer connections.
- [71] Mr Cawood dismally failed to put any facts before this Court to show that the period of the restraint that he contractually agreed to, was unreasonable.
- [72] The period of the restraint that the Applicant seeks to enforce does not go beyond what is reasonably required to protect its interests relating to customer connections.

Costs

- [73] This Court has a broad discretion in respect of costs.
- [74] In *Zungu v Premier of Kwa Zulu-Natal and Others*⁴ the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.
- [75] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation.
- [76] In *Public Servants Association of South Africa on behalf of Khan v Tsabadi NO and Others*⁵ it was emphasized that: '...unless there are sound reasons which dictate a different approach, it is fair that the successful party be awarded its costs. The successful party has been compelled to engage in litigation and incur legal costs. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in the Labour

⁴ (2018) 39 ILJ 523 (CC) at para 24.

⁵ (2012) 33 ILJ 2117 (LC) at p 2119 I-J.

Court, whether as an applicant in launching proceedings or as a respondent opposing proceedings.’

[77] This is a case where the Court has to strike a balance.

[78] Mr Whitcutt for the Applicant submitted that Mr Cawood should be ordered to pay the Applicant’s costs. This is so because he conceded that he was bound by the restraint of trade, but came to Court as part of a bargaining process in respect of the period of the restraint. As far back as 21 January 2020, the Applicant, via its attorneys, indicated that Mr Cawood could remain in the employ of Biotronik, provided that he gave certain undertaking. Instead of providing an undertaking that he would step away from the relevant doctors for a period of 12 months, Mr Cawood engaged in a horse trading exercise.

[79] Mr Whitcutt referred to the matter of *Medtronic v Strydom*⁶ where this Court made an order as to costs and he submitted that the same principles and considerations should be applied *in casu*.

[80] Mr Scheepers for Mr Cawood submitted that the Applicant should be ordered to pay the costs as the tender Mr Cawood made in February 2020, was reasonable. Alternatively, and if the Court finds on the Applicant’s favour, there should be no order as to costs as Mr Cawood’s opposition was not unreasonable, considering the facts of this case. I cannot agree.

[81] In my view, this is a case where it is appropriate to make a cost order. I reiterate: A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success.

[82] Mr Whitcutt referred to a plethora of Labour Court cases involving the Applicant⁷ and where this Court has enforced a restraint of trade the period of 12 months. This is not the first case involving the Applicant, a competitor and an employee who left for greener pastures and who wants to escape the terms of the restraint. As to why this Court is called upon yet again to determine the self-same issue, is a pertinent question. One would expect that by now, the principles would be

⁶ See; *Medtronic v Strydom and another* unreported case number J 2187/19.

⁷ See: *Medtronic Africa (Pty) Limited v Redelinghuys* under case no. J3364/12; *Medtronic Africa (Pty) Limited v Kleynhans and Another* (2016) 37 ILJ 1154 (LC), *Medtronic Africa (Pty) Limited v Van Wyk and Others* (2016) 37 ILJ 1165 (LC); *Medtronic Africa (Pty) Ltd v van Rooijen and another, Medtronic v Strydom and another* under case number J 2187/19.

clear and that parties would be able to understand and comprehend what those are. Yet, that is not the case: Time and time again they come knocking on the door of this Court, with facts similar to previous cases, asking questions no different from those that have already been considered and pronounced upon this Court.

- [83] Let this be a warning: *Pacta servanda sunt* is a live principle and provides that restraint agreements are enforceable, unless they are unreasonable. The onus is on the party seeking to avoid the restraint to establish, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable. This Court has enforced the Applicant's restraint agreements for a period of 12 months on a number of occasions. Any party seeking to avoid such a restraint period, must have regard to previous judgments of this Court and must consider the facts and the findings of the Court before coming here in an attempt to get a different outcome or to escape the restraint when there is no basis in law or on the facts to do so.
- [84] This is a Court of law and not a forum where parties are invited to come and renegotiate the terms of agreements they freely have entered into, nor is the type of horse trading that is seen in applications such as this one, welcomed.
- [85] An appropriate award of costs is a method of ensuring that much earnest thought and consideration goes into decisions to litigate in this Court. Litigating with no regard to previous judgments on the same issue and with a clear intention to escape the terms of an agreement, without being able to attack the reasonableness thereof, is conduct that this Court would not tolerate.
- [86] This Court is ordinarily reluctant to make orders for costs against individuals, for whom the prospect of an adverse costs order may serve to inhibit the exercise of what they perceive as their rights. This is not an immutable rule.
- [87] I am alive to the fact that Mr Cawood is an individual, but I cannot ignore the fact that he acted in breach of his restraint agreement when he took up employment with Biotronik, that the Applicant made a reasonable concession to allow him to be employed by Biotronik and to seek a limited enforcement of the restraint, and that his refusal to abide by the terms of the agreement, led to this urgent application. This application could have been avoided had Mr Cawood

had any regard to previous judgments, the facts of his case and his weak prospects of success.

[88] Fairness dictates that the Applicant cannot be expected to endure the costs of instituting litigation that ought not to have been instituted in the first place, but which had to be instituted on an urgent basis due to Mr Cawood's conduct.

[89] In the present circumstances, the interests of justice require that Mr Cawood pay at least a portion of the Applicant's costs. In my view, a sum equivalent to 50% of the Applicant's costs will best serve those interests.

[90] In the premises, I make the following order:

Order

1. The First Respondent is interdicted and restrained from disclosing, disseminating, divulging, relaying or in any other way conveying the confidential information of the Applicant to any third party, including Biotronik;
2. The First Respondent is interdicted and restrained until 31 January 2021 and within the Republic of South Africa, from directly or indirectly, marketing, promoting, selling or providing any technical support or being required by Biotronik to, directly or indirectly, market, promote, sell or provide any technical support in respect of any products that compete with the Applicant's CHRF product range to any of the following:

2.1. Life Flora Hospital:

2.1.2. Dr Becker

2.1.3. Dr Ho

2.1.3. Dr Botha

2.1.4. Dr Conradie

2.1.5. Dr Peters

2.2. Netcare Union Hospital:

2.2.1 Dr Theron

2.2.2 Dr Zamabakides

2.2.3. Dr Mamdoo

2.2.4. Dr Botha

2.3. Vereeniging Hospital:

2.3.1. Dr Skudicky

2.3.2. Dr Mogogane

2.3.3. Dr S Steyn

2.4. Netcare Sunward Park Hospital:

Dr Klug

2.5. Life The Glynnwood Hospital:

2.5.1. Dr Maharaj

2.5.2. Dr Rost

2.5.3. Dr Grogorov

2.5.4. Dr Jardine

2.6. Netcare Sunninghill Hospital:

Dr Gebka

2.7. Zuid Afrikaans Hospital:

Dr van Wyk

2.8. Other hospitals:

2.8.1. Dr Foccart

2.8.2. Dr Nkwanazi

3. The First Respondent is interdicted and restrained until 31 January 2021 and within the Republic of South Africa, for his own benefit or for the benefit of

Biotronik or any other third party, from enticing, encouraging, inducing, persuading or soliciting any employee of the Applicant to leave the employ of the Applicant;

4. The First Respondent is to pay the costs of the application, limited to 50% of the Applicant's taxed costs, to include the cost of one counsel.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate C Whitcutt SC with Advocate C de Witt

Instructed by: Fasken Attorneys

For the Respondents: Advocate G J Scheepers SC

Instructed by: Manong Badenhorst Attorneys

LABOUR COURT