THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between	Case No: 19362/14
AWCAPE (PTY) LTD	**APPLICANT**
And	
BARBARA ANN PIETERSEN	**FIRST RESPONDENT**
STEPHEN GEORGE RUSH	**SECOND RESPONDENT**
STREAMLINK TECHNOLOGIES CC	**THIRD RESPONDENT**

Coram: ROGERS J

Heard: **29 APRIL 2015**

Delivered: **8 MAY 2015**

JUDGMENT

ROGERS J:

Introduction

[1] The applicant ('AWCape') seeks to enforce the terms of restraints of trade against the third respondent ('Streamlink') and the first and second respondents ('Pietersen' and 'Rush Snr') who work for Streamlink. Streamlink's sole shareholder is Rush Snr's son Anthony Rush ('Rush Jnr'). The application was issued on 29 October 2014. The need for urgent interim relief was obviated by an agreed order made on 5 November 2014. Mr Corbett appeared for AWCape and Mr Brembridge for the respondents.

[2] In the founding affidavit AWCape's deponent, Mr JH Hattingh ('Hattingh'), states that AWCape markets and sells Sage computerised accounting packages and after-sales support and services to its customers. AWCape is accredited by Sage to do so. It is one of about 50 Sage agents in South Africa. AWCape started business in 2009. It initially traded under the name Acctech. At the time proceedings were instituted it had 30 alleged customers, whose names were listed in an annexure to Hattingh's affidavit ('the listed customers'). Excluded from the list are eight customers who were allegedly poached by the respondents in breach of the restraints before the application was launched ('the excluded customers'). AWCape accepts that it cannot regain the excluded customers but relies on their loss to establish its reasonable apprehension that the respondents will continue to breach the restraints unless interdicted.

[3] Paras 2.1 and 2.2 of the notice of motion are directed at protecting allegedly confidential information. Paras 2.3 and 2.4 seek to interdict the respondents from selling products and services to the listed clients, for two years as from 1 March 2014 in the case of Pietersen and Streamlink and for two years as from 1 August 2014 in the case of Rush Snr.

Factual background

[4] In December 2011 a written agreement was concluded between AWCape and Streamlink ('the distribution agreement'). Rush Jnr and Pietersen signed it on behalf of Streamlink. In terms thereof Streamlink appointed AWCape as its sole distributor and was to have AWCape as its sole customer for the products and services covered by the agreement. Those products and services were to be absorbed into AWCape's product offerings. In respect of products and services developed by Streamlink, identified in the agreement as 'backup services, virtual servers and Internet ISP services', gross profit was to be shared on a 50/50 basis. In respect of consulting services, Streamlink was to be paid a specified amount per hour plus an additional commission on consulting revenue received from Streamlink's existing clients. In respect of software sales clinched by Streamlink it would receive 10% of AWCape's gross profit.

[5] Hattingh styled this agreement a 'merger'. This characterisation, and Hattingh's allegation that the transaction was prompted on Streamlink's side by financial distress, have been disputed by the respondents.

[6] Be that as it may, the terms of the agreement are not in dispute. Clause 2.3 reads as follows:

'2.3. Streamlink further agrees and undertakes in favour of Acctech that it or its associated companies shall not directly or indirectly engage in business involving products and services with any customer of Acctech, either in that customer's private or corporate capacity, for a period of 3 (three) years following termination of this agreement, either as principal, agent, partner, representative, shareholder, member, director, employee, consultant, adviser, or in any other like or similar capacity. Existing customers of Streamlink at time of concluding this agreement and as indicated in Appendix A are excluded from this constraint.'

I shall refer to the customers listed in the said appendix A as the pre-existing Streamlink customers. There were eight of them.

[7] In terms of clause 3.1 of the agreement Streamlink acknowledged that, by virtue of its association with AWCape, it had become possessed of AWCape's confidential information and had gained access to AWCape's trade connections,

particulars of which were listed in clause 3.2. In clause 3.3 Streamlink acknowledged that AWCape's proprietary interest in its trade connections and confidential information would be prejudiced if Streamlink[1] or its employees became associated with or interested in a competitor of AWCape. Clause 4 sets out various restraints accepted by Streamlink in favour of AWCape. Clauses 4.1.1 and 4.1.2 deal with confidential information. Clauses 4.1.3 and 4.1.4 read thus:

'4.1.3. Streamlink shall not for a period of three years after the date of the termination of his/her [sic] engagement with Acctech:

4.1.3.1. persuade or attempt to persuade any person whom [sic], during his/her employment with Acctech, was a banker, financier, supplier or customer of Acctech, to cease doing business with Acctech or commence doing business with anyone else;

4.1.3.2. solicit or attempt to solicit the business or custom of any persons referred to in 4.1.3.1 above;

4.1.3.3. persuade, induce, solicit, encourage or procure any employee employed by Acctech to cease such employment or to undertake employment with or have any interest in any other business.

4.1.4. Streamlink shall not during the period of three years after the termination of this agreement for any reason whatsoever, either alone or jointly or together with or as agent for any other person, assist, be interested, engaged or concerned, directly or indirectly, whether as principal, proprietor, shareholder, partner, representative, member, consultant, adviser, director, administrator, employee or otherwise, in any business, company or concern which carries on business in competition with Acctech within the provincial area of Western Cape; Existing customers of Streamlink at time of concluding this agreement and as indicated in Appendix A are excluded from this constraint.'

[8] In clause 5 Streamlink acknowledged the reasonableness of the restraints in all respects.

[9] During October 2012 Rush Snr signed what purported to be a contract of employment with AWCape. The agreement was to be effective from 24 October 2012. His job title was Services Manager, reporting to Hattingh as CEO. His remuneration was set out in an annexure. Clause 9 identified trade connections and

[1] The agreement says 'Acctech' but that is obviously a typographical error.

confidential information in identical terms to clause 3 of the distribution agreement. Clause 10 contained a restraint identical to clause 4 of the distribution agreement. Rush Snr acknowledged the reasonableness of the restraints in clause 11.

[10] Rush Snr admits that he signed this document but claims he did so without applying his mind and he denies that the parties gave effect to the document. The true position, he says, is that he was employed by Streamlink. The latter invoiced AWCape in terms of the distribution agreement, inter alia for his consulting services. On this basis he denies being bound by the restraint. Hattingh in reply says that some of Rush Snr's remuneration was channelled through Streamlink to take advantage of the latter's assessed loss but that he was employed by AWCape. This explanation is denied in the respondents' supplementary answering papers.

[11] I do not need to decide whether Rush Snr was an employee of AWCape or of Streamlink. If technically he was employed by Streamlink, the terms of the distribution agreement were nevertheless such as to create a situation practically the same as if Rush Snr were working for AWCape. Rush Snr has not alleged facts to show that AWCape through its CEO was not, from a practical point of view, the entity which directed Rush Snr's activities. Rush Snr must have seen things the same way because he not only signed the contract of October 2012 but also an addendum in February 2013 setting out his remuneration structure applicable from 1 February 2013. AWCape had the same justification for obtaining restraints from Rush Snr as if he were its employee. I am satisfied that the restraint undertakings represent a valid contract between the parties.

[12] I may add that Rush Jnr in May 2013 also signed an addendum reflecting that he was an employee of AWCape. The addendum set out his remuneration as from 1 March 2013. Whether there was an employment contract preceding this addendum does not appear from the papers. There may well not have been, given that AWCape has not cited Rush Jnr or alleged that he is personally bound by any restraints.

[13] AWCape asked Pietersen to sign an employment contract similar to that of Rush Snr. She refused to do so on the basis that it was not intended that she should

be an AWCape employee. This is not entirely consistent with a letter of grant she signed during May 2013 in which she accepted a 2% shareholding in AWCape. It was a condition that she should be an employee of AWCape at the date of acceptance. Again, however, AWCape does not in her case rely on a restraint flowing from an employment contract but on a restraint contained in clause 34 of AWCape's memorandum of incorporation, which the shareholders adopted on 28 October 2013. Pietersen was one of those shareholders. She does not dispute that she signed the memorandum. Clause 34.4 reads as follows:

'34.4. The Shareholders further undertake and agree in favour of the Company that neither they nor their associates shall directly or indirectly engage in business involving products and services with any customers of the Company, such customers including all customers, past and present which were active and did business with the Company during the time that any such Shareholder was a Shareholder of the Company either in that customer's private or corporate capacity, for a period of two (2) years following either the termination of that Shareholder's shareholding in or employment with the Company, whichever shall be the later, either as principal, agent, partner, representative, shareholder, member, director, employee, consultant, adviser, financier, or in any other like or similar capacity.'

[14] In early October 2013 Rush Jnr informed Hattingh that he wished to negotiate a termination of their contract. He said he had been offered part-time employment with one of AWCape's customers, Wesgro. He expressed the view that this would not conflict with the services AWCape provided to Wesgro but would provide him with the flexibility to continue developing his products and solutions and to pursue other interests outside the consulting environment. Further correspondence and discussion took place on the subject during October, November and early December 2013. Hattingh was prepared to relax the Streamlink restraint in respect of certain services supplied to Wesgro. There is a factual dispute as to the precise terms of the termination but it is common cause that the distribution agreement came to an end.

[15] The precise date on which this termination occurred is not clear. There does not seem to have been a clean break. The discussions in the latter part of 2013 were concerned mainly with the role of Rush Jnr. Pietersen and Rush Snr continued to provide their services to AWCape customers, on their version as employees of

Streamlink rather than as employees of AWCape. In February 2014 Pietersen terminated her services in respect of AWCape customers and ceased to be a shareholder of AWCape. Rush Snr followed suit in July 2014. Both of them continue to work for Streamlink.

<u>The relief claimed</u>

[16] In respect of Pietersen and Streamlink, AWCape seeks an interdict preventing them from directly or indirectly engaging in business involving the provision of products and services to the listed clients for a period of two years as from 1 March 2014. In the case of Streamlink, the requested interdict is (i) for a shorter period than the three years specified in clauses 2.3, 4.1.3 and 4.1.4 of the distribution agreement; and (ii) accords, in ambit, with clause 2.3 of the distribution agreement. AWCape does not seek to enforce the general prohibition against competition contained in clause 4.1.4. In the case of Pietersen the two-year period is reckoned from the termination of her shareholding in AWCape, in accordance with clause 34.4 of the memorandum of incorporation. In her case, the ambit of the requested restraint is more or less in line with clause 34.4 of the memorandum, save that AWCape does not seek to prevent her from dealing with Streamlink's pre-existing customers.

[17] In respect of Rush Snr, AWCape seeks a similar interdict for a two-year period as from 1 August 2014. The two-year period is in line with clause 10.1.4 of his employment contract. The ambit of the requested restraint is confined to dealing with the listed customers. Once again, AWCape does not seek to enforce the general prohibition against competition contained in clause 10.1.4.

[18] In respect of confidential information, AWCape in summary seeks an interdict to prevent the respondents from divulging or using AWCape's confidential information and an order directing them to hand over all documents in their possession, written or electronic, pertaining to AWCape's business.

Restraints of trade - legal principles

[19] There was no dispute regarding the law applicable to the enforcement of restraints of trade. The following legal principles, taken from leading authorities (including *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A), *Basson v Chilwan & Others* 1993 (3) SA 742 (A), *Rawlins & Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) and *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)), may be mentioned:

(a) There is nothing in our common law which states that a restraint of trade agreement is invalid or unenforceable.

(b) It is in the public interest that agreements entered into freely should be honoured.

(c) However, it is also in the public interest that everyone should, as far as possible, be able to operate freely in the commercial and professional world and that productive capacity should not be sterilised.

(d) Because of the public interest in (c), a restraint of trade may be unenforceable by virtue of being contrary to public policy. Generally this will be the case where the restraint is not reasonably required to protect a legitimate interest of the enforcing party, typically an interest in confidential information or trade connections, the use of which in either case by the restrained party would be competitively harmful to the restraining party.

(e) The question of reasonableness calls for a value judgment guided by the competing policy considerations just mentioned, which are now also underpinned by constitutional rights and values. The court must consider how the restraining party's protectable interests, if any, weigh, qualitatively and quantitatively, against the restrained party's interest in not being economically inactive and unproductive. The enquiry covers a wide field, and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.

(f) The burden of proving that the restraint is contrary to public policy and thus unenforceable rests on the restrained party.

(g) The reasonableness of the restraint must be assessed with reference to the circumstances prevailing at the time of enforcement.

(h) That the restrained party contractually acknowledged the reasonableness of the restraint may be taken into account in assessing enforceability but can never be decisive.

[20] The fact that in motion proceedings the onus rests on a respondent does not reverse the operation of the *Plascon-Evans* rule (*Ngqumba en 'n Ander v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259E-263D). If there is a genuine dispute of fact bearing on the question whether the restraint is unenforceable, the respondent's version must be accepted unless the applicant seeks a referral to oral evidence (*Rawlins* supra 541I-542B).

[21] The general requirements for a final interdict, which is what AWCape in this case seeks, are trite: (i) a clear right on the part of AWCape; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of any other satisfactory remedy.

<u>The restraints - assessment</u>

The 'products and services'

[22] As observed, the notice of motion follows clause 2.3 of the distribution agreement and clause 34.4 of the memorandum in seeking to restrain the respondents from engaging in business 'involving products and services with any customers of' AWCape. There was some debate about the meaning of the expression 'products and services'. On the face of it the expression is unrestricted. I do not think it is limited to the products and services which AWCape provided to its customers immediately prior to the conclusion of the distribution agreement or to the additional products and services which Streamlink brought to the table. Indeed, this type of distinction would have no textual support in the memorandum of incorporation, which was not concerned with the relationship with Streamlink at all.

[23] In context, the expression ‘products and services’ may by necessary implication be limited to products and services in the IT field. Beyond this I do not think it is limited to the products and services actually supplied by AWCape or Streamlink at any given point in time. Accordingly, and as framed, the restraints provide protection to AWCape not only in respect of its actual product offering from time to time but also in respect of potential expansions of the product offering into other IT products and services.

The excluded customers

[24] Mr Brembridge drew a distinction in argument between the enforceability of the restraints and the question whether, for purposes of obtaining an interdict, AWCape had established a breach or reasonable apprehension of a breach of the restraints. The evidence regarding the breach or reasonable apprehension of breach focused on the fact that the eight excluded clients had switched from AWCape to Streamlink. Mr Brembridge submitted that the respondents had satisfactorily explained these switches, showing in some instances that there had in truth been no breach of the restraints and in other instances that there were reasons why the restraints were not enforceable in respect of the specific customers in question. One must bear in mind, however, that AWCape does not seek to enforce the restraints in respect of the eight excluded customers. While the facts surrounding those customers may be relevant to the question of reasonable apprehension of injury, the enforceability of the restraints must be judged with reference to the 30 listed customers in respect of whom AWCape seeks to enforce the restraints. Facts peculiar to the eight excluded customers would not be facts demonstrating why it would be contrary to public policy to enforce the restraints in respect of the 30 listed customers.

[25] Bearing these distinctions in mind, I deal briefly with the circumstances of the eight excluded customers. Three of them – Achievement Awards, Trader’s Warehouse and UCS/Moresport – appointed Streamlink in place of AWCape as their accredited Sage agent during the period March - May 2014. Since they were pre-existing Streamlink customers, the restraints in the distribution agreement did not prevent Streamlink from dealing with them. Streamlink was thus entitled to

resume its position as their accredited Sage agent. This exception to the restraints in the distribution agreement is of potential application to only one of the 30 listed customers, Oom Polla se Winkel (Pty) Ltd ('OPW'). OPW is a pre-existing Streamlink customer which chose, after termination of the distribution agreement, to remain with AWCape. Although I was not addressed on the matter, I do not think the distribution agreement prevents Streamlink from competing for OPW's custom merely because, for the moment, OPW has not switched back to Streamlink. On an ordinary reading of clauses 2.3 and 4.1.4 the exemption in respect of the pre-existing Streamlink customers is absolute.

[26] The next three excluded customers with which I deal are SPH Kundalila ('SPH'), Smit Amandla Marine ('SAM') and Duferco Steel ('Duferco'). These customers appointed Streamlink as their Sage agent on various dates in August and October 2014. They are not pre-existing Streamlink customers. The respondents contend, however, that AWCape has no proprietary interest in respect of these customers worthy of protection by way of a restraint. The facts underlying this contention are briefly the following. During 2012 Ms Evelyn Wiehahn ('Wiehahn'), who conducted business under the name Proacctive, concluded a collaboration agreement with AWCape. If there was a written contract between AWCape and Wiehahn it has not been adduced as an exhibit in this case but the arrangement seems to have been similar to the Streamlink distribution agreement, in that Wiehahn brought certain customers to AWCape on the basis that she would be entitled to take them back if her agreement with Streamlink was terminated. The agreement was terminated in September 2014. SPH, SAM and Duferco were pre-existing Wiehahn customers. The respondents allege that Wiehahn did not intend herself to continue servicing them and therefore referred them to Streamlink. They say that during the period of her agreement with AWCape Wiehahn was the person who exclusively dealt with them. The respondents had no dealings with these customers and there was thus no 'trade connection'justifying a restraint.

[27] The fact that Wiehahn could have taken back the customers does not in itself mean that Streamlink could lawfully deal with them on Wiehahn's referral. The three customers in question were AWCape customers before they switched to Streamlink, even though Wiehahn had brought them into AWCape's business. Wiehahn's right

was limited to taking them back if she so wished. She could not exempt the respondents from their restraints.

[28] However, the respondents go further and allege that during their time at AWCape they had no dealings with SPH, SAM and Duferco so that there was no trade connection of which they could take advantage after the termination of the distribution agreement. Whether the respondents were aware of confidential information which could have been of assistance in competing for the business of these customers is unclear. The evidence regarding confidential information or lack thereof was of a general nature; it did not focus on these specific customers.

[29] In regard to trade connection, I am doubtful whether its absence in relation to these three specific customers renders the restraint unenforceable in respect of them. If the restrained party's opportunity to take advantage of trade connections is on the facts of the case a general justification for a restraint of trade, I do not think the law requires that the enforceability of the restraint be tested separately in relation to each customer. In *Rawlins*, for example, a two-year restraint in general terms was enforced on the basis that the appellant had not shown an absence on his part of any significant personal knowledge of or influence over the persons with whom he dealt as a salesman. The appellant's evidence was that during his employment with the respondent he largely dealt with his own pre-existing customer base rather than the respondent's other customers. The court found that his employment with the respondent gave him the opportunity to strengthen his relationships with his pre-existing customers and that this justified the restraint. Notwithstanding evidence that Rawlins did not deal with other customers of the respondent, the court did not limit the enforceability of the restraint.

[30] However, and even if one assumes that the enforcement of the restraints as against these Wiehahn customers would have been contrary to public policy, the respondents do not say that any of the listed customers in respect of whom AWCape seeks to enforce the restraints are Wiehahn customers or that they stand on a similar footing to SPH, SAM and Duferco.

[31] The next excluded customer is RMS Shopfitters ('RMS'). On 21 October 2014 this customer appointed Streamlink as its Sage agent in place of AWCape. The respondents say that they did not solicit RMS' business. RMS had recently become an AWCape client. Wiehahn provided consulting services to RMS on behalf of AWCape as well as certain accounting services in her own right. She continued providing services to RMS after the termination of her agreement with AWCape. At about this time, so the respondents say, RMS decided to discontinue a database hosting service provided by AWCape and instead to use an in-house server to store its database. This switch was done by RMS' own IT personnel. RMS told Wiehahn that because they intended to terminate the AWCape hosting service they would require someone to assist in the administration of the in-house server. Because (so the respondents allege) AWCape did not have the capability to offer this service, Wiehahn referred RMS to Streamlink.

[32] What does not appear to be in dispute, however, is that AWCape was previously RMS' Sage agent. The respondents do not say that Wiehahn brought RMS to AWCape as a Sage client and that Wiehahn had a right to take RMS back as a Sage client after the termination of her agreement with AWCape. At least in regard to the provision of Sage products and related after-sale and support services, RMS does not seem to stand on a different footing from the other listed customers. The fact that the respondents did not actively solicit RMS' custom is irrelevant because the restraints are not limited to solicitation.

[33] It is convenient here to mention certain email correspondence relating to RMS. Hattingh attached to his founding affidavit email communications between Pietersen, Wiehahn and the Rushes on 14 August 2014. From the first email it appears that they wanted to locate a copy of AWCape's contract with RMS. Pietersen wrote to the others as follows:

> 'Good news! Steve has located a copy of the contract between RMS & AWC and there is no notice period required, so as soon as we get the go-ahead and have the signed forms (even though we won't send them until André gives the go-ahead so) we can get going. [sic]
>
> Will get the quotes prepared asap and send them along.'

(The 'André' mentioned in this email is Mr André Tancred of RMS. It appears from another email of the same date that he did not have a copy of RMS' contact with AWCape.)

[34] In the event, Pietersen was mistaken in thinking that Rush Snr had found the RMS contract. This appears from an email she wrote to Tancred (with copy to Wiehahn and Rush Jnr) on 18 August 2014. She annexed this email to her answering affidavit.[2] The email reads thus:

'It appears that Steve was mistaken when he thought he had found a signed RMS/AWCape contract. He had been looking at the Standard T & C Agreement which does not have an expiry date in it. He cannot find a signed contract. I think you will be quite safe giving a week's notice.

Evelyn indicated that you have decided to move your server to on premise, as you were concerned about the reaction of AWCape. Just for your information, we have servers ready for you to change over at a moment's notice which will be a lot quicker than commissioning and setting up a server on site. Please let me know if we can provide you with costs relating to this, just in case this route is still open to consideration. You can always change your mind again in the future.'

[35] This email, of which AWCape was not aware when it launched the application, lends force to its apprehension that the respondents were using, or attempting to use, AWCape's confidential information. Rush Snr evidently had in his possession a number of documents relating to AWCape's business and initially thought that the RMS contract was among them. The respondents had no compunction in trying to use the document with a view to assisting RMS' departure from AWCape. It also appears from the email of 18 August 2014 that RMS' decision to move its server in-house was not the cause of the shifting of business to Streamlink. Rather, the decision to move the server in-house (with the resultant need for RMS to obtain administration support services from Streamlink) appears to have been a precaution prompted by RMS' concern 'about the reaction of AWCape'. Reaction to what? The only event identified in the papers to which an adverse reaction from AWCape might have been anticipated was a decision by RMS to

[2] The email was alluded to in her answering affidavit but mistakenly not attached. It was, by agreement, handed up during the course of argument under cover of a short supplementary affidavit.

appoint Streamlink as its Sage agent in place of AWCape. The timing fits in with this thesis: the in-house server, according to the respondents, became operational on 13 October 2014; RMS formally appointed AWCape as its Sage agent on 21 October 2014.

[36] The last of the eight excluded customers is Wesgro. On 28 June 2014 Wesgro appointed Streamlink as its Sage agent in place of AWCape. The reason Wesgro gave for the switch in the appointment form was that Streamlink was now servicing all Wesgro's IT requirements. As I have already mentioned, a partial relaxation of the restraint in respect of Wesgro was agreed when Rush Jr left AWCape. The initial emails between Rush Jnr and Hattingh indicated that the former's new role in Wesgro would not be in conflict with the services provided by AWCape to Wesgro. In an email dated 25 November 2013 Hattingh set out his proposal 'in layman's terms, and without prejudice'. He said that AWCape would relax the restraint only for Wesgro, the extent of the relaxation being that

'… you will be allowed to provide goods and services to Wesgro similar to products and services offered by AWCape and such services will be limited to the creation and support of their infrastructure, hosted servers, Sage CRM support but will exclude Sage 300 ERP (Accpac) and related third-party products such as eWorkflow.'

[37] This was the last of the emails attached to Rush Jnr's supplementary answering affidavit. It appears, however, from Hattingh's supplementary replying affidavit that there was further discussion, leading to an email by Hattingh of 29 November 2013 recording various matters, in response to which Rush Jnr on 3 December 2013 interpolated his comments. The following is relevant to Wesgro (for convenience I italicise Rush Jnr's interpolations):

'◦ We are happy to allow you to join Wesgro on a one-year contract as outlined by Ian Blackie, but the services that you will supply to Wesgro should be limited to CRM, cloud & infrastructure services. *[AR] There are other services that are being supplied to Wesgro, which are in fact the primary focus of contracts in place, but which don't conflict.*

◦ You are not allowed to get involved in Accpac or eWorkflow services at Wesgro on behalf of AWCape. *[AR] As previously mentioned – as AWCape is the business partner to Wesgro – it is only right that I forward requests for Accpac/eWorkflow support to AWCape.*

◦ By allowing you to engage in business for your own account with Wesgro, this does not constitute a waiver of our rights under this agreement.

◦ Other customers of AWCape – you are not allowed to engage in business with any of the existing AWCape customers in accordance with the attached agreement concluded with you, and in particular with reference to paragraphs 2.3 and those contained in paragraph 4 of the agreement …

◦ *[AR] Regarding the above 2 points – as I have mentioned before I am, as you have been doing, taking these under advisement so everyone is protected. As I have stated before, the legal opinions I have indicate that the contract referred to above would, at worst, need rectification, as it is flawed around the restraint.'*

[38] These emails show that AWCape was not prepared to grant a blanket exclusion in respect of Wesgro. In particular, Rush Jnr would not be permitted to supply Sage 300 ERP (Accpac) and eWorkflow services to Wesgro. Rush Jnr seems to have accepted this state of affairs. But even if he did not, the emails indicate that AWCape did not waive the restraint in respect of these particular products and services. Yet in the event Wesgro in June 2014 appointed Streamlink as its Sage agent for all products. Accordingly, and though Hattingh can be criticised for not having acknowledged the partial relaxation in his founding affidavit, Streamlink's conduct in accepting all Sage business breached the restraints. At any rate, AWCape does not now seek an interdict in respect of Wesgro. Any special arrangements excluding Wesgro from the restraints have no bearing on the enforceability of the restraints in respect of the listed customers.

Dowson and NSFAS

[39] There are two other customers – both on the list of 30 – calling for comment. They are Dowson & Dobson Industrial ('Dowson ') and National Student Financial Aid Scheme ('NSFAS'). Prior to the scheduled hearing of the urgent interim relief on 5 November 2014 the respondents disclosed that, in addition to the eight excluded customers, they currently had dealings with Dowson and NSFAS. Accordingly, and although in terms of the interim order the respondents agreed not to engage in business with the listed customers, an exception was made for Dowson and NSFAS in the following terms:

'7.2.1 In respect of Dowson & Dobson Industrial Respondents shall be entitled to continue to provide existing maintenance and support services; and

7.2.2 In respect of [NSFAS] the Respondents shall not provide any products and/or services, save that Respondents shall be entitled to complete the work which they have been contracted to perform and which has been partially performed if so required or requested by NSFAS.'

[40] Rush Jnr dealt with these two customers in his answering affidavit. In regard to Dowson, he said that Streamlink continues to provide maintenance and support services to Dowson which AWCape does not have the capability to render. He alleged that because of this lack of capability Hattingh agreed that Rush Jnr could continue to render the services. In the replying affidavit Hattingh admitted that this was 'initially agreed' but said that AWCape had subsequently acquired the necessary resources to service Dowson. In a supplementary answering affidavit Rush Jnr denies that AWCape has acquired the necessary capability.

[41] Clause 2.4 of the distribution agreement provides that no alteration or waiver of the terms thereof will be of any force or effect unless reduced to writing and signed by the parties. Nevertheless, Hattingh has admitted that there was 'initially' an agreement that Streamlink could provide the maintenance and support services in question to Dowson. The word 'initially' refers, as I understand, to the time when the relationship between AWCape and Streamlink ended. Hattingh does not say that his agreement with Rush Jnr was limited in point of time. Accordingly, and despite the absence of a formal written waiver, I do not think it would be right to enforce the restraint in respect of the provision of the existing maintenance and support services mentioned in para 7.2.1 of the interim order. However, and subject to any general findings regarding the enforceability of the restraints, they will remain applicable to all other products and services supplied to Dowson (and in particular Sage products).

[42] In regard to NSFAS, Rush Jnr alleges in the answering affidavit that NSFAS is not an AWCape customer. NSFAS' Sage agent is eNovate. AWCape did render certain services to NSFAS but was contracted to do so by Deloittes; NSFAS was not AWCape's direct customer in respect of these services. The services were

physically provided by Pietersen through Streamlink. These allegations are effectively admitted by Hattingh in reply. He says that it was anticipated that once the project for which AWCape had been contracted through Deloittes was completed NSFAS would contract directly with AWCape to provide maintenance and support services. That may be so but NSFAS nevertheless was at no stage a direct customer of AWCape. I am not inclined to interpret the expression 'any customer' in the distribution agreement and memorandum of incorporation broadly so as to include indirect relationships.

The enforceability of the restraints in general – trade connections

[43] This concludes the discussion regarding customers or alleged customers who stand on a special footing. Insofar as the listed customers are concerned, the upshot is that the restraints are not enforceable in respect of NSFAS and OPW and are not enforceable in respect of Dowson in regard to the existing maintenance and support services mentioned in para 7.2.1 of the interim order of 5 December 2014. Save as aforesaid, a consideration of the circumstances surrounding the excluded customers does not lead to a conclusion that the restraints are not enforceable against the listed customers.

[44] What remains to consider is whether the respondents have put up facts to show that in general the enforcement of the restraints in respect of the listed customers would be contrary to public policy. Since the onus was on the respondents, AWCape was entitled to deal with these matters more fully in reply than in the founding papers. This has not caused procedural unfairness because the respondents were granted leave to file supplementary answering papers.

[45] In regard to customer connections, Hattingh in the founding affidavit says that Pietersen and Rush Snr were responsible for installing the Sage computerised accounting systems at the offices of AWCape's customers and for providing after-sales support in respect of the systems. As a result of ongoing contact, they built up relationships with AWCape's customers and knowledge of their IT requirements. In their answering papers the respondents allege that Rush Snr is not a qualified Sage consultant and has never installed Sage systems, his services being limited to

consulting services as set out in the distribution agreement. Hattingh's riposte in the replying affidavit is that Pietersen attended to many Sage installations and provided ongoing support. Rush Snr was designated as AWCape's Services Manager and was in this capacity responsible for project management and ensuring that services were delivered according to customer expectations. He was required regularly to visit customers to keep them informed regarding the progress of projects. He was a team member of most Sage implementation projects undertaken by AWCape during the period of his employment.

[46] Although the respondents take issue with Hattingh regarding the precise nature of Rush Snr's work, they do not appear to deny that Pietersen and Rush Snr both had occasion to develop relationships with key personnel of AWCape's customers. They certainly do not allege facts to show that there was an absence of such relationships with the concomitant ability to influence customer behaviour.

[47] Hattingh's allegations regarding Rush Jnr in the founding papers focused on Wesgro. There seems little doubt that during the period of the distribution agreement Rush Jnr spent some months at Wesgro's offices working on a special AWCape project. In the addendum he signed in May 2013 he was described as AWCape's Divisional Director. He was at all material times Streamlink's sole member. In the answering papers he did not allege an absence of relationships with the listed AWCape customers. In the replying affidavit Hattingh said that the respondents and Rush Jnr developed strong relationships with key personnel of AWCape's customers, becoming privy to information concerning their IT structures and future needs and requirements. The nature of the close association allowed the respondents to take advantage of AWCape's trade connections with its customers. In his supplementary answering affidavit Rush Jnr did not deny this. What he said in para 36 was that the respondents did not solicit the customers who had switched to Streamlink and that only Wiehahn had dealt with the customer she had referred to them.

[48] Since the respondents say that during the period of the distribution agreement Pietersen and Rush Snr dealt with AWCape customers via Streamlink, any relationships they developed with AWCape customers would provide a basis for

restraints not only against them personally but also against Streamlink. Relationships between Rush Jnr and AWCape customers would provide a further basis justifying the restraints as against Streamlink.

[49] In my opinion, the respondents have not discharged the burden of showing that AWCape lacks a proprietary interest in the form of customer connection justifying the restraints. Accordingly, and as in *Rawlins* (cf 541B-C), it would not matter whether or not the restraints were also justified with reference to trade secrets.

[50] The respondents have also not discharged the burden of showing that the restraints are unreasonable, having regard to AWCape's interest in its customer connections. The reaching of this conclusion is made easier by the relatively modest form in which AWCape seeks an interdict. Firstly, AWCape has reduced the restraint period to two years. This does not seem an unreasonable period for diluting the influence which the respondents might during the period of the distribution agreement have been able to develop over AWCape customers. And as matters stand, the restraints will only be operative for another nine months in the case of Streamlink and Pietersen and for another 14 months in the case of Rush Snr.

[51] Second, AWCape only seeks to enforce the restraint in respect of actual customers. And even in respect of actual customers, there is an exemption for Streamlink's pre-existing customers (despite the fact that the respondents' relationships with the pre-existing customers might have been strengthened during the period of the distribution agreement). While a non-compete restraint in wider terms might be justified by customer connection, the respondents can have little reason to be aggrieved at a temporary restriction against dealing with persons who are actual customers of AWCape and whom the respondents did not introduce to AWCape. The distribution agreement gave the respondents entrée to AWCape's customer base. In the founding affidavit Hattingh said that Pietersen and Rush Snr had knowledge of and experience in the installation and support of computer systems while AWCape had a quite extensive customer base which was growing at a good pace. In his answering affidavit Rush Jnr, while disputing that Streamlink was in financial distress at the time the distribution agreement was concluded, says

that the agreement was an opportunity for Streamlink to extend the network of customers to whom it could provide its suite of products and services. If Streamlink was not in financial distress and if the respondents believed that their wider service offering would have enabled them to win existing AWCape customers through ordinary competition, they would not have needed the distribution agreement.

[52] The restriction on the respondents' right to compete freely in the market is very limited. There are at least 50 other accredited Sage agents in South Africa. As Rush Jnr himself said in his answering affidavit, there are in the Western Cape and in the rest of South Africa a great number of other firms who conduct essentially the same business as AWCape. The respondents are at liberty to compete for the Sage business currently provided by these other agents and to compete for the custom of other firms which do not currently use Sage or Streamlink's other products and services. The universe of Streamlink's potential customers is large.

[53] In short, I am unpersuaded that AWCape's interest in protecting its trade connections does not, quantitatively and qualitatively, outweigh the interests of the respondents in being able to do business, for the remaining months of the restraint, not only with Streamlink's existing customers and the large universe of potential customers (which they are free to do) but also with the 28 or so listed AWCape customers.

[54] In the answering papers the respondents place considerable emphasis on alleged differences between the businesses of AWCape and Streamlink. As noted, Hattingh in the founding affidavit described AWCape's business as the marketing and selling of Sage accounting products and after-sales support and services. In his answering affidavit Rush Jnr described this business as that of a Sage reseller. He said that although Streamlink too was and still is a Sage reseller, its business was not limited to that of a reseller; Streamlink's business was 'the delivery of complete business solutions to companies to transform the way that they do business'. To do this Streamlink partnered not only with Sage but also with Mweb, Microsoft and others:

'36. By using a combination of Sage & Microsoft Applications, Mweb & Microsoft Infrastructure products and importantly, its own in-house developed products and solutions, Streamlink offers services which can provide a complete bespoke transformation of a company's IT department including ERP & Procurement systems, CRM Systems, Networking and Infrastructure Design & Support, VoIP telephony, Online Data Backups, Digital Marketing and Web Design and Hosting.

37. The important distinction between the business of AWCape and that of Streamlink is thus that, in addition to being a reseller of Sage products, Streamlink trades in the products of its other business partners and in addition, both develops IT infrastructure products and supplies IT infrastructure services of its own and in which it holds the intellectual property and thus has a protectable interest.

38. It was in respect of these products, belonging to Streamlink, in respect of which AWCape was contracted, by way of the distribution agreement to act as Streamlink's distribution agent. As agent AWCape could not and did not acquire rights in these products.'

[55] Rush Jnr goes on to allege that Streamlink's products were not and are not in competition with AWCape's business because AWCape did not and does not have an equivalent suite of products. The attraction of the distribution agreement for AWCape was that it could offer a wider range of services. With the termination of the distribution agreement, AWCape's capability to provide this wider range of services also came to an end.

[56] In reply Hattingh says that subsequent to the departure of the respondents AWCape has appointed a new team making up its 'systems engineering division' to offer the services previously offered to AWCape's customers via Streamlink. Rush Jnr scoffs at this in his supplementary answering affidavit, saying that AWCape's engineering division exists 'in name only' but does not have the skills or capabilities to offer the services in question.

[57] It is not easy for a lay person to understand the precise boundaries of the businesses of AWCape and Streamlink at the time the distribution agreement was concluded though it seems clear that Streamlink brought certain additional skills and products to the table. I cannot resolve the factual dispute as to whether AWCape's systems engineering division is a serious contender to provide the additional services which Streamlink can offer. I do not think, however, that a finding on these matters is necessary. The listed customers are AWCape's customers. Let us

assume that immediately prior to the conclusion of the distribution agreement AWCape was only able to provide its customers with Sage products and related services. Even so, by concluding the distribution agreement AWCape put itself in a position to extend its product offering. Although AWCape has no proprietary interest in unique products developed by Streamlink, it has a legitimate interest in protecting its business relationships with its customers not only in respect of Sage products but also in respect of the expanded range of services which it was able to offer to its customers by contracting with Streamlink. Upon Streamlink's departure, AWCape was and is entitled to attempt to replace the skills which Streamlink previously provided, thereby enabling it to continue providing an expanded range of services.

[58] For this reason, and even if it were clear that the respondents had no intention of offering Sage products and related services to the listed customers, I think AWCape would have a legitimate interest in restraining them, for a limited period, from offering the additional services which Streamlink previously contributed and which AWCape, following the termination of the distribution agreement, is entitled to try to replace. But I do not understand the respondents in any event to accept a restraint against supplying Sage products and related services to AWCape's existing customers. As I read the answering papers, Sage features, or at least generally features, as a component of the 'complete business solution' that Streamlink offers its customers. Streamlink's case is that because it offers 'bespoke' products of which Sage only forms part, and because AWCape does not do likewise, the restraints are not enforceable. That contention is unsound. On the basis of its proprietary interest in its trade connections, AWCape is at very least entitled to protect its business of providing Sage products by restraining the respondents from using their influence to sell to AWCape customers 'complete business solutions' which incorporate Sage products and services, thus causing AWCape a corresponding loss of Sage business.

The enforceability of the restraints in general – confidential information

[59] Although it is not strictly necessary in the present case to deal with the question of confidential information as an additional basis for justifying the restraints,

I intend to do so since confidential information is in any event the subject of distinct relief claimed in paras 2.1 and 2.2 of the notice of motion.

[60] In the founding affidavit Hattingh says that the respondents, during their time with AWCape, became privy to highly confidential information 'concerning customer lists, the requirements of individual customers, the key persons at the individual customers, the future requirements of individual customers and [AWCape's] pricing structures'. In the distribution agreement Streamlink acknowledged that it would acquire confidential information of this kind, as did Rush Snr in the employment contract.

[61] The respondents in Rush Jnr's answering affidavit criticise AWCape's supposed inability to explain or identify the confidential information. They say that because AWCape's business is only that of a Sage reseller, the supposed confidential information is common to all Sage agents or is proprietary or confidential to Sage or is dictated or regulated by Sage. Sage provides the necessary manuals and training information. They claim that Sage dictates the contractual arrangements between agents and their customers. Pricing is determined by Sage. Sage's price list is known to all agents and often by customers as well.

[62] In his replying affidavit Hattingh said that AWCape has developed business strategies which he regards as unique. Most IT projects undertaken by AWCape for a particular customer are formally managed by a project manager, following specific procedures. Individual IT projects often take a long time to implement. The respondents and Rush Jnr became privy to information concerning individual customers' existing IT structures and their future needs and requirements. He emphasised that AWCape did not lay claim to intellectual property in Sage software and Sage's manuals and training programs. He alleged that the respondents also obtained knowledge of AWCape's pricing structures and the terms of the contracts concluded between AWCape and its customers. In regard to contractual arrangements, he stated that while customers signed an end-user license agreement with Sage, all other contractual arrangements regarding installation and support were the subject of separate contracts, the content of which was confidential

to AWCape. Although Sage's price lists were not confidential, AWCape's prices for installing, implementing and maintaining IT systems were indeed confidential.[3]

[63] Hattingh alleged, further, that AWCape had designed, developed and implemented what is known as a customer portal (an electronic helpdesk), which he believed to be unique among Sage agents. AWCape had also designed, developed and supplied hosted virtual server products, branded as AwCloud Solutions.

[64] In his supplementary answering affidavit Rush Jnr says that AWCape's price list cannot be confidential because AWCape quotes its price list to its customers and anyone else who seeks a quote.[4] This is, as I read it, an admission that AWCape indeed determines its own prices for installing, implementing and maintaining IT systems, including Sage. Rush Jnr's allegation is now that AWCape's prices, like Sage's, are not confidential. Even if Rush Jnr had persisted with an allegation that AWCape did not determine prices for the services it provided, I would not have regarded this as a genuine dispute of fact. It is inconceivable that AWCape cannot determine its own prices for related services, even if it is bound to charge a particular price for the Sage software itself. Dictation of this kind by Sage, apart from being contrary to commercial common sense, would be contrary to s 5 of the Competition Act 89 of 1998.

[65] Although Rush Jnr referred to AWCape's 'price list', Hattingh did not say that AWCape issued price lists for its services to customers; he said that the prices AWCape charged its customers constituted confidential information. Be that as it may, and even if AWCape has price lists which are available to its customers, it is a common occurrence in commerce for negotiated contractual prices to differ from price lists. Larger customers, for example, may be able to bargain for better rates than smaller customers.

[66] In regard to the customer portal, Rush Jnr said in his answering affidavit that it was not unique but 'a simple call-logging system'. The hosted server products

[3] Paras 10 and 49-51.
[4] Para 58.

were likewise not confidential. These had previously been supplied via Streamlink and were transferred to AWCape after termination of the distribution agreement.

[67] I do not need to decide whether Hattingh has exaggerated the extent of AWCape's confidential information. I accept that there must be some information of a confidential nature relating to AWCape's business, including negotiated contract terms and information pertaining to the IT requirements of its customers. Even if AWCape's business were confined to the supply of Sage accounting packages and related services, these packages are sophisticated software products, not a simple physical commodity. It is inevitable that some degree of customisation is needed to adapt the packages to the particular needs of customers. In any event, I do not accept that AWCape's business is confined to that of a Sage reseller. AWCape extended its product range by concluding the distribution agreement with Streamlink. Information regarding its customers' IT needs is also relevant to the provision or potential provision of such additional services to its customers. As I have explained, AWCape is entitled to attempt to supply such services by procuring expertise in substitution for that hitherto provided by Streamlink. Accordingly, information obtained by AWCape in regard to its customers' broader IT needs is protectable confidential information.

[68] I thus find that the respondents have failed to discharge the burden of proving that the restraints are not also justified on the basis of protecting confidential information. For similar reasons, the contractual terms in the distribution agreement and Rush Snr's employment contract for the protection of confidential information are enforceable.

<u>Requirements for an interdict</u>

[69] The analysis thus far leads to the conclusion that AWCape has established a clear right in regard to the restraints and confidential information. The only other requirement for an interdict calling for discussion is injury or reasonable apprehension of injury.

[70] Although AWCape's loss of Wesgro, RMS, SPH, SAM and Duferco is characterised by certain special circumstances not applicable to the listed customers, I have nevertheless concluded that the respondents breached the restraints in taking on their Sage business (though in respect of Wesgro, the breach would be limited to the supply of Sage 300 ERP and related third-party products such as eWorkflow). The loss of this business constitutes injury suffered by AWCape and, together with Pietersen's email correspondence of August 2014 relating to RMS, provided a reasonable basis for apprehending future conduct in breach of the restraints. There was thus a proper basis for launching an application for an interdict to enforce the restraints. The answering papers did not neutralise the reasonable apprehension. Although the respondents in some respects provided satisfactory answers, the position they adopted, to the effect that that the restraints were not enforceable, strengthened rather than weakened the apprehension that future harm would be suffered in the absence of an interdict.

[71] The requirements for an interdict are thus satisfied in respect of the relief sought in paras 2.3 and 2.4 of the notice of motion (the restraints of trade).

[72] Insofar as confidential information is concerned (paras 2.1 and 2.2 of the notice of motion), the email correspondence of August 2014 relating to RMS indicates, to my mind, that Rush Snr was in possession of confidential information relating to AWCape's business affairs and that the respondents were prepared to take advantage of such confidential information in dealing with RMS. It is naturally difficult for AWCape to know precisely what confidential information the respondents have in their possession. The respondents' attitude (which I have rejected) that AWCape has no confidential information does not inspire confidence that they do not have any in their possession.

[73] Accordingly, I think AWCape is entitled to an interdict against the use of confidential information and an order for the delivery-up of all documentation containing such confidential information. Para 2.2 of the notice of motion does not contain a date by which the confidential information must be surrendered and does not specify precisely how it must be handed over. Since I was not addressed in that regard, I do not intend to go beyond the terms of the notice of motion. I trust that the

parties will reach a sensible arrangement. Prima facie the appropriate procedure would be for the respondents to file affidavits within a reasonable period listing the documents in their possession containing confidential information relating to AWCape's business. Hopefully this judgment will provide some guidance as to what sort of information is to be regarded as confidential. To the extent that the confidential information is in electronic form, a mutually acceptable arrangement will need to be reached for the removal of such data from the respondents' computers and storage devices.

Conclusion

[74] In regard to costs, this matter originally came before Riley AJ as a matter of urgency on 5 November 2014. The costs of that hearing were reserved. The application was issued on Wednesday 29 October 2014 and only served on the respondents after ordinary business hours. AWCape's attorneys had already addressed a letter to Streamlink on 11 September 2014 regarding alleged breaches of the restraints. Streamlink's attorney responded on 30 September 2014, stating that any legal action would be vigourously defended. It was not reasonable for AWCape to delay until the end of October and then give the respondents barely three court days' notice of the application. This degree of urgency was not satisfactorily explained in the founding affidavit. If the application had been launched earlier with more generous notice, an interim arrangement might have been reached at lower cost. As a mark of the court's disapproval I intend to disallow the costs of that appearance.

[75] In regard to the appearance on 9 February 2015, a costs order has already been made.

[76] I grant the following order:

(a) The respondents are interdicted and restrained from divulging and/or utilising any confidential information in their possession relating to the applicant's clients, transactions, business and/or affairs including its trade connections and trade secrets, either directly or indirectly.

(b) The respondents are directed to hand over to the applicant all documents, notes, memoranda and records, whether written or electronic, pertaining to the applicant's business in their possession, including all copies thereof.

(c) The respondents are interdicted and restrained, for a period of two years calculated from 1 March 2014 in the case of the first and third respondents, and for a period of two years calculated from 1 August 2014 in the case of the second respondent, from directly or indirectly engaging in business involving the provision of products and/or services to the applicant's clients, a list of which clients is annexed to the founding affidavit of Johannes Hendrik Hattingh marked 'JH1', save that the interdict and restraint in this paragraph shall not apply to clients 22 and 23 on the said list (National Student Financial Aid Scheme and Oom Polla se Winkel (Pty) Ltd) and shall, insofar as client 7 on the list is concerned (Dowson & Dobson Industrial), not apply in respect of the existing maintenance and support services referred to in para 7.2.1 of this court's order dated 5 November 2014.

(d) The respondents shall pay the applicant's costs jointly and severally, the one paying the others to be absolved, save that no order is made in respect of the costs of the appearance on 5 November 2014.

ROGERS J

APPEARANCES

For Applicant	Mr PA Corbett
	Instructed by

Fairbridges

16th Floor Main Tower

Standard Bank Centre

Heerengracht

Cape Town

For Respondents	Mr I Brembridge
	Instructed by
	Adriaans Attorneys
	16th Floor, 2 Long Street
	Cape Town