IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

CASE NUMBER: 21838/2015

13/4/2015

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

13.4.2014
DATE

SIGNATURE

In the matter between:

CUREMED CC	Applicant
trading as Curemed Healthcare Consultants	
and	
VICKY VAN ONSELEN	First Respondent
MARIETHA CIAMPI	Second Respondent
HESTER DU PREEZ	Third Respondent
SHC PROJECTS PROPRIETARY LIMITED	Fourth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicant launched this application against three of its ex-employees, being the first to third respondents ("the three respondents") and their present employer, the fourth respondent, claiming, *inter alia*, the following relief:

> "*2. That:*
>
> *2.1 The First, Second and Third Respondents shall, for a period 12 (twelve) calendar months, from date of this order, be interdicted and restrained from:*
>
> *2.1.1 Unlawfully competing with the Applicant by, applying intellectual property of the Applicant, consisting of the Applicant's confidential data which includes all information, application forms and personal details of Clients belonging to the Applicant as well as the data base of all information relating to Clients of the Applicant.*
>
> *2.1.2 Contacting, soliciting or continuing to deal with the Applicant's clients who have been so solicited and or contacted by the First, Second* and or *Third Respondents;*
>
> *2.1.3 Contacting and/or soliciting the Applicant's clients to:*
>
> *2.1.3.1 Terminate their association with the Applicant; and/or*
>
> *2.1.3.2 Discontinue their transactions with the Applicant; and/or*
>
> *2.1.3.3 Act contrary to the interests of the Applicant.*
>
> *2.2 The First, Second and Third Respondents shall:*

2.2.1 *Forthwith return to the Applicant, all originals and or copies of all the Applicant's confidential information, in the possession of the First, Second* and/or *Third Respondents, including but not limited to:*

2.2.1.1 *All confidential information relating to the Applicant's manuals;*

2.2.1.2 *All confidential information relating to the Applicant's, specifically including, the Applicant's manuals, client lists, client contact details and client application forms.*

2.2.2 *Permanently destroy or delete all confidential information of the Applicant contained in electronic format from whatever memory source.*

2.2.3 *Permanently destroy and or delete all confidential information of the Applicant contained in those e-mails which the First, Second* and or *Third Respondents sent from their work e-mail address, to their personal e-mail addresses and or those belonging to* and/or *being utilised by unauthorised third parties.*

2.3 *The First, Second and Third Respondents shall be interdicted and restrained from continuing to engaging in business or any other related activities with the Applicant's clients, for a period 12 (twelve) calendar months from date of this order.*

3. *That the Fourth Respondents shall, for a period of 12 (twelve) calendar months, from date of this order, be interdicted and restrained from unlawfully competing with the Applicant by, applying intellectual property of the Applicant, consisting of the Applicant's confidential data which includes all information, application forms and personal details of Clients belonging to the Applicant as well as the sata base of all information relating to Clients of the Applicant, which information has*

been made known to the Fourth Respondent by the First, Second and/or Third Respondents, if any."

[2] The respondents oppose the relief claimed by the applicant.

BACKGROUND AND COMMON CAUSE FACTS

[3] The applicant markets medical scheme products and so-called gap cover products (short term products) to the public. Although the applicant's principal place of business is in Pretoria, Gauteng, the applicant also has offices in KwaZulu Natal and the Western Cape.

[4] The fourth respondent also markets medical scheme products and gap cover products (short term products) to the public. The fourth respondent trades throughout the Republic of South Africa and is a direct competitor of the applicant.

[5] The three respondents have been in the employment of the applicant as health care advisers since respectively, May 2005, March 2009 and February 2007.

[6] All three respondents entered into Healthcare Adviser Agreements with the Applicant, which agreement contain, for present purposes, *inter alia*, the following clauses:

"11 Ownership of information

11.1 The Adviser acknowledges that all information, application forms, and personal detail of Clients belong to the Broker or another lawful owner. Equally, the data base of all information relating to Clients is that of th Broker.

11.2 .....

11.3 The Adviser agrees that, when this Agreement ends, for whatever reason, he/she will not persuade, invite, or suggest to any Client to

11.3.1 terminate their association with the Broker;

11.3.2 discontinue their transactions or in any way to act contrary to interests of the Broker or the Client."

and

"13 Restraint

13.1 For the purposes of this clause 13, unless the context indicate a contrary intention:

13.1.1 "area" means the Republic of South Africa;

13.1.2 .....

13.1.3 .....

13.1.4 "restraint period" means the duration of this Agreement and a period of 2 (two) years after this Agreement comes to an end.

13.2 Unless and to the extent otherwise agreed in writing with the Broker, the Adviser shall not, during the restraint period and in the area, carry on or have any involvement in or with an entity carrying on a business that competes with the business of the Broker Such restraint also includes preventing the Adviser from making use of or giving personal information or particulars of any person referred to the Adviser through any of the marketing channels in which the Broker operates, notwithstanding that consent may have been obtained before termination of this contract.

13.3 The Adviser agrees that the restraint set out in this clause 13 is reasonable as to subject matter, geographical area, and duration, and i required to protect the proprietary interests of the Broker."

[7] The three respondents, furthermore, entered into Confidentiality and Non-Disclosure Agreements. The applicant does not rely on these agreements in support of the relief claimed and it is not necessary to consider the contents thereof.

[8] The three respondents sold medical aid related services to the public. Once such a service has been rendered, the purchaser becomes a member of a specific medical aid and a client of the applicant. Each client so procured was added to the client list of a specific advisor. The relevant medical schemes paid commission to the applicant in respect of each client.

[9] At the end of January 2015, the three respondents gave a months' notice of their intention to resign from the applicant. During early February 2015, the three respondents received letters from the applicant, in terms of which their attention was drawn to, *inter alia*, the restraint of trade clause in their agreements. At that stage, the first respondent had 926 clients, the second respondent 520 clients and the third respondent 657 clients.

[10] At the beginning of March 2015, the three respondents joined the fourth responded as health care advisors.

[11] On respectively 10 and 11 March 2015, employees of the applicant were contacted by clients of the first and third respondents. Both clients indicated that they had been contacted by the first and third respondents respectively, in order to change their membership to the new brokerage for which the first and third respondents were working. I pause to mention that these allegations were not admitted by the respondents.

[12] On 13 March 2015, letters were sent by the applicant's attorney to the three respondents, warning them to cease and desist from enticing clients of the applicant to move their business to the fourth respondent.

[13] On the same day, Bestmed, one of the medical aid schemes the applicant procured members for, informed the applicant that approximately 50 of their members had indicated their intention to move their medical aid cover from the applicant to the fourth respondent.

[14] The three respondents do not deny moving clients from the applicant to the fourth respondent, but allege that these clients were family members and friends.

[15] In the premises, it is clear that the three respondents have breached the provisions of the restraint of trade clause.

GROUNDS OF OPPOSITION

[16] The three respondents oppose the relief claimed by the applicant on the following grounds:

i) the applicant has failed to prove that it has a clear right; and:

ii) the restraint and relief sought is unreasonably wide.

LEGAL FRAMEWORK

[17] It is at this stage apposite to, first of all, refer to the legal principles applicable to restraint of trade contracts.

[18] The principles have been succinctly summarised in *Basson v Chilwan and Others* 1993 (2) SA 742 A at 776H-777B, as follows:

".....the covenseeking to enforce the restraint need do no more that to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the rerstraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade."

[19] The test for determining reasonableness has been developed to include the following enquiries:

i) is there an interest worthy of protection?

ii) if so, is such interest being prejudiced?

iii) if so, does the prejudice justifies the economic inactivity and unproductivity of the offender;

v) does another facet of public policy having nothing to do with the relationship between the parties, requires that the restraint be either maintained or rejected? and

vi) does the restraint go further than is necessary to protect the interest.

[See: *Basson v Chilwan and Others,supra* at 767G; *Kwik Kopy (SA) (Pty) Ltd v Van Heerden and Another* 1999(1) SA 472 W at 484E]

[20] Customer-connections is deemed a proprietary interest that can be protected by a restraint of trade agreement. [See: *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 T at 502 D-F.

[21] In *Experian SA v Haynes* 2013 (1) SA 135 GSJ at 141 I-J, confidential information worthy of protection has been defined as follows:

"For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it (see Towsend Productions (Pty) Ltd v Leech and Others *2001 (4) SA 33 (C) ([2001] 2 All SA 255) at 53J-54B;* Mossgass (Pty) Ltd v Sasol Technology (Pty) Ltd *[1999] 3 All SA 321 (W) at 333f)."*

[22] In view of the aforesaid principles, the three respondents' opposition to the relief claimed by the applicant will be examined *infra*.

CLEAR RIGHT

[23] The three respondents contend that the applicant has failed to prove:

i) that it is the proprietor of the information it seeks to protect;

ii) that the information qualifies as confidential information;

iii) that such strong customer-connections exist between the three respondents and the clients of the applicant that the clients would follow the three respondents to the fourth respondent; and

iv) the duration of the restraint.

Proprietor of information

[24] In support for their contention in this regard, the three respondents rely the Healthcare Adviser Agreements containing the restraint clause and on a Commercial Facilitators Agreement between the applicant and Bestmed.

[25] Firstly and in respect of the Healthcare Adviser Agreement, the three respondents refer to clause 11.1 *supra* and more specifically the words *" or any other lawful owner"* therein. According to the three respondents, the applicant did not disclose who the other lawful owner of the information is and/or what information of clients belong to such owner.

[26] Secondly, the three respondents aver that, on a proper construction of clauses 6 and 7.1 of the Commercial Facilitators Agreement, it appears that Bestmed is the lawful owner of, at the very least, some of the information pertaining to the applicant's clients.

[27] If one have regard to the different contractual relationships that exist between the applicant and Bestmed on the one hand and the applicant and the three respondents on the other hand, it is clear that both contracts endeavour to protect client information that will, due to the nature of the services rendered, come to the attention of the party rendering the services.

[28] In *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 A at 541 C-D customer-connections worthy of protection was described as follows:

"..the need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to built up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business."

[29] For purposes of the basis on which the applicant claims the relief herein, I am satisfied that it has the necessary proprietary interest in the information it aims to protect.

Confidential information

[30] The three respondents rely on clauses 12.2, 12.4 and 12.5 (confidentiality clauses) of the Healthcare Advisor Agreements in support of their contention that the information the applicant seek to protect is not confidential. These clauses deal with the dissemination of information regarding the business of the applicant, which includes particulars of its clients. The clauses prohibit disclosure of the information without prior written consent by the applicant or the client or in some instances the medical scheme. The confidentiality clauses apply according to clause 12: *"For the duration of this Agreement and afterwards.."*

[31] The three respondents gained knowledge of the details and particulars of the applicant's clients through the services it rendered to the applicant. The fact that a client of the applicant may give written consent to the three respondents for his/her particulars to be made known to another person/entity, does not distract from the confidentiality of the information.

Customer- connections

[32] The applicant seeks an order interdicting and restraining the three respondents from contacting, soliciting or continuing to deal with any of its clients. The three respondents aver that the applicant has at least 20 000 to 30 000 clients. Prior to the three respondents' resignation, they were part of a team of 10 advisors utilised by the applicant in Gauteng. The applicant also has advisors in KwaZulu Natal and the Western Cape.

[33] Due to the nature of the services rendered by the advisors, each advisor attends to the clients in his/her portfolio. In the premises, the three respondents do not know any of the clients of the other advisors nor did they build customer connections with such clients. I agree with the three respondents that the applicant did not prove that they have customer-connections with all of the applicant's clients.

[34] The three respondents, furthermore, aver that they did not form strong customer- connections with the bulk of the clients in their own portfolios. According to the three respondents, contact with clients were mostly restricted to contact once a year or if and when a client has a query. In *Experian SA v Haynes, supra,* at 142 B, Mbha J held as follows:

"...It suffices if it is shown that trade connections through customer contact exist and that they can be exploited if the former employee were employed by a competitor."

[35] In the premises, the applicant has made out a clear right for protection only in respect of the clients that formed part of the client portfolios of the three respondents, respectively.

RESTRAINT AND RELIEF SOUGHT UNREASONABLY WIDE

[36] The arguments pertaining to the number of clients discussed *supra*, is also relied upon by the three respondents in support of this ground of opposition. I agree with the three respondents that the relief claimed is unreasonably wide. That is, however, not the end of the matter. If it is possible to partially enforce the agreement without possible injury to the public and without injustice to the parties themselves, the court is at liberty to do so. [See: *National Chemsearch (SA)(Pty) Ltd v Borrowman and another* 1979 (3) SA 1092 T at 1117]

[37] The three respondents contend further that the duration of the restraint is not clear and/or unreasonable. Clause 11.3 relied upon by the applicant to obtain an order interdicting and prohibiting the three applicants from contacting, soliciting or continuing to deal with any of the applicant's clients, does not contain a restraint period. Consequently, so the three respondents argue, the prohibition is in perpetuity and extremely unreasonable.

[38] In clause 13 the restraint period in respect of the activities mentioned therein, is for a period of two years. Clause 13 does, however, not refer to the activities mentioned in clause 11.3. In the premises, the three respondents contend that the relief sought on the strength of clause 11.3 cannot be

granted by this court. I do not agree with this argument. As stated *supra*, a court might order partial enforcement of a restraint clause in appropriate circumstances.

[39] Lastly, the three respondents contend that the words *"or any related activities"* in prayer 2.3 is unreasonable for a number of reasons, *inter alia*, because the term was not agreed upon by the parties. I agree with the three respondents and will be mindful of this ground of opposition in considering an appropriate order.

RETURN OF DOCUMENTS

[40] The three respondents denied that they are in possession of any of the documents referred to by the applicant in prayer 2.2 of the Notice of Motion.

[41] The applicant has failed to provide any detailed information in substantiation of its assertion that the three respondents possess these documents. In the premises, the applicant is not entitled to an order in terms of prayer 2.2 of the Notice of Motion.

FOURTH RESPONDENT

[42] It is common cause that the fourth respondent has already benefited from the fact that the three respondents have persuaded clients of the applicant to join the fourth respondent. Notwithstanding the fact that an undertaking was requested from the fourth respondent to desist from taking over clients from the applicant via the efforts of the first to third respondents, the fourth respondent has steadfastly refused to do so.

[43] Mr Prinsloo, counsel for the applicant, has referred me to various decisions justifying an interdict prohibiting the fourth respondent from persisting in its current course of conduct. In *Coolair Ventilator Co (SA) Ltd v Liebenberg and Another* 1967 (1) SA 686 W at 691 B, the following was stated in respect of such a type of situation:

"It seems to me than an employer is entitled to be protected from unfair competition, as it is called in American law, brought about by confidential

information of his business having been conveyed to a trade rival by an employee or ex-employee. "

[44] I am satisfied that the applicant is entitled to be protected from the unfair competition brought about by the disseminating of its confidential information to the fourth respondent.

COSTS

[45] The parties were each successful to such an extent, that I do not deem it fair to award costs to any of the parties.

ORDER

In the premises, I make the following order:

1. The First, Second and Third Respondents shall, for a period 12 (twelve) calendar months, from date of this order, be interdicted and restrained from:

    1.1.1 Unlawfully competing with the Applicant by, applying intellectual property of the Applicant, consisting of the Applicant's confidential data which includes all information, application forms and personal details of clients belonging to the Applicant and which clients formed part of the first, second and third respondents' client portfolio whilst rendering services to the Applicant ("the clients"), as well as the data base of all information relating to the clients of the Applicant.

    1.1.2 Contacting and/or soliciting the clients of the Applicant to:

        1.1.2.1 Terminate their association with the Applicant; and/or

        1.1.2.2 Discontinue their transactions with the Applicant; and/or

        1.1.2.3 Act contrary to the interests of the Applicant.

2. The Fourth Respondents shall, for a period of 12 (twelve) calendar months, from date of this order, be interdicted and restrained from unlawfully competing with the Applicant by, applying intellectual property of the

Applicant, consisting of the Applicant's confidential data which includes all information, application forms and personal details of the Clients belonging to the Applicant as well as the data base of all information relating to the Clients of the Applicant.

JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA