IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED:

Date: ***18th May 2018*** Signature: _____

CASE NO: 2018/17635

In the matter between:

PAM GOLDING PROPERTIES (PTY) LTD Applicant

and

GREEF: LYNDA ROSE First Respondent

TYSON PROPERTIES Second Respondent

JUDGMENT

ADAMS J:

[1]. This is an urgent application by the applicant, who applies *inter alia* for an order interdicting and restraining the first respondent from utilising and / or

communicating to any other person or entity the applicant's confidential information and data base, including property lists, details and portfolios, seller and buyer lists and details, property pricing and commission arrangements, the applicant's methods, designs and techniques relating to its business. The applicant also seeks an order interdicting the first respondent from carrying on any business that might reasonably be expected to trade as a residential, commercial or rental estate agency that might reasonably be expected to so trade or carry on business within the area of Bryanston. The applicant furthermore applies for an order interdicting the first respondent from encouraging, enticing, inciting, persuading or inducing any estate agent of the applicant to terminate their employment and / or business relationship with the applicant.

[2]. The applicant therefore applies in the main for interdictory relief against the first respondent, who was in its employ from the 4th of March 2016 up to and until the 23rd of April 2018, on the basis of a restraint of trade clause and a confidentiality clause which had been incorporated into the contract of employment between the applicant and the first respondent concluded on the 25th of February 2016. This employment contract forms the basis of the applicant's claim. Applicant alleges that the first respondent is in breach of the restraint of trade clause and the confidentiality clause in that during the period shortly after she left the employ of the applicant, the first respondent, whilst in the employ of the second respondent, a competitor of the applicant, actively did her utmost to take away listings from the applicant.

[3]. The restraint sought is for a period of six months, and pertains to the Bryanston area only. As a means of enforcing the above order, the applicant seeks further to interdict the first respondent from conducting practice at the Rosebank branch of the second respondent, because, so the applicant contends, the Rosebank branch is the branch from which the second respondent manages the areas of Sandton, Rosebank and Bryanston.

[4]. In terms of the first respondent's contract of employment with the applicant styled a 'Full Status Agent Agreement', the first respondent specifically acknowledged that for the duration of the agreement, she would have access to confidential information of the applicant, including property lists, details and portfolios, seller and buyer lists and details. This 'Confidential Information' shall, so the agreement provided, at all times remain the property of the applicant, whether or not it was created or compiled by first respondent.

[5]. The first respondent had also undertaken not to 'carry on any business through or be interested or engaged in or concerned with or be employed by or be a shareholder, partner, director or member of or act as a consultant or advisor to any [entity] that trades or carries on business predominantly as a residential... retail estate agency...' ('the Restraint'), which restraint would bind the first respondent for a period of six months.

[6]. In support of its claim that the first respondent is in breach of the restraint of trade agreement, the applicant refers in its founding affidavit to instances on the 25th April 2018, when the applicant requested it to remove the listings of a certain Cliff Norman, a client of the applicant, from its listings, and again a week later when a simirlar request was made in respect of listings for other clients of the applicant, one Mr Liebenberg and a Mr Dawber. This is not disputed by the first respondent.

[7]. The first respondent opposes the application mainly on the basis that she denies the existence of the restraint of trade and the confidentiality agreement. In view of what is alleged by the applicant in its replying affidavit, which has attached to it the written 'Full Status Agent Agreement', duly signed by the first respondent, the denial by the first respondent is far – fetched and can safely be rejected on the papers. This leaves the first respondent's opposition to the application, at least as far the factual disputes are concerned, on very thin ice.

[8]. In her answering affidavit the first respondent does not dispute that after she left the employ of the applicant she continued dealing with the clients who had listed their properties with the applicant. She however claims that her relationship with those clients arose from the marketing which she carried out, including via the marketing she did through the applicant's website. This admission, in my judgment, is the death knell for the first respondent's case.

[9]. I therefore agree with the submission made by Mr Cooke, Counsel for the applicant, that the breach of the restraint is manifest. On her own version the first respondent acquired the applicant's confidential information and she is using it.

[10]. There has not just been a threat of the use of the applicant's confidential information. There has been actual use of it in breach of the restraint of trade and the confidential information clause.

[11]. I find myself in agreement with the view expressed by Harms in 'Amler's Precedents of Pleadings'. He has this to say:

> 'A party wishing to enforce a restraint of trade agreement need only allege and prove the agreement and its breach by the defendant. An ex-employer who seeks to enforce against an ex-employee a protectable interest recorded in a restraint does not have to show that the ex-employee has in fact used confidential information only that the ex-employee could do so.'

[12]. Furthermore, it is trite that in order to enforce its restraint and confidentiality clause, the applicant is required to show some proprietary interest in enforcing the restraint. However, the onus is on the first respondent to satisfy this court that the applicant does not have a proprietary interest. In

that regard the following was said by Lewis JA in *Digicore Fleet Management v Steyn*, [2009] 1 All SA 442 (SCA):

> 'It is now trite that provisions in restraint of trade are enforceable unless shown by the person wishing to escape an undertaking to be unreasonable and hence contrary to public policy. It is not necessary to rehearse the principles that have been set out by this and other courts governing agreements in restraint of trade. Suffice it to say that Steyn, in order to escape her contractual undertaking, must show that Digicore has no proprietary interest that is threatened by her working for a competitor of Digicore.'

[13]. In my judgment first respondent's grounds on which she denies that the applicant does not have a proprietary interest desiring of protection is without merit. Her first ground that the propriety interest did not exist prior to 2018 is defeated simply by the fact that the restraint of trade was concluded during February 2016. Also, not all of the information which she is using is in the public domain.

[14]. I am strengthened in this conclusion by the findings of Spilg J in *Pam Golding Properties v Neille*, [2017] ZAGPJHC (28 July 2017) , which is a case strikingly simirlar to the matter *in casu*. In that matter, Spilg J recognised that the details of sellers and potential buyers constitute a proprietary interest in the hands of the applicant, and had this to say a par [12]:

> '12. Straddling both confidential information and customer contacts is PGP's database comprising lists of sellers of residential property and also potential buyers within the Parks area which is accessible to its agents. The lists are compiled by PGP from referrals, enquiries and those who are prepared to provide their particulars to PGP's agent's at show-houses (which is the common experience of anyone who attends a show-day). Even if an individual agent was to hand out business cards at a shopping mall his or her relationship with the

principal would render any contacts made with prospective buyers or sellers the proprietary interest of the agency.

13. I am therefore satisfied that PGP has a protectable interest in the lists it compiles and updates for the benefit of all its individual agents, including Neille, of sellers and potential buyers of residential property who might show interest in purchasing a property in any specific suburb, or of a particular configuration, or in a particular price bracket. Moreover the flysheets of properties for sale would have been produced by PGP and it has a proprietary interest in their make-up, although not necessarily in all their content.

[15]. The applicant has agreed to limit the area of the restraint to only the suburb of Bryanston. This is my view is fair and reasonable. As far as the duration of the restraint is concerned, I am in agreement with the submission by Mr Cooke that the six month period is reasonable especially if regard is had to the fact that the first respondent had agreed to that.

[16]. In the circumstances, I am of the view that the applicant has made out a proper case for the enforcement of the restraint of trade in terms of the agreement for a period of six months in respect of the Bryanston area. I have however not been persuaded that the applicant should be prohibited from conducting her business as the Rosebank offices of Tyson Properties.

[17]. It is trite that in order to obtain final relief by way of an interdict an applicant must demonstrate that it has a clear right, that it has suffered actual harm or reasonably apprehends that it will suffer harm, and that there is no other satisfactory remedy available to the applicant other than an interdict.

[18]. The requisites for a final interdict were stated in *Setlogelo v Setlogelo*, 1914 AD 221, as follows:

> 'The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.'

[19]. These requirements have, in my judgment, been demonstrated to exist by the applicant.

Costs

[20]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[21]. I can think of no reason why I should deviate from this general rule.

[22]. I therefore intend awarding cost against the applicant in favour of the first respondent.

Order

Accordingly, I make the following order:-

1. This application is urgent.

2. The first respondent be and is hereby interdicted and restrained from:

2.1 Utilising and/or communicating to any other person or entity the applicant's confidential information and data base including, but not limited to, to property lists, details and portfolios, seller and buyer lists and details, property pricing and commission arrangements, the Applicant's methods, designs and techniques relating to its business;

2.2 For a period of six months from the date of this order, carrying on any business through or being interested in or engaged in or concerned with or being employed by or being a shareholder, partner, director or member of or acting as a consultant or advisor to any company, close corporation, undertaking or concern (in each case directly or indirectly) that trades or carries on business predominantly as a residential estate agency; or any such company, close corporation, undertaking or concern that might reasonably be expected to so trade or carry on business within the areas of Bryanston.

3. The first respondent shall pay the applicant's cost of this urgent application.

L ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	16th May 2018
JUDGMENT DATE:	18th May 2018
FOR THE APPLICANT:	Adv M J Cooke
INSTRUCTED BY:	McGregor Stanford Kruger Inc (Cape Town)
FOR THE RESPONDENTS:	Advocate
INSTRUCTED BY:	Dean Carro & Associates (Durban)