IN THE KWA-ZULU NATAL HIGH COURT, DURBAN

(REPUBLIC OF SOUTH AFRICA)

CASE NO : 12506/2010

In the matter between:

PSG KONSULT FINANCIAL PLANNING (PTY) LTD Applicant

and

BALLACK, IAN First Respondent

BALLACK WEALTH MANAGEMENT (PTY) LTD Second Respondent

JUDGMENT

VAN ZÿL, J. :-

1. The applicant initially sought, by way of urgent interdictory relief, a *rule nisi* preventing the first respondent, its former employee, from

canvassing business from any of its clients, or from using or disclosing any of its confidential information. After notice of the application was given the respondents signified their intention to oppose and the first respondent delivered an answering affidavit on behalf of both respondents. The applicant replied thereto and the application was then heard and argued as an urgent matter. By reason of such urgency neither counsel were able to prepare and submit written heads of argument.

2. During the course of the proceedings, however, the parties were *ad idem* that the need for interim relief, by way of the issue of a *rule nisi*, had been overtaken by the exchange of affidavits and that, in the event of the application succeeding, the Court should grant final relief. The general rule when a final interdict may be granted on the papers alone and without resort to oral evidence was authoritatively set out in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E – G where Van Wyk J formulated it as follows:

> "*... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.*"

3. Neither counsel contended that there were any material factual disputes that required to be resolved by a resort to oral evidence. Mr Marais, who appeared for the respondents, submitted that any factual conflicts which might emerge should be dealt with according to the principles as set out by Corbett JA (as he then was) in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD) at page 634E - 635C. In that matter the learned Judge of Appeal reaffirmed and qualified the general rule in Farmers' Winery vs Stellenvale Winery referred to above, at 634I – 635D (See also : Kemp NO v Van Wyk 2005 (6) SA 519 (SCA) at page 525A).

4. At this point it is convenient to deal with the background to the development of the relationship between the parties and which ultimately gave rise to the present litigation. In his answering affidavit the first respondent states that he commenced his working life in the banking industry and worked for about ten years as a bank manager. About ten years ago, according to him, he commenced business as a financial planner, originally in association with BOE Private Bank and he subsequently joined and was employed for some years by Advance Wealth Management (Pty) Limited (AWM) as a Financial Planner. With effect from 1 October 2006 their relationship was regulated in terms of a fresh written agreement concluded at Durban on 23 August 2006 (the employment agreement).

5. The business of AWM was sold to the applicant as a going concern,

effective from 1 November 2006. In terms of clause 11 of the agreement of sale it was recorded that the provisions of s197 of the Labour Relations Act, 1995 would be applicable thereto, so that the rights and obligations as between AWM and its employees were transferred to the applicant. The first respondent was such an employee.

6. The first respondent continued in the service of the applicant until his letter of resignation of the 16th August 2010, addressed to the applicant's regional manager and the relevant portion of which reads as follows –

> "*..I, Ian Ballack employee number A03018, hereby tender my resignation from the employment of PSG Konsult Financial Planning (Pty) Ltd. I hereby provide you with four weeks written notice as stated in clause 18.2.4 of the Employment Agreement signed and dated in Durban on 23 August 2006.*"

7. There was some suggestion, in the course of the argument, that the first respondent was not in law employed by the applicant in terms of the employment agreement at all because it had been concluded with AWM and he was not party to the transfer of rights and obligations which arose from the sale of the business of AWM to the applicant. I did not understand Mr Marais, who appeared for both respondents, to persist in this argument. In any event, it is clear that the first

respondent and prior to his resignation, never objected to the transfer of his employment from AWM to the applicant. It is also apparent from the wording of his letter of resignation quoted above that at that time he considered the terms of the employment agreement to have been applicable even to his resignation and that such resignation was from the employment of applicant and not from that of AWM.

8. The employment agreement contained *inter* alia a number of clauses which are relevant to the issues under consideration. For ease of reference they are set out below.

9. Clause 12 dealt with the applicant's client base and reads as follows;

> "***CLIENT BASE***
>
> *Clients (as defined) of the Company shall at all times be regarded and treated as clients of the Company. All client details, particulars and databases shall at all times remain the sole and exclusive property of the Company and shall not be disclosed to any other party or entity without the written consent of the Company, the intention being that "ownership" of the clients shall at all times remain vested in the Company. "*

10. Clause 26 dealt with confidentiality, property and restraint of trade and which reads as follows;

"*26.4 In consideration of the various matters referred to above, and in accordance with the agreement reached between the parties, the Employee now agrees and undertakes to and in favour of the company that:*

26.4.1 the Employee shall not, directly or indirectly, whilst an employee of the company or during the restricted period, use the confidential information for his/her own benefit, or the benefit of any other person or entity, and shall furthermore not disclose any confidential information to any third party or entities, other than to those persons or entities connected with the company, who are required and entitled to have that information;

26.4.2 the Employee as well as any entity in which he/she is directly or indirectly interested shall not, except in the normal cause of the company's business, during any month of the restricted period and in the restricted area, directly or indirectly, through any entity, and whether for reward or not:-

26.4.2.1 solicit or canvass business or mandates from any of the Company's clients;

26.4.2.2 render any services or advice to, or do any business with, any of the

Company's clients.

26.5 *Notwithstanding the contents of 26.4.2 above, it is specifically recorded that the contents of 26.4.2.2 shall not apply if any client contacts the Employee of their own volition after the expiry of a period of 6(six) months calculated with effect from the termination date.*"

11. The second respondent, as its name indicates, is a company formed or acquired by the first respondent and intended as the vehicle with which he would pursue his activities as a financial planner, following his resignation from the employment of the applicant. In the introductory portion of the first respondent's answering affidavit he reflects himself as the managing director of the second respondent and there is no suggestion that he is not also the dominant, if not the sole, shareholder thereof. For purposes of this application the second respondent may fairly be considered as the alter ego of the first respondent.

12. The main thrust of the argument advanced by Mr Marais for the respondents was that this was not a typical restraint of trade situation and that as a result the restrictive provisions of the employment agreement are not enforceable against the respondents.

13. In this regard counsel referred to Basson v Chilwan 1993 (3) SA 742

(AD), where Nienaber JA, with Botha JA and Milne JA concurring and representing the majority, held that an agreement was unenforceable, either wholly or in part, if it was not in the public interest and is therefore in conflict with public policy. A provision of this nature and which attempts to restrain a former employee, after termination of the employment agreement, would conflict with public policy if the effects of the restraint were to be unreasonable. The reasonableness or otherwise of the restriction is to be considered against the broad interests of the community on the one hand and the interests of the contracting parties on the other.

14. Insofar as far as the broad interests of the community are concerned, the court identified two conflicting considerations. The first consideration was whether agreements should be abided, even where this would promote unproductivity and secondly whether unproductivity should be discouraged, even if this could destroy the agreement. With regard to the parties themselves, the Court held that a restrictive provision would be unreasonable and as such contrary to public policy, if it prevented one party, after the termination of the contractual relationship, from participating freely in commercial and other professional activities, without there being a recognised protectable interest of the other party that was served by such restriction. In addition a restraint which is reasonable as between the parties themselves may nevertheless be detrimental to the public interest.

15. In this connection and against the background referred to above, the court (at 767G - I) considered that generally four(4) questions would arise, namely whether;

(a) there is, following the termination of the employment agreement, an interest of the one party which is deserving of protection;

(b) such interest is being prejudiced or compromised by the other party;

(c) such interest qualitatively and quantitatively weighs up against the interests of the other party not to be rendered economically inactive and unproductive;

(d) there may be any other aspect of public policy, not arising out of the relationship *inter partes*, but which nevertheless requires that the restraint should either be maintained, or rejected.

Insofar as the interests in (c) above outweigh the interests in (a), the restraint would as a rule be unreasonable and accordingly unenforceable. That was, however, a matter of judicial discretion which would differ from one case to another. Accordingly the personal

views of the parties, as commonly expressed in their agreement, regarding the reasonableness of the disputed provisions, whilst relevant, could never be decisive of the issue.

16. Mr Marais for the respondents and with reference to Basson v Chilwan (supra), did not join issue with the applicant on the questions posed in paragraphs (a), (b) and (c) above, but developed his argument based upon issues of public policy arising from paragraph (d) thereof. In this regard he drew attention to various aspects of the terms of the employment agreement.

17. The first attack centred upon the unique relationship between the first respondent and what he claimed to be "his" clients. Counsel pointed out that the employment agreement brought about a change in the earlier administrative arrangements between first respondent and AWM, which were then taken over by applicant. Whereas prior to 1 August 2006 financial planners such as first respondent received a commission and their administrative expenses were paid for by AWM, the new employment agreement required them to pay their own expenses, in return for what he claimed was an inadequate increase in commissions payable. In addition attention was drawn to the sale agreement concluded between AWM and first applicant relating to portion of what was termed the recurring revenue book and also with effect from 1 October 2006. This referred to AWM's claims against clients serviced by first respondent for recurring income derived from

income of a recurring nature and which included management fees on investments and short-term commissions.

18. Counsel also emphasised the manner in which financial advice and services were rendered to clients. According to the first respondent the relationship between financial advisor and employer was such that the client dealt almost exclusively with the financial advisor only. Consequently a close bond, a relationship of trust and often a long standing friendship developed between the financial advisor and the client. So much so that first respondent's clients, upon his resignation from the service of applicant were generally resistant to change and insistent that he should personally continue to render financial planning services to them, despite his departure from the applicant's organisation.

19. Whilst first respondent abided by this agreement until his resignation, he claims in his answering affidavit that –

> " .. *it would be iniquitous for the Applicant to be allowed to treat its advisors as independent contractors, on the one hand, whilst, on the other, seeking to enforce a restraint against us as if we were simple employees, to prevent us from dealing with persons it (*a reference to the applicant*) had never dealt with.*"

20. The employment relationship is not, however, so straight forward. Mr Odendaal, who appeared with Ms Tolmay for the applicant, submitted that restrictive conditions such as those under consideration are not limited to simple employment situations. Counsel pointed out that the relationship was nevertheless governed by the terms of the employment agreement and that this arrangement facilitated first respondent's access to past and new clients and that he has, since 2006 and without complaint, been conducting business under the name of the applicant. Indeed, the first respondent concedes in his answering affidavit that a number of "his" clients were acquired during his term of employment with the applicant.

21. Whilst denying that he used any confidential information or canvassed business from any of "his" clients after his departure, the first respondent readily admits to knowing the names, personal circumstances and financial requirements of each of his fifty two clients. With regard to his resignation from the service of applicant, the first respondent states that he informed these clients of his departure. He further explains that, because clients normally contacted him on his cellphone, whey were able and generally did communicate with him again through that medium even after he left applicant's service. Likewise, after he left, it is common cause that he had retained certain client files and subsequently returned these, with the exception of two files, to the applicant on 7 October 2010, although he claims to have done so without prejudice.

22. Applicant alleges that respondent, subsequent to his departure form the service of applicant, continued to render services to at least nine clients whose investments had previously been placed with an investment platform called Glacier. Glacier, which is part of the Sanlam group, is one of several investment platforms. Others include Old Mutual, Investec, Allan Gray, Stanlib, Momentum and ABSA.

23. Applicant fortuitously came to know that the names of nine of its clients, who had investments administered by Glacier, had been changed in Glacier's records to being clients of the second respondent. To achieve this the client has to sign a mandate in favour of the new financial advisor. Applicant alleged that first respondent must have obtained these mandates in favour of second respondent from these clients. As a result the investment portfolios managed by first respondent on behalf of applicant and placed with Glacier had reduced from R27 201 096-00 as at the end of June 2010 to R6 928 252-00 as at the end of September 2010. Since the respondents "*basically admit*" these allegations in respect of eight of the nine clients (claiming the ninth represents a duplication), these allegations may also be considered as common cause.

24. The underlying theme of the respondents' opposition to the enforcement of the restrictive conditions of the employment agreement is that it should not be enforced because to do so would run counter

to considerations of public policy and therefore would not be in the public interest. In this regard counsel sought to emphasise what he terms as the unique nature of the relationship between a financial planner and "*his*" client.

25. I find myself entirely unpersuaded that there is anything so unique about such a relationship. The respondents calculate that the applicant countrywide employs some 1100 financial planners who, each servicing on average 150 "*customers*", support a client base of some 77 000 clients. Applicant, although a significant player in the financial planning market, is but one of many financial planning enterprises and the second respondent is one of the new entrants in this field.

26. The first respondent himself, in setting out his own professional background and experience, does not mention any academic or vocational qualifications which he obtained, nor any specialist financial or investment training which he completed. Implied in the resume of his career which he provides is that he gained applicable experience in the course of his career. That does not, in my view, elevate the services which he can offer to a level where they may be considered as unique.

27. Counsel for the respondents, in developing his argument, sought to emphasise not only the first applicant's rights to work, but the

constitutional rights of his clients to insist upon the benefits of his services, despite the restrictive conditions to which he agreed as part of his employment contract with the applicant through the latter's predecessor AWM. Letters of support from three of these clients were submitted for consideration. These clients were not, however, joined as parties to the application. Mr Odendaal, for the applicant contended that the very purpose of a restraint of trade clause is to afford the former employer a reasonable opportunity to break the bond between its former employee and the client and to offer continued service to the client for a limited period.

28. As regards the first respondent's claim that his right to work is unfairly prejudiced by the restrictive conditions, counsel for the applicant contended that he had abided by the employment agreement until after his resignation took effect and only raised objection in opposition to the application proceedings. In principle and subject to what is contained in this judgment, I do not consider that the nature of the restrictive conditions contained in the employment agreement are unreasonable and therefore objectionable on grounds of public policy (Reddy v Siemens Telecommunicatons (Pty) Ltd 2007 (2) SA 486 (SCA) at 493G).

29. In developing his argument in relation to public policy with regard to the restrictive conditions contained in the employment contract,

counsel for the respondents relied, *inter alia*, upon Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (AD). But at page 9 D-E Smalberger JA remarked, as follows;

> "*One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St John-Mildmay 1938 AC 1 (HL) at 12 ([1937] 3 All ER 402 at 407B - C),*
>
> *'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'*
>
> *(see also Olsen v Standaloft 1983 (2) SA 668 (ZS) at 673G).*"

30. It is clear from the admitted conduct of the first respondent that he considers it justified, despite the restrictive conditions, to render services to "*his*" clients at what he says is their insistence. The applicant has no means of monitoring whether first respondent makes any approaches to such clients or otherwise invites their approaches to him. It also has no effective means of monitoring the movement or loss of investment portfolios due to the activities or influence of first respondent. It is therefore no answer to applicant's claim for protection merely to deny, as first respondent has done, the use or disclosure of confidential information or that he has made approaches to "*his*" clients. First respondent is after all admittedly in possession of

confidential information in respect of which the risk of disclosure by his employment with second respondent, a direct competitor of the applicant is, considered objectively, quite obvious. First respondent's loyalty will be to his new business and the opportunity to disclose confidential information at his disposal, whether deliberately or not, is undeniable. The restraint was intended to relieve applicant precisely of such a risk of disclosure. In these circumstances the restraint cannot be said to be either unreasonable, or contrary to public policy. (Reddy v Siemens (supra) at 499 G-H).

31. The respondents also objected to what was claimed to be the wide ambit of the restrictive conditions and Mr Marais submitted that by reason thereof the relevant clauses should be held to be unenforceable. However, as was pointed out by Wallis AJ (as he then was) in Den Braven SA (Pty) Ltd v Pillay 2008 (6) SA 229 (D) at 260 F-G :

> "*The proper approach in my view is for the court to ask itself whether the conduct that the applicant seeks to restrain by way of an interdict is conduct that falls within the terms of the restraint agreement and from which the former employee agreed to abstain. If the answer to that question is in the affirmative the court then moves to an analysis of whether it should, in accordance with the principles of public policy, enforce the agreement to that extent by granting relief to the applicant. It has*

no need in those circumstances to have regard to those portions of the agreement that are more extensive than the relief actually being sought."

32. With due respect and despite the reservations expressed by Davis J in Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another 2009 (3) SA 78 (C) at 83, I am not convinced that the approach of Wallis AJ was clearly wrong and as such I am bound thereby.

33. In the present matter the relief sought by the applicant, by way of a draft order submitted at the conclusion of argument, comprises the following;

> *"2. The first and second respondents are interdicted and restrained during the restricted period ending 14 March 2011 from:*
>
> *2.1 directly or indirectly during the restricted period, using the applicant's confidential information for the respondents benefit, or the benefit of any other person or entity, disclosing any confidential information to any third party or entities, other than to persons or entities connected with the company, who are required and entitled to have that information;*
>
> *2.2 directly or indirectly, through any entity, and*

whether for reward or not during the period of restriction:

2.2.1 soliciting or canvassing business or mandates from any of the applicant's clients;

2.2.2 rendering any service or advice to, or doing business with, any of the company's clients.

2.3 The first and second respondent are interdicted and restrained as form 15 March 2011, from directly or indirectly, through any entity, and whether for reward or otherwise:

2.3.1 soliciting or canvassing business or mandates from any of the applicant's clients as at 16 September 2010; and

2.3.2 directly or indirectly during the restricted period, using the applicant's confidential information for the respondents benefit, or the benefit of any other person or entity, disclosing any confidential information to any third party or entities connected with the company, who are

required and entitled to have that information

3. The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the costs of this application on an attorney and client scale, including the costs of two counsel."

34. The first paragraph of the relief claimed relates to the restricted period, which is defined in the employment agreement as "*the period of employment, as well as a continuous period of six(6) months commencing with effect from the termination date.* " The first respondent's letter of resignation was delivered on Monday 16 August 2010 and in terms of clause 18.2.4 of the employment agreement gave applicant four weeks' notice. This period would then expire with effect from Tuesday 13 September 2010. The termination date as comtemplated must therefore be 13 September 2010 and it follows that the restricted period of six(6) months would expire on 13 March 2011.

35. During the restricted period as defined the first respondent is, in terms of clause 26.4.1 restrained from using or disclosing applicant's confidential information. In terms of clause 26.4.2 first respondent is prohibited from soliciting or canvassing business or mandates, or to render any services or advice to, or do any business with, any of

applicant's clients. The clear intention of the parties in agreeing to the terms contained in clause 26.4 was to shield applicant's clients from any contact with, or influence of, the first respondent. This suggests an agreed cooling off period during which the applicant may endeavour to re-establish a working relationship with its client. During this period the client will, of necessity, be compelled either to accept and from applicant's point of view hopefully to bond with its substitute employee, or take his or her business to a stranger, but not to the first respondent. After the expiry of the restricted period, the restriction is limited to the first respondent not disclosing applicant's confidential information to any third parties.

36. Commercially such agreement represents nothing extraordinary, unfair, or objectionable. This is particularly so given the first respondent's extended period of service in the employ of both AWM and the applicant, his close relationship with "*his*" clients and his in depth knowledge of the applicant's remaining client base, pricing, marketing methods and strategies. The respondents may still compete in the marked place with applicant and others, but they may not enjoy any advantage based upon applicant's confidential information, or through contact with applicant's clients, particularly those formerly serviced on behalf of applicant by the first respondent.

37. Clause 26.5 of the employment agreement, however, presents something of a problem. It purports to alleviate to a degree the

restrictions contained in clause 26.4.2.2 by rendering them inapplicable to those of the applicant's clients who approach the first respondent "*of their own volition*" and then only "*after the expiry of a period of six(6) months calculated with effect from the termination date*".

38. As indicated above, if the termination date is 13 September 2010, then the six month period contemplated in clause 26.5 would expire on 13 March 2011. Clause 26.4.2.2 is expressed to endure until expiry of the restricted period as defined on 13 March 2010. Clause 26.5 is based upon the premise that the effects of clause 26.4.2.2 would endure indefinitely beyond that date, albeit with a reduced impact. This cannot be and clause 26.5 is consequently not enforceable.

39. The provisions of clause 26.4.2, as framed, apply within the restricted area as defined, namely the Republic of South Africa. Counsel for the respondents in passing submitted that the ambit of this restriction was impermissibly wide and should therefore not be enforced. I have given some thought to this submission but I have come to the conclusion that it is not offensive. It is common cause that the applicant operates throughout the Republic. Indeed the first respondent alleges that applicant operates about 208 offices spread throughout South Africa. Given the mobility of investments and the ease of communication, particularly via the various forms of electronic media available, I do not consider it unreasonable for the agreed

restrictions to operate, over a relatively limited period of six months, throughout the Republic.

40. I have therefore come to the conclusion that the applicant has established a clear right to enforce the restrictive provisions of clause 26.4 of the employment agreement by way of the relief contained in the order I propose to make and as more fully set out below. But, as already indicated, I do not consider that the provisions of clause 26.5 are capable of enforcement.

41. Finally, there remains the issue of costs. In my view the first respondent's disregard for the restrictive terms of his employment agreement with the applicant was marked. Not only did he ignore these restrictions where it suited him, but when confronted by the applicant he failed to give an undertaking to cease his objectionable behaviour, thereby rendering the present application inevitable. Once brought the respondents opposed the application and in so doing broadly relied upon specious defences. In my view a punitive order as to costs, as sought by the applicant, is justified.

42. In the result I make the following order:-

1. The first and second respondents are interdicted and restrained during the restricted period ending 13 March 2011 from;

1.1 directly or indirectly during the restricted period, using the applicant's confidential information for the respondents benefit, or for the benefit of any other person or entity, disclosing any confidential information to any third party or entities, other than to persons or entities connected with the applicant, who are required and entitled to have that information;

1.2 directly or indirectly, through any entity, and whether for reward or not during the period of restriction:

1.2.1 soliciting or canvassing business or mandates from any of the applicant's clients;

1.2.2 rendering any service or advice to, or doing business with, any of the applicant's clients.

1.3 The first and second respondent are interdicted and restrained as form 14 March 2011, from directly or indirectly, through any entity, and whether for reward or otherwise, directly or indirectly disclosing any of the applicant's confidential information to any third party or entities, other than those persons or entities connected with the applicant, who are required and entitled to have that information.

2. The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to pay

the costs of this application on an attorney and client scale, including the costs of two counsel where employed.

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VAN ZÿL, J.

Appearances:

For the Applicant: Adv F H Odendaal SC and Adv Ms E Tolmay
Instructed by Blake Bester Inc, Roodepoort
c/o Strauss Daly Attorneys, Umhlanga.

For the Respondents:	Adv J Marais SC
	Instructed by Deneys Reitz, Durban
Matter argued:	27 and 28 October 2010.
Judgment :	12 November 2010