IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: J125/2023

In the matter between:

TWK AGRI (PTY) LTD **Applicant**

and

ALMA BOTHA **First Respondent**

TANIA STRYDOM (BOTHA) **Second Respondent**

MRA INSURANCE BROKERS (Pty) LTD **Third Respondent**

Heard: 16 February 2023

Order Delivered: 16 February 2023

Reasons for the Order:07 March 2023

JUDGMENT

MABASO, AJ

Introduction

[1] Forthwith arguments on 16 February 2023, considering the urgency and nature of the matter, this Court made the following Order, and undertook to deliver supporting reasons later:

> *"1. That the non-compliance with the forms, time periods and manner of service prescribed by the Rules of the Labour Court be condoned and that the application be dealt with as one of urgency;*
>
> *2. The first and second respondents are interdicted directly or indirectly:*
>
> *2.1 soliciting the customs of clients of the Applicant and /or accepting any business or custom from the clients of the applicant, and /or in any manner and enticing the clients of the applicant to terminate their business with the Applicant, in particular, those clients appearing in the Schedule annexed "A" hereto, for 12 (twelve) months;*
>
> *2.2 Conducting any business with, or have any business relationship with, any of the cancelled clients of the Applicant that they have cancelled their business with the Applicant after 31 December 2022, in particular, any clients appearing on the Schedule annexed hereto as Annexure "A", for 12 months; and*
>
> *2.3 Revealing or Disclosing or any in any way utilising, whether for the First and the Second Respondents' own purposes, for any Third Party, any of the Applicant's confidential information and/ or clients particular relating to any clients appearing in Schedule which is appended as Annexure "A" to the notice of motion.*
>
> *3. The First and Second Respondents are to pay the Applicant's costs, jointly and severally, the one paying the other to be absolved."*

[2] This application was opposed by the First and Second Respondent (Collectively referred hereinafter as the Respondents), whereas the Third Respondent, MRA Insurance Brokers (Pty) Ltd ("the Competitor"), opted not to oppose it.

Relevant Background

[3] In matters like *in casu,* the following questions are to be determined:

"(a) Does the one party have an interest that deserves protection ***after*** termination of the agreement?

(b) If so, ***is that interest threatened by the other party***?

(c) In that case, does such interest weigh ***qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive***?

(d) ***Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the Restraint be maintained or rejected***? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the Restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement 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.

(e) A fifth question, implied by question (c), which may be expressly added, viz ***whether the Restraint goes further than necessary to protect the interest***."

(*Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (*2) SA 486 (SCA) at paras 16-7)*

[4] However, answering these questions depends on what issues a presiding officer is called upon to decide. In this matter, the Respondents disputed that there is an existing Restraint of trade agreement between them and the Applicant, so this Court will have to answer all the above questions, where it is found that, indeed, the Restraint of trade exists, a further question that has to be decided is whether its enforcement is unreasonable and contrary to public policy. In that case, the *onus* is on the Respondents as they are the parties resisting enforcement, considering that generally, Restraint of trade agreements are valid and enforceable.

[5] To answer these questions, this Court proposes to first set out the following either common cause facts and/ or not seriously disputed points.

[6] The Applicant was established in 1978 to provide support services to clients with main products offered, such as short-term and long-term insurance, crop insurance, plantation insurance, and medical aids. The Applicant's short-term insurance products are marketed by a professional network of brokers supported by administration offices and provide clients with personalised services and effective claims handling.

[7] The Applicant's insurance department has services in provinces such as Mpumalanga, and currently, it has outsourced agreements with nine of the major insurers in the insurance industry. The Competitor is the largest independent insurance broker in the whole of Mpumalanga and is a direct and major competitor of the Applicant.

[8] Before the end of June 2019, both Respondents were employed by an entity called Platorand Makelaars (Pty) Ltd ("the Seller") as short-term insurance brokers. On or about June 2019, the Applicant and the Seller entered into a sale agreement wherein it was agreed that the Applicant was to purchase the Seller's business being the rights and obligations arising from a short-term insurance policy that the Seller had managed. This sale was a going concern and included goodwill and confidential clauses. The First Respondent was the owner and the sole director of the Seller; furthermore, both Respondents are related to each other and worked for the Seller immediately before the sale could be concluded.

[9] The Applicant and Competitor agreed that relating to employment contracts between the employees and the Seller were not to be transferred to the Applicant. However, instead, the employees (the Respondents) were to enter into new employment contracts with the Applicant with effect from 1 July 2019. Consequently, both Respondents were employed by the Applicant as marketers. The Applicant and the Respondents further signed respective confidentiality agreements, and their relevant terms that require reproduction herein read thus:

"2.3.3 the employee will not, while he is employed in the group ***and for a year after he ceases to be employed within the group for any reason whatever****.*

2.3.3.1either for himself or as the agent of anyone else, persuade, induce, solicit or procure any employee of any company in the group to become employed by or interested in any manner whatever in any business, firm, undertaking or company (all of which are hereinafter referred to as "any concern"), directly or indirectly in competition with the business carried on by any company in the group:

solicit, interfere with, or entice or endeavour to entice away from any company in the group any person, firm or company who or which, during the period of this agreement or at on the date of its termination, was a customer and /or a supplier and /or agent of or was accustomed to dealing with any company in the group."

(Own emphasis)

[10] The Respondents worked for the Applicant, as alluded to above, until November 2022, wherein they tendered their resignation notices to the Applicant as they intended to leave it by 31 December 2022. Before the latter date, a meeting was held between Ms Prinsloo of the Applicant and the Respondents' legal representatives wherein *inter alia* the issue of confidentiality clauses that were entered into were debated, the Respondents conveyed their intention to purchase from the Applicant a list of the client ("the Book") to the value of R1,5 million (a written offer containing the list of clients), and that such offer was rejected by the Applicant. The Respondents advised Ms Prinsloo that they wanted to start their short-term insurance company.

[11] It is also common cause that some of the list of names in the Book are in possession of the Respondents and that some of the clients communicated with the Respondents on or about January 2023, following the latter's departure from the Applicant. In December 2022, Prinsloo

received a Screenshot via WhatsApp advising him that one client, Isaac Smith, who is falling under the client's list, received a notification from one of the Respondents asking him to delete the phone number that had been allocated to the First Respondent by the Applicant and provided Smith with a new cell phone number.

[12] On 13 January 2023, one Ndlovu working for an insurer informed Prinsloo that the Second Respondent sent him an email requiring him to cancel a policy of a client of the Applicant previously serviced by the Second Respondent whilst in the employ of the Applicant. That 72 of the Applicant's clients previously serviced by the First or the Second Respondents have cancelled their policies with the Applicant, and the Applicant contends that they have joined the Third Respondent. This is correct because the Third Respondent has not disputed this averment.

Assessment and Analysis

[13] The Applicant indicates explicitly that the reason for them to approach this Court is to enforce the confidentiality agreement entered into between them and the Respondents relating to the Book. In response to the Respondents disputes about being in possession of the Book, furthermore deny that the Book has a commercial value and says this information is readily available through Google search. In addition, they are saying the protection of Goodwill purchased from the Seller expired on 30 June 2022. This Court deems it appropriate, at this stage, to indicate that the agreement being at play herein is not between the Seller and the applicant but between the latter and the Respondents, and the evidence indicates that the agreements entered into between the Respondents and the Applicant were not depending of the Seller and the Applicant's agreement.

[14] Confidential information falls under the description of protectable interest. However, for the Court to determine whether or not there is any confidential information, the party alleging such has a burden to show it. For information to be confidential, it must (a) be capable of application in

trade or industry, meaning it must be useful; not be public knowledge and property; (b) it must be known only to a restricted number of people or a closed circle, and (c) be of economic value to the person seeking to protect it. *cf*. *Walter McNaughton (Pty) Ltd v Schwartz & Others* 2004 (3) SA 381 (C) at 390 C-D, and *Den Braven S.A. (Pty) Limited v Pillay and Another* [2008] 3 All SA 518 (D).

[15] What is stated in paragraph 9 above clearly indicates that parties agreed that there was going to be a Restraint of trade for 12 months after the Respondents had left the Applicant; more so, this restraint is very specific that the Respondents should not solicit clients of the Applicant. This Court agrees with the Applicant that the agreement exists for 12 months, counting the date the Respondents exited the Applicant's employ.

[16] To determine this inquiry, this Court has to remind itself that it is not involved in the insurance business but it is the parties before it that are involved. Considering the evidence before this Court, it is clear that the client's list fell under the portfolio of the Respondents once in the employ of the Applicant. The Respondents, on their own, were saying they *"not first obtained knowledge of their existence and contact details whilst in the employ of the applicant and* ***formed part of the client list sold by Platorand****…admit that the parties listed, but for the stated 3 whom we do not know, fell under the individual portfolios whilst in the employ of the applicant"*. It is, therefore, clear that this information is helpful to the Applicant. Relating to whether it is of economic value and not of public knowledge, this Court deals with these elements hereafter.

[17] The Respondents may be within their rights to approach whoever they want to approach in order to bring business to the Competitor because competition is allowed; however, this Court has to take into account when such right is being exercised and under what circumstances in order to evaluate factors such as the protection of the agreements already in place, has to take into account "the honesty and fairness of the conduct involved",

and "the motive of the actor". *cf. Phumelela Gaming and Leisure Ltd v Grundlingh and Others* 2006 (8) BCLR 883 (CC) at para 32.

[18] It is common cause that when the Applicant bought the business from the Seller, as going concerned, that business was defined as including short-term insurance policies established and managed by the latter, so it is the Book that forms part of the economic value of the Applicant, which the Applicant has approached this Court to protect such entity. Furthermore, the Applicant and Seller agreed on the confidentiality clause of the clients, and the Seller was owned by the First Respondent. Clearly, these parties were aware that such a book was of economic value, and without any doubt, this was useful in the industry in which the Applicant operates. The conduct of First Respondent by approaching the Applicant wanting to buy some of the business that she sold to the Applicant via the Seller and, immediately upon leaving the Applicant, approached some of the clients of the Applicant, soliciting them that they must join the Competitor indicates that the motive of doing this was necessitated by dishonesty. Therefore, this Court opines that it will be unfair if these rights are not protected as they seem to be integral in the insurance business that the Applicant is involved in.

[19] It is the conclusion of this Court that this interest is being threatened, based, among other things, on the following reasons: the Applicant clients, namely Smith and Ndaba, were approached by the Respondents to solicit them to join the Competitor, and their is proof to that effect. The Applicant when agreed with the Seller, which was owned by the first Respondent; some of the names in the Book are part of such agreement, and parties agreed that it was going to be confidential when the First Respondent decided to leave; the Applicant indicated that they wanted to buy part of the business back, which Ms Prinsloo did not agree to. The Applicant has presented evidence that it lost about 72 of its clients immediately after the Respondents had left it. Moreover, in paragraph 21.9 of the founding affidavit stated that it has a direct loss of an amount of R1 149.630.71

because of the conduct of the Respondents; it is this Court's conclusion that the Applicant has demonstrated that there is a continuous harm which is substantial herein. Under the circumstances, this Court concludes that, indeed, there is a continuous threat, and if they are not protected, such a threat will continue and harm it further.

[20] Has the Applicant waived its right to protect this interest by attaching the list of clients on the application before this Court? The Respondents argued that the Applicant by annexing to this application the same information that it wants to protect no longer qualifies as confidential information that deserves protection. The Applicant disputes this as it argues that it is still protectable. In order to determine this issue, this Court is of the view that it would be proper to follow what Roos J said in *Vav Castricum v Thheunissen & Another* 1993 (2) SA 726 (T) where it said:

> *'What is clear from the aforesaid, is that someone who saves himself the trouble of going through the process of compilation of the document, even where it is compiled from information which is available to anybody, such a person would be interdicted if that information had been obtained in confidence. The reason is simply that confidential information may not be used as a springboard for activities detrimental to the person who made the confidential information available. It would remain a springboard even when all the features have been published or can be ascertained by actual inspection by any member of the public."*
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> (cf. Experian South Africa (Pty) Ltd v Haynes and Another 2013 (1) SA 135 GSJ)

[21] This suggests that one has to consider whether such information is of economic value to the Applicant. As indicated above, this information of economic value to the Applicant, despite being disclosed through these proceedings, has to be taken into account that it is a list that was purchased from the Seller and was not sourced via Google search as suggested by the Respondent. The Applicant troubled itself to source it from the Seller, so this Court follow the principle as expounded by Roos J above. The Applicant knew that they would become in possession of and

will have access to the trade secrets and confidential information of the Applicant, see paragraph 2.1.1.11. Such information has been shared with another competitor, which would prejudice the Applicant, clause 2.2.

[22] The Respondents have not tendered any reasons why enforcing the Restraint of trade is unreasonable. Furthermore, the Applicant is not seeking an order to interdict the Respondents from working for the Competitor nor suggesting that the Restraint would be for years but just 12 months. So, this Court concludes that public policy calls for the protection of the Applicant's interest herein. Moreover, there is no evidence from the Competitor suggesting that they will not be protected should the Restraint be ordered. So, this Court concludes that the restraint period is reasonable.

Urgency

[23] The Applicant properly set out the reasons for urgency in their papers, most importantly that the Respondents were already transferring the clients to the Competitor and upon becoming aware of that the Respondents made an undertaking that they were to comply with the Restraints of trade, but it transpired that they were not complying even with their undertaking. Furthermore, urgency of commercial interests sometimes justify hearing matters, like this one, on urgent basis considering the irreparable harm that might be suffered by a party who is calling for protection. *Cf. Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd* 1982 3 SA 582 (W)). So if this Court had not heard this matter the Applicant was to suffer irreparable harm because the restraints of trade are for a period of 12 months and the Respondents were already breaching the Restraint.

Conclusion

[24] These are the reasons for the Order issued on 16 January 2023.

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Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv Redding SC
Instructed by:	Seymore Du Toit & Basson Inc.
For the Respondents:	Adv Malan SC
Instructed by :	Lüneburg Janse Van Vuuren Attorneys