REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 741/17

In the matter between:

ABSA INSURANCE AND FINANCIAL ADVISORS (PTY LTD Applicant

and

JOHAN LEON JONKER First respondent

MOMENTUM CONSULT (PTY) LTD Second respondent

and

Case no C 742/17

ABSA INSURANCE AND FINANCIAL ADVISORS (PTY LTD Applicant

and

TERESA JONKER First respondent

MOMENTUM CONSULT (PTY) LTD Second respondent

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Heard: 14 November 2017

Delivered: 17 November 2017

SUMMARY: Urgent application – unlawful competition – application to restrain former employees from being employed by competitor in absence of restraint clause. Further application to prevent employees from using confidential information. Applications dismissed.

JUDGMENT

STEENKAMP J

Introduction

[1] This is a most unusual application. It raises a novel issue before this Court: Can an employer interdict and restrain its former employees from taking up employment with a competitor, on the basis of unlawful competition and without relying on a covenant in restraint of trade?

[2] Two applications were brought before Court on an urgent basis. They involve the same former and new employers, but two different employees. Although the positions of the two employees are slightly different, the two applications were heard and argued together and this judgment deals with both.

[3] The applications were heard on an urgent basis, outside of the normal time periods, in the midst of a very full opposed motion court roll on Tuesday 14 November 2017. The employee in case no C 742/17 is due to take up employment with the competitor in three days' time, on Friday 17 November 2017. She has not, through her legal team, given any interim assurances or undertakings. This judgment has therefore been drafted under severe time constraints, without the opportunity to do justice to a full discussion of the novel point that it raises.[1]

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[1] I am nevertheless grateful to counsel, and especially to Mr *Sibanda*, for the helpful and fairly comprehensive heads of argument that they have produced under similar time constraints. I have drawn liberally from those heads for references to authorities and indeed for framing the debate.

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Background facts

[4] The applicant, ABSA Insurance and Financial Advisors (AIFA), operates as a broker in the financial services industry. The first respondent in case number C 741/17 is Mr Leon Jonker. AIFA employed him and his wife, Mrs Teresa Jonker, as financial advisers. He specialised in commercial and agricultural lines of short term insurance; Teresa specialised in personal lines. She is the first respondent in case number C 742/17. Mr Jonker has taken early retirement and Mrs Jonker has resigned. He has taken up employment with Momentum Consult (Pty) Ltd (the second respondent in both applications) with effect from 1 November 2017. She intends to do so from today, Friday 17 November 2017. Momentum is a competitor of AIFA.

[5] The Jonkers live in Robertson. All the parties accept that it is a small community – especially when one has regard to those members of the community who are in the privileged position of being in need of financial advice – and that the Jonkers have built up close relations with their clients. Many of their clients are also friends. They provided brokering services to clients on behalf of AIFA and earned commission on an initial and ongoing basis for each client that they bring to and retain with AIFA.

[6] Both of the Jonkers have signed contracts of employment with AIFA that contain the following clauses:[2]

> "**11. CONFIDENTIALITY AND COMPANY PROPERTY**
>
> …
>
> 11.2 All information or information documents that the employee receives from the company must be kept strictly confidential.
>
> …
>
> 11.4 All training material in respect of internal courses conducted by the company [*sic*]. Instruction books, product analyses, forms, tariff books and client records or information [*sic*]. Company letterheads and other written matter that the employee may obtain in the course of his employment at the company, including all client data in whatsoever form or format, remain the property of the company, unless explicitly stated otherwise and must be

[2] His in English and hers in Afrikaans, but the Afrikaans version is a translation of the English.

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returned to the company upon request on termination of his service. As long as the employee fails to give effect to this, in addition to the company's right to claim damages, all further payments to the employee will be terminated until the requirements of these provisions have been met.

11.5 Any lead, reference, name or marketing information that the employee may obtain during his employment with the company remain [*sic*] the property of the company and shall not be actively applied by the employee following the termination of his service with the company in order to negotiate new assurance/insurance business or any other financial gain for himself, his family or any company/business in which he has a direct or indirect interest. However, this limitation does not prevent a client, from his own motivation and without encouragement from the employee, to have his business conducted by the employee following the termination of the latter's service with the company."

[7] Mrs Jonker's contract contains no agreement in restraint of trade. Mr Jonker's contract, though, does contain the following further clause:

"12. **PROTECTION OF CLIENT INFORMATION AND COMPANY INTERESTS**

12.1 It is not the intention of the company with this clause to prevent the employee from conducting business as a broker or financial adviser anywhere in the Republic of South Africa, or anyone else, as long as the employee's conduct is not in contravention of the stipulations of this clause in particular, or any other relevant laws in this agreement in general.

12.2 The employee agrees and undertakes in favour of the company, that should he resign from the employee of the company, or should his services be terminated for any reason whatsoever, he will not, for a period of two years after such resignation or termination, either personally or as principal, agent, partner, representative, shareholder, director, employee, consultant, adviser, financier, demonstrator, or in any other capacity, directly or indirectly:

12.2.1 carry on a business or activity similar to that of the company, by utilising the database, or any part thereof, or the client information on the database, or any part thereof, which she had access to or utilise at his normal place of business was employed by the company;

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12.2.2 solicit, interfere with or entice away from the company any person who was employed by the company as at the date of resignation of the employee from the employee of the company or at any time within two years immediately preceding such date.

12.3 The intention of the company with this clause is to protect the proprietary interests of the company, the client information of the company, the client information of the company within the practice the departing employee leaves behind, and the goodwill of the business of the company."

[8] Mr Jonker took early retirement on 1 October 2017. His notice period was to terminate on 31 October 2017. At the time he serviced some 470 clients. Mrs Jonker resigned on 16 October 2017. She serviced 792 clients. She did not tell AIFA in her resignation letter that she intended to go to work for Momentum at the end of her notice period, but it was a well-known fact in the office. The applicant immediately put both Jonkers on "garden leave" for the remainder of their notice periods. On 20 October 2017 they returned their company equipment, including their laptops and other software. AIFA also removed any confidential information from their laptops. It did not ask them to return or clear the information on their cellular phones. After this application had been launched, though, the Jonkers had all of the potential confidential information (including all client details, emails and SMSes) professionally removed from their cellular phones by an IT expert, as well as all information stored on iCloud.

[9] AIFA uses what it calls "sky agents" to approach what it calls "orphaned clients", i.e. clients that had been serviced by a financial adviser that leaves its employ. The sky agents try to persuade the clients to remain with AIFA rather than following the former financial adviser to a new brokerage or if they decide to practice for their own account.

[10] When the sky agents started contacting Mr Jonker's clients, it emerged that five of them had been in contact with Mr Jonker and that they had decided to stay with him as their broker. Transcriptions of the conversations were made available to the court. One sky agent asked one of the clients a leading question after having been told that "Leon Jonker is still doing things". Having asked, "oh, so he did contact you in the recent days?", the client answered, "yes, yes." Only one other client contacted

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indicated that Jonker had phoned him, but said that it was after Jonker had retired from AIFA. None of them indicated that they had been contacted by Mrs Jonker.

[11] Mr Jonker acknowledged that he had been contacted by clients who had been contacted by the "sky agents" or the applicant's call centre. They requested him to continue as their short-term insurance adviser after they had had dealings with the call centre. He was careful not to respond to any of those requests until after 31 October 2017.

[12] Mrs Jonker acknowledged that she had sent an email (from AIFA's server) to her former clients advising them that she was leaving the applicant. However, she did not say that she was joining Momentum nor did she encourage clients to follow her. What she said, was:

> "Ek stel u hiermee in kennis dat ek bedank het by ABSA Finansiële Adviseurs.
>
> Ek wil [van] hierdie geleentheid gebruik maak om u te bedank vir u lojale ondersteuning deur die jare."

[13] On 20 October 2017 the applicant wrote to Mr Jonker and reminded him of his obligations relating to confidential information and proprietary interests. It said:

> "Absa does not seek to enforce these provisions to prevent you from being employed as a short term adviser. This is, however, subject to the very important and express conditions relating to the poaching/enticement of our clients as outlined in clause 12 of your contract of employment."

[14] The applicant sought an undertaking from Mr Jonker not to communicate with any of its clients with the purpose of advising them that he is taking up competitive employment and encouraging them to transfer their business to him or his new employer. He replied by email without giving the undertaking but simply saying: "Ek verwys na u brief. Ek neem kennis van die inhoud."

[15] The applicant then launched this urgent application.

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The relief sought

[16] The applicant sought the following relief from both Mr and Mrs Jonker on an urgent basis:

> "2. Declaring that the respondent's position and use of the applicant's proprietary data (including, but not limited to, client contact details) is unlawful and in breach of the respondent's contractual obligations to the applicant, as set out in his contract of employment.
>
> 3. Ordering the respondent to return all proprietary data belonging to the applicant, in whatsoever format it may be held, within 24 hours of receipt of the order;
>
> 4. To the extent that such proprietary data cannot be returned, ordering the respondent to delete or destroy it and furnish proof that he has done so to the applicant's attorneys within 24 hours of receipt of the order;
>
> 5. Interdicting and restraining the respondent from breaching his confidentiality undertakings by contacting the applicant's clients, alternatively by using the applicant's proprietary data for the furtherance of his personal interests or the interests of another party, whether individual or juristic entities;
>
> 6. Restraining the respondent from taking up employment in the financial advice sector, within the Republic of South Africa, whether for his own account or in the employment of the applicant's competitors, for a period of six months or any other period that the court may deem reasonable."

[17] In an amended notice of motion, apart from joining momentum to the application, the applicant sought to change the time period in prayer 6 to two years instead of six months in respect of Mr Jonker only.

Urgency

[18] It is as well to dispose of the issue of urgency upfront. In the case of Mr Jonker, the horse has not only bolted, it has been grazing on the green grass of Momentum for two weeks. But Mrs Jonker is only due to take up employment with Momentum in three days' time, on Friday 17 November. And in any case, applications of this sort – regardless of their merits – are inherently urgent. It is on that basis that the court dealt with the matter.

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The confidential information

[19] AIFA seeks to enforce clause 11 of the contract quoted above in prayers 2, 3 and 4 of its notice of motion. It says that the Jonkers have its client data – including client contact details – and that they must either return or destroy it.

[20] The applicant did have a right to enforce this clause; but the Jonkers have already given effect to it. They have destroyed the client data in their possession – in the case of the data on their iPhones and on iCloud, of their own accord. They say they have no other client data in their possession. AIFA has not put up any evidence that they do. Applying the rule in *Plascon-Evans*[3], as this Court must in motion proceedings asking for final relief, I must accept that the Jonkers have destroyed the data in their possession.

[21] Prayers 2 to 4 in the notice of motion are moot.

Unlawful competition: Should the employees be restrained?

[22] Mr *Sibanda* argued that AIFA has a right to ensure that client confidential information is not used in competition with it. He argues that it is an implied term of every employment contract. In *Coolair*[4], the court set out the contractual and common law basis of this right as follows:

> "It is a matter of common knowledge that, under a system of free private enterprise and therefore competition, it is to the advantage of a trader to obtain as much information as possible concerning the business of

[3] *Plascon-Evans Paints (Tvl) Ltd. v Van Riebeck Paints (Pty) Ltd*. 1984 (3) SA 620 (A) at 623: "[W]here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (…)

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination … and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks."

[4] *Coolair Ventilator Co SA (Pty) Ltd v Liebenberg and Another* 1967 (1) SA 686 (W) at page 689.

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> his rivals and to let them know as little as possible of his own. He would be happiest if only what he himself chooses to disclose comes to the knowledge of his competitors. He is of course aware of the fact that his employees collectively know a great deal if not all of his business affairs. Whilst in his employ, or even after leaving it, it is in their power to disclose to competitors information capable of use adverse to him. The information may be a trade secret, e.g. a method of production not protected by patent, or a business secret, such as the financial arrangements of the undertaking, or a piece of domestic information like a salary scale of clerks, or the efficiency of the firm's filing system. Some of this information would be of a highly confidential nature, as being potentially damaging if a competitor should obtain it, some would be less so, and much would be worthless to a rival organisation. All this being well known to employers and employees alike, it must be presumed that every employer who has trade competitors would, if asked the question, say: 'But of course my employees are under a duty to me not to disclose information which can harm my business,' and the employees would confirm that such a term is implied in their contract of service. If an employee or ex-employee breaches the term he is liable to be interdicted from continuing to do so and to be made to compensate for damages caused."

[23] The conventional way to protect this right is of course by means of a restraint of trade, as Mr *Steyn* pointed out. The Appellate Division recognised this in *Reeves*[5], when it said:

> "An employee who by virtue of his employment would be in a position to exploit on his own behalf his employer's customer connections is free on leaving his employment, subject to certain limitations, to compete with his erstwhile employer for the business of the latter's customers unless restrained by contract from doing so…"

[24] But, argued Mr *Sibanda*, a restraint of trade is not the only way for an employer to protect itself. As a general principle, every person is entitled to exercise his or her trade or profession in competition with others. However, this right is not absolute. Such competition must remain within lawful bounds. If it does not, the other party is entitled to two forms of

[5] *Reeves and Another v Marfield Insurance Brokers CC and Another* 1996 (3) SA 766 (A) at 772E-F.

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relief, namely (i) an interdict against unlawful competition; and (ii) a delict against unlawful competition.

[25] Our law recognises two forms of unlawful competition, namely the unfair use of a competitor's fruits and labour; and the misuse of confidential information in order to advance one's business interests and activities at the expense of a competitor. The elements of unlawful competition were set out in *Waste Products*[6]:

> "Confidential information can be protected by means of an interdict and/or a claim for damages. To succeed with such relief, the following must be established. The plaintiff must have an interest in the confidential information, which need not necessarily be ownership. The information must be of a confidential nature. There must exist a relationship between the parties which imposes a duty on the defendant to preserve the confidence of information imparted to him, which could be the relationship between the employer and employee, or the fact that he is a trade rival who has obtained information in an improper manner. The defendant must have knowingly appropriated the confidential information. The defendant must have made improper use of that information, whether as a springboard or otherwise, to obtain an unfair advantage for himself. Finally, the plaintiff must have suffered damage as a result."

[26] In *Mullane*[7], the High Court recognised that, in the absence of a restraint of trade, a former employer could rely on unlawful competition. There, the Court was not faced with an application to restrain an ex-employee from taking up employment. Rather, it was faced with an interdict against the use of confidential information.

[27] Although it appears to be against him, Mr *Sibanda* argued that *Freight Bureau*[8] is not authority for the proposition that this Court cannot grant interdictory relief of the nature sought in this application. The Court in *Freight Bureau* held that an interdict of the nature sought is impermissible because its scope could be wider than the already overbroad restraint. However, he argued, this was *obiter* as the parties in any event agreed to

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[6] *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W) at 571 F-G.

[7] *Mullane and Another v Smith and Others* [2015] 3 All SA 230 (GJ) at paras 10 and 11.

[8] *Freight Bureau (Pty) Ltd v Kruger and another* 1979 (4) SA 337 (W).

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an order. I disagree. The following remarks of King J[9] preceding his comment that the common law interdict would be wider in scope than the restraint clause in that case, appear to me to be unequivocal:

> "In *Pelunsky & Co v Teron*[10] no interdict was sought restraining the defendant from carrying on any business whatsoever in competition with the plaintiff, nor, in my view, could such an order have been competently sought. …
>
> In any event, the granting of an interdict is an extraordinary remedy. It is granted in the exercise of a discretion by a court. It is not an actionable wrong for which there is no defence in law for an erstwhile employee to commence employment with a direct competitor of his or her erstwhile employer.
>
> In *Roberts v Etwell's Engineers Ltd* (1972) 2 All ER 890 Lord DENNING MR at 894 said:
>
> 'It is settled law that a servant, having left his master's service, may, without fear of legal consequences, canvass for the custom of his late master's customers, whose names and addresses he has learned during the period of his service, so long as he does not take a list of them away with him: see *Robb v Green* (1895) 2 QB 315. All the more so, an agent may do so, especially when the customers have been introduced by the agent himself. In the absence of express restriction [11](which must be reasonable) he cannot be restrained from canvassing the customers for a new principal.'
>
> The commentary in Heydon *The Restraint of Trade Doctrine* at 98 also contemplates that the difficulties of policing an order restraining the divulging of confidential information
>
> 'can be overcome *by a covenant not to compete drafted* to prevent work in a certain area, or in a certain trade, or for a certain firm. Such covenants act as blankets: *they go further than the interests protected by general law*, but this is permitted so that these interests are more effectively protected'.

[9] At 341 C – H.

[10] 1913 WLD 34.

[11] My underlining.

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> Thus *Heydon* recognises that without such an agreement to prevent employment with a competitor the general law would not grant such a protection.
>
> The interdict sought by the applicant based on common law cannot, therefore, be granted on the application of the basic principles for the granting of an interdict. No authority was quoted to me nor have I been able to find any which justifies the granting of an interdict merely on the basis that it creates a mechanism to police an interdict which is granted to stop conduct for which there is no defence in law. If the interdict could be granted on the basis of the common law as sought by the applicant there should in principle be no limitation in regard to time or area. The startling result would be that the applicant would have an interdict wider in scope than even if the grossly unreasonably restraint clause was enforced by way of interdict. In answer to this difficulty Mr *Cohen* submitted that the Court could limit the effect of the interdict by granting it for a period of six months. The period is arbitrary and there is, in my view, no valid basis for choosing such a period."

[28] The following part of the judgment in *Freight Bureau* was indeed obiter:[12]

> " I might add that, but for the consent of the first respondent to the granting of an interdict restraining her from divulging confidential information, I might have been mindful to refuse that order as the question as to whether the applicant had a reasonable apprehension that the first respondent was to divulge such information was evenly balanced on the papers. The unequivocal undertaking given by the first respondent in that regard might well have carried the day."

[29] In this case as well, the Jonkers have not only given an undertaking that they won't use the client data, they have destroyed it. Can AIFA in any event rely on an "express restriction" in this case?

[30] The only restriction applicable to both Mr and Mrs Jonker is that client names and data they obtained at AIFA "shall not be actively applied by the employee following the termination of his service with the company in order to negotiate new assurance/insurance business or any other financial gain for himself, his family or any company/business in which he

[12] At 342 B-C.

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has a direct or indirect interest. However, this limitation does not prevent a client, from his own motivation and without encouragement from the employee, to have his business conducted by the employee following the termination of the latter's service with the company."

[31] On the papers before me, and taking into account the rule in *Plascon-Evans*, the Jonkers have not "actively applied" the information they obtained at AIFA to negotiate new business or to obtain financial gain (such as continued commissions from their old clients). The only clients that have demonstrably been in contact with them are those that, according to Mr Jonker, contacted him because of their unhappiness with the AIFA call centre; and in the case of Mrs Jonker, those that she informed (by way of an email sent from the AIFA server) that she had resigned, without disclosing where she was going. I do not read the relevant clause to prevent the Jonkers from letting their old clients know that they were leaving without actively canvassing their business for themselves or MMI; and the clause explicitly allows any clients to elect for themselves to continue using the Jonkers as their brokers.

[32] I agree with Mr *Sibanda* that the case most on point appears to be the judgment of Pillay J in *Forwarding African Transport*[13] [*FATS*] – a case that he, to his credit, brought to the Court's attention although it appeared to be against him and he had to do his best to distinguish it from this one. There, the High Court was faced with an application to interdict an ex-employee from taking up employment with a new employer. The ex-employer sought this interdict (i) on the strength of an overbroad restraint of trade; and (ii) unlawful competition. The Court declined to enforce the restraint, leaving only the interdict to prevent unlawful competition. The Court's finding can be broken down into the following component principles:

> The applicant did not bring an application to interdict the ex-employee from using confidential information. The Court continued: "This suggests that the applicant's claim must rest on the notion that merely being employed by a competitor of the applicant in circumstances where the second

[13] *Forward African Transport Service CC t/a FATS v Manica Africa (Pty) Ltd* (2005) 26 *ILJ* 734 (D).

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respondent is in possession of confidential information constitutes unlawful competition by the second respondent…"

32.1 The Court endorsed the view expressed in *Freight Bureau*.

32.2 The Court reiterated that an interdict is a drastic remedy. To have granted it in the circumstances of that case, would have the effect of rendering the ex-employee economically inactive for a year.

32.3 The Court then said:

"All that the applicant has now is a fear that the second respondent might disclose information yet it does not apply for an order prohibiting the disclosure of confidential information but simply requires the second respondent not to work for the first respondent for a year."

32.4 Having found the restraint unenforceable, the Court could not grant an interdict that had the same, or a greater effect than the restraint.

[33] Mr *Sibanda* submitted that *FATS* is not an impediment to the relief his client seeks. This is so, he argued, for the following reasons:

33.1 The Court's ratio in *FATS* did not close the door to interdicting an ex-employee from taking up employment with a new employer based on unlawful competition. It only said this was unacceptable in the context where the ex-employer did not even seek protection of its confidential information in the interdict.

33.2 AIFA's case is distinguishable because its relief is finely carved. It is only designed to permit AIFA the opportunity to contact its clients who were serviced by the Jonkers before those clients decide to remain with the Jonkers. He argued that this will "give effect to" the right of those clients to elect. And AIFA seeks only to interdict the Jonkers to the extent that it will permit it to contact former clients to give effect to this election. This period is crafted in the notice of motion as six months, but Mr *Sibanda* argued that it could be as little as one or two months (or any other period the Court may deem reasonable).

33.3 Mr *Sibanda* conceded, quite properly, that the mere fact that the Jonkers are taking up employment with Momentum, even while in

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possession of client confidential information, is not unlawful competition. However, he urged the Court to find that the Jonkers have done more: They have actually utilised the information to contact clients.

33.4 AIFA does not seek the interdict solely to police the use of its confidential information. AIFA has already sought specifically to interdict the use of confidential information. However, he argued, AIFA cannot be expected to be content that the Jonkers will resist this, especially in light of the compelling personal circumstances described by Mr Jonker.

[34] Much like the case in *FATS*, granting the interdict based on unlawful competition would have the result of rendering the Jonkers economically inactive and unproductive for six months (or perhaps a lesser period, given Mr *Sibanda*'s submissions in argument – but that is still a drastic inroad on their productive capacity).

[35] The Jonkers have already destroyed the confidential information that remained in their possession after they had returned their laptops and files to AIFA. And they are expressly permitted to continue servicing clients who elect to do so, provided they do not "actively apply" AIFA's data to pursue those clients. The onus is on AIFA to prove a clear right; it has not, on the papers before me and given the Jonkers' assurances to the contrary, proven that the Jonkers have actively pursued any AIFA clients in order to secure their business for themselves or for Momentum.

[36] AIFA's "sky agents" are free to contact the clients who have been using the Jonkers' services. And they are free to compete for their continued custom in an open market. What it cannot do, is to prevent those clients from making their own election to continue with the Jonkers' services. As Mr Jonker pointed out, Robertson is a small community. Many of the Jonkers' clients are also their friends. His explanation that the news of their resignation from AIFA has "spread like wildfire" through the community, is entirely plausible. It would quickly come to the attention of their clients; and it is entirely logical and conceivable that those clients

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would contact them to obtain clarity about their insurance and other portfolios, whether the sky agents got to them first or not.

[37] Mr *Sibanda* further argued that what AIFA seeks is not a restraint by the back door. It is akin to an "implied restraint", which is not excluded in our law. Only a handful of cases have dealt with an implied restraint of trade. Courts are reluctant to include restraints of trade by implication.

> "A covenant in restraint of trade is one which is in itself closely scrutinised as regards its reasonableness. It is a kind of agreement which is not encouraged by the law and must be confined within certain fixed limits before it will be upheld. Where a written contract of service is in existence, the Court would not readily read into it an implied covenant in restraint of trade. I do not wish to be understood to say that such a covenant can never be contained in an agreement by implication."[14]

[38] However, the courts have not excluded its possibility. *Saner* [15] states:

> "There is no reason why the normal rules for the implication of terms in contracts should be applied any differently with regard to agreements in restraint of trade than in any other contract. The decision in Magna Alloys has not altered the law in this regard."
>
> But, he adds:
>
> "But the courts will not lightly read into an unclear or ambiguous provision in an agreement a restrictive covenant in restraint of trade, primarily, presumably, because of the importance at common law, and in terms of the Constitution, of a person's right to work and to choose his or her trade or profession."

[39] I am not persuaded that AIFA has been able to prove an implied restraint of trade in the face of the clear protections relating to the protection of confidential information it has negotiated in the contracts of employment.

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[14] *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler* 1971 (3) SA 866 (W) at 869 E-F.

[15] Saner, *Restraints of Trade in South African Law* (LexisNexis Issue 11 at 15.7.

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Clear right?

[40] As the court pointed out in *Freight Bureau* and in *FATS*, the granting of an interdict is an extraordinary and drastic remedy. Has AIFA established a clear right to that extraordinary remedy in this case? I think not.

[41] AIFA did have a clear right to protect its confidential information; but the Jonkers have destroyed the information in their possession. AIFA has not proven that they have acted unlawfully.

Injury committed or reasonably apprehended?

[42] Similarly, AIFA has not been able to show that the Jonkers have committed an injury. AIFA may subjectively have an apprehension that the Jonkers will still actively solicit its clients' business; but on the evidence to date, that apprehension has not been shown to be a reasonable one.

Alternative remedy?

[43] AIFA has an alternative remedy in any event. Should it be able to prove – in a trial with oral evidence – that the Jonkers have indeed abused confidential information in unlawful competition with it, the damages (mostly based on commission lost) will be easily quantifiable.

<u>Mr Jonker's restraint clause</u>

[44] That leaves the application based on Mr Jonker's restraint clause, interdicting him for two years "from taking up employment in the financial advice sector, within the Republic of South Africa, whether for his own account or in the employment of the applicant's competitors". This is based on the clause in his contract of employment that says that he may not -

> "carry on a business or activity similar to that of the company, by utilising the database, or any part thereof, or the client information on the database, or any part thereof, which he had access to or utilise at his normal place of business was employed by the company".

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[45] The aspects to consider to assess the reasonableness of a restraint are well known:[16]

45.1 Does one party have an interest that deserves protection after termination of the agreement?

45.2 If so, is that interest threatened by another party?

45.3 Does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive or unproductive?

45.4 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?

[46] Enforceability of a restraint hinges on a reconciliation of a number of factors. These include the nature of the activity sought to be prevented, the duration of the restraint, and the area of operation of the restraint. [17]

[47] This issue turns on a protectable interest. The following principles have been espoused regarding protectable interests:

47.1 There are generally two kinds of interest to protect: (i) trade secrets, which could be used by a competitor to gain a relative advantage; and (ii) trade connections, which are relationships with customers and suppliers.[18]

47.2 Information received in confidence during employment is protected by a legal duty implied in the contract of employment.[19]

47.3 Information deserving of protection includes information received by an employee about business opportunities; information received in confidence; and information about a process of skill which has been

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[16] *Basson v Chilwan* 1993 (3) SA 742 (A); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) par 16; *SPP Pumps (SA) (Pty) Ltd v Stoop* (2015) 36 *ILJ* 1134 (LC) par 28.

[17] *Ball v Bambalela Bolts (Pty) Ltd* 2013 (34) *ILJ* 2821 (LAC) paras 16-17.

[18] *Vox Telecommunications (Pty) Ltd v Steyn* (2016) 37 *ILJ* 1255 (LC) par 50.

[19] *Dickinson Holdings Group (Pty) Ltd v Du Plessis* (2008) 29 *ILJ* 1165 (N).

kept confidential. In assessing the employee's role, care must be taken to view it holistically. [20]

[48] It is for the respondent to show that he or she did not acquire any significant personal knowledge. All the applicant need show is that there is secret information to which the respondent had access and could, in theory, transmit if so inclined.[21]

[49] The commitment not to disclose confidential information is not a defence. An employer does not have to show that an employee has, in fact utilised confidential information. Only that he could do so. The employer should not have to content itself with hoping that the employee will not breach the restraint. [22]

[50] AIFA contends that its restraint is reasonable on account of all these factors and that it is enforceable. I disagree.

[51] AIFA hung its restraint on one identifiable protectable interest, viz its database, and more specifically client information. Mr Jonker did have access to that information and his access to the information did threaten AIFA's interests: he could use it to his advantage or to the advantage of Momentum. But he has destroyed it; AIFA need not cross its fingers and hope that Mr Jonker doesn't use the information, because it is no longer his to use.

Conclusion

[52] AIFA has not demonstrated a clear right to the extraordinary relief it seeks. Nor has it satisfied the other requirements for final relief.

[53] Both parties have asked for costs to follow the result. I agree.

Order

The applications in case numbers 741/2017 and 742/17 are dismissed with costs.

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[20] *Meditronic (Africa) (Pty) Ltd v Van Wyk* (2016) 37 *ILJ* 1165 (LC) par 16.

[21] *Vox Telecommunications (Pty) Ltd v Steyn* (2016) 37 *ILJ* 1255 (LC) par 31.

[22] *Ball v Bambalela Bolts (Pty) Ltd* 2013 (34) *ILJ* 2821 (LAC) para 22.

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A J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

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RESPONDENTS:	J F Steyn
Instructed by	Gerings attorneys.

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