



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

REPORTABLE: ~~YES~~/NO
OF INTEREST OF OTHER JUDGES: ~~YES~~/NO
REVISED _____

DATE

SIGNATURE

CASE NO: 2021/36805

In the matter between:

HERITAGE FINANCIAL CONSULTANTS (PTY) LTD

Applicant

and

RAMBOROSA, NIESHAM

First Respondent

ABSOLUT WEALTH MANAGEMENT (PTY) LTD

Second Respondent

JUDGMENT

FRIEDMAN AJ:

1 The facts of this matter are, relatively speaking, straightforward. The first respondent (“Mr Ramborosa”) was employed by the applicant (“Heritage”) on 31 March 2014 as a “life administrator”. In this position, Mr Ramborosa was responsible for managing and/or administering the financial products purchased by clients of Heritage, and related tasks. From 1 April 2021, Mr Ramborosa became employed by the second respondent (“Absolut Wealth”), a competitor of Heritage. In this application, initially launched as a “semi-urgent” application, Heritage seeks to restrain Mr Ramborosa from “approaching, contacting or soliciting any of the applicant’s clients on his behalf and/or for his benefit and/or on behalf of and/or for the benefit of any third party, in particular [Absolut Wealth], for a period of twelve months with effect from the date of the granting of this order, alternatively from the 1st of April 2021.”

2 It is clear from the papers in this matter that the relief described above was the main prize for Heritage when it launched this application. But, in prayers 3 and 4 of the notice of motion, Heritage seeks additional relief:

2.1 In prayer 3, Heritage seeks to interdict Mr Ramborosa from “utilising and/or disclosing the applicant’s confidential information, which confidential information includes but is not limited to, inter alia, the

particulars of the applicant's clients, contact details and/or details of the applicant's product suppliers and/or financial products and/or procedures ("the applicant's confidential information") to any third party, in particular" Absolut Wealth.

- 2.2 In prayer 4, Heritage seeks to interdict Absolut Wealth from "utilising any of the applicant's confidential information, in particular the applicant's confidential information which pertains to any of the applicant's clients for its own benefit or for the benefit of any other person or entity".

The contracts

- 3 At the heart of this matter are three contracts which were concluded by Mr Ramborosa and Heritage between 2014 and 2016, which were all annexed to the founding affidavit. It is necessary for me to discuss the relevant terms in each of them.
- 4 On 31 March 2014, Heritage made an offer of employment to Mr Ramborosa, which he accepted. It includes various terms and conditions of the employment relationship. At the end of the document, right before the signatures and after all of the numbered paragraphs, the following appears:

"You further agree that you will not, during the next twelve (12) months [sic] period following termination of your employment, approach, contact or solicit, either on your behalf or on behalf of any third party, for any reason competitive with the business of the organization, and any party which was a client of those companies during your employment and with whom you had contact on behalf of the organization".

5 This is a verbatim reproduction of the clause. I pause to emphasise that fact, because the wording of the clause is not entirely clear. I return to discuss the implications of that below.

6 The offer of employment provided that, after a three-month probation period, an employment contract would be concluded. On 18 August 2014, the parties concluded a contract of employment (“the August 2014 agreement”). The August 2014 agreement contains the usual terms relevant to an employment relationship – governing issues to do with the commencement date, responsibilities, place of work, remuneration, deductions, leave and the like. For our purposes, the noteworthy aspects of the August 2014 agreement are:

6.1 It does not contain a restraint clause similar to the one reproduced in paragraph 4 above.

6.2 It contains a clause, not unusual in contracts of this nature, providing that:

“The parties acknowledge and agree that this Agreement constitutes the entire contract between them and that no provisions, terms, conditions, stipulations, warranties or representations of whatsoever nature, whether express or implied have been made by either of the parties or on their behalf except as are recorded herein”.

7 In 2016, a decision was made to register Mr Ramborosa as a “representative under supervision” in terms of section 13 of the Financial Advisory and Intermediary Services Act 37 of 2002 (“the FAIS Act”). In essence, the motivation for this decision was that Mr Ramborosa had rendered services to

Heritage of a high quality and Heritage wanted to enable Mr Ramborosa to be able to solicit new clients for the benefit of Heritage and himself (by earning commission). Registration under section 13 was a pre-requisite to that.

8 As a result of the requirements of the FAIS Act, on 1 July 2016 Heritage and Mr Ramborosa concluded a “Contract of Employment for Representatives Under Supervision” (“the supervision agreement”). The supervision agreement contains similar provisions to the August 2014 agreement – ie, clauses relating to the conditions of employment, responsibilities, place of work, remuneration, leave, medical aid and the like. There are several noteworthy aspects of this agreement:

8.1 Like the August 2014 agreement, the supervision agreement does not contain a restraint clause similar to the clause found in the March 2014 offer of employment.

8.2 Like the August 2014 agreement, the supervision agreement contains a clause providing that

“The parties acknowledge and agree that this Agreement constitutes the entire contract between them and that no provisions, terms, conditions, stipulations, warranties or representations of whatsoever nature, whether express or implied have been made by either of the parties or on their behalf except as are recorded herein”.

8.3 Both the August 2014 agreement and the supervision agreement contain a clause dealing with confidential information. I did not reproduce the clause appearing in the August 2014 agreement (clause 18) above because, for reasons that will become apparent shortly, it is

not necessary to do so. However, because of its importance to this matter, I quote the clause dealing with confidential information (clause 19) in the supervision agreement. It provides that:

“19.1 It is recorded that, by virtue of his/her employment with the supervisor, will have [sic] access to confidential information.

19.2 The representative under supervision/Supervisee acknowledges and agrees that the confidential information has considerable value to the employer.

19.3 He/she has been and will be given access to the confidential information in order that he/she may carry out the duties that he/she was appointed to perform; and

19.4 The duties imposed upon him/her by virtue of his/her employment relationship with the supervisor include, without limitation, a duty of trust and confidence and to act at all times in the best interests of the supervisor.

19.5 The representative under supervision agrees that he/she shall not, either during or after termination of employment:

19.5.1 Directly or indirectly use for his/her own benefit, or the benefit of any other person, and shall keep confidential and not disclose any confidential information of the supervisor other than those persons connected with the supervisor through any failure to exercise all due care and diligence cause any unauthorised disclosure of the supervisor’s confidential information.”

9 I again wish to emphasise that I have quoted verbatim from the supervision agreement in the extract above.

10 There is then a further contract, concluded between Heritage and Absolut Wealth. There was a time when Absolut Wealth was considering buying Heritage. In order for them to negotiate openly, and for Absolut Wealth to

conduct what I would term a due diligence (although this is not a term used in the papers), the parties concluded a confidentiality agreement so that Absolut Wealth could look at Heritage's books, and the confidentiality of Heritage's proprietary information could be protected. The purpose of the agreement was to facilitate the sharing of confidential information with the proviso that each party (a) acknowledged that it was only able to gain access to the confidential information because of the negotiations that the parties were conducting and (b) undertook not to make use of the confidential information.

THE ISSUES

11 The following issues arise for determination:

11.1 Did the restraint clause reflected in the offer of employment survive the conclusion of the August 2014 and supervision agreements? Or, as argued by the respondents, did each of the latter agreements novate the former, meaning that the restraint clause is no longer enforceable against Mr Ramborosa?

11.2 If the restraint clause did not survive, does the confidentiality clause in the supervision agreement give rise to an entitlement on the part of Heritage to the interdict sought in paragraph 3 of the notice of motion (see paragraph 2.1 above)?

11.3 Either way, does the confidentiality agreement concluded between Heritage and Absolut Wealth give rise to an entitlement on the part of

Heritage to the interdict sought in paragraph 4 of the notice of motion (see paragraph 2.2 above)?

THE LAW

12 There are primarily two legal questions arising from the issues which I have identified above. These are:

12.1 What is the proper approach to the interpretation of the agreements described above?

12.2 What is the proper approach to the question whether the supervision agreement novated the August 2014 agreement and the offer of employment?

13 These questions overlap because the second question – whether a contract novates a prior agreement – is also a matter of interpretation. But it is necessary for me to deal briefly with the specific principles relevant to novation.

The interpretation of contracts

14 Could Wallis JA, when writing paragraph 18 of the *Endumeni*¹ judgment, possibly have anticipated the extent to which it would be adopted as an incantation? It is hard to tell, but his remarks have certainly been beloved, both by practitioners and our courts. Justifiably, if I may respectfully say so.

15 In *University of Johannesburg*,² the Constitutional Court once again endorsed Wallis JA's remarks in *Endumeni*.³ It then proceeded to state the following principles (some of which were reflected in previous decided cases, including *Endumeni*), which guide the interpretive exercise that I must conduct in this case:

15.1 First, to determine the correct meaning of a clause in a contract, one must consider the context, language and purpose from the outset, with none of these predominating over the others.⁴

15.2 Secondly, the principle described does not only apply in cases of ambiguity. When interpreting a contract a court must, from the outset, "consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract."⁵

15.3 Thirdly, in order to apply the approach described above, the parties will "invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions."⁶

¹ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

² University of Johannesburg v Auckland Park Theological Seminary 2021 (6) SA 1 (CC)

³ See University of Johannesburg (supra) at para 64. I say "once again" because the Court had already endorsed *Endumeni* on several occasions (see, for example National Credit Regulator v Opperman 2013 (2) SA 1 (CC) at para 96; Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd 2015 (5) SA 370 (CC) at para 22)

⁴ University of Johannesburg (supra) at para 65

⁵ University of Johannesburg (supra) at para 66

⁶ University of Johannesburg (supra) at para 67

- 15.4 Fourthly, despite this, extrinsic evidence is not always admissible. Contractual interpretation remains a question of law and evidence to establish matters of purpose and context should be used as conservatively as possible.⁷
- 15.5 Fifthly, where reasonable people might disagree as to the admissibility of evidence as to the context and purpose of the agreement, courts should err on the side of admitting the evidence. In this regard, there are sufficient checks on “any undue reach of such evidence” because courts would be free to disregard evidence considered not to be sufficiently weighty.⁸
- 16 In my view, the summary which I have produced in paragraph 15 above constitutes an accurate reflection of the current approach to the interpretation of contracts in South African law. I am therefore obliged to apply it in respect of the three issues identified in paragraph 11 above. To what I have said in my summary in paragraph 15 above, I would only wish to add this: I do not understand the implication of the Constitutional Court’s judgment, in stating the proper approach to the handling of evidence, to be that where there is a dispute of fact between the parties as to the proper meaning of a contract in motion court one should simply apply *Plascon-Evans* and crown a winner. The task of a court, in a matter where no oral evidence is led, remains to consider the meaning of the agreement understood in its proper context, and in the light of

⁷ University of Johannesburg (supra) at para 68

⁸ University of Johannesburg (supra) at para 68

its purpose. The evidence in the affidavits is, of course, relevant to this exercise. But, the failure of a respondent to dispute an allegation meaningfully – such as, an allegation that the parties intended for particular information to be treated as confidential – does not simply mean that the applicant must prevail on that point. The context and purpose of a particular clause of an agreement may in many cases be derived from the wording and the rest of the agreement (a point made in *Endumeni*), including what the agreement says itself about its purpose. I return to discuss the relevance of this later.

Novation

17 In my view, it would be fair to describe *National Health Laboratory Service*⁹ as the leading, modern case on novation because it dealt with the topic in detail in the light of the *Endumeni* line of cases. In *National Health Laboratory Service*, the SCA repeated what had already been held several times before that there is a presumption against novation because it involves a waiver of existing rights.¹⁰ As the Court put it:

“When parties novate they intend to replace a valid contract with another valid contract. In determining whether novation has occurred, the intention to novate is never presumed. In *Acacia Mines Ltd v Boshoff* [1958 (4) SA 330 (A) at 337D] the court held that novation is essentially a question of intention.”

⁹ *National Laboratory Health Service v Lloyd-Jansen van Vuuren* 2015 (5) SCA 426 (SCA)

¹⁰ *National Health Laboratory Service* (supra) at para 15

18 Christie points out that it will be very rare for a subsequent agreement to record expressly that the parties intended to novate a previous agreement.¹¹ Therefore, it will generally be necessary to derive the intention of the parties by the drawing of necessary inferences from the circumstances of the case and the text of the agreements. This is reflected in the approach of the SCA in *National Health Laboratory Service* in which it referred to an old Appellate Division case (*Electric Process Engraving and Stereo Co v Irwin* 1940 AD 220) in which the Court said that “the question is one of intention and . . . in the absence of any express declaration of the parties, the intention to effect a novation cannot be held to exist except by way of necessary inference from all of the circumstances of the case”. The SCA held that it follows from this approach that a court considering the question of whether the parties intended to novate a prior agreement “is entitled to have regard to the conduct of the parties, including any evidence relating to their intention”.¹²

19 What is noteworthy about *National Health Laboratory Service* is that, although this was not the focus of the Court’s reasoning on whether the parties had intended to novate, there was a whole-agreement clause in the second agreement (which had been one of the bases on which the High Court had held that there had been a novation¹³). And despite this (although, again, it has to be said that the implication of this clause was not discussed in detail in the judgment), the Court held that the parties did not intend the latter agreement to

¹¹ Christie’s *Law of Contract in South Africa* (7 ed) at 522. The 7th edition of this great resource was written by GB Bradfield.

¹² See *National Health Laboratory Service* (supra) at para 16

¹³ *National Health Laboratory Service* (supra) at para 7

novate the former. In essence, the rationale for the decision in *National Health Laboratory Service* is that the two agreements considered in that case dealt with different aspects of the relationship between the parties (ie, they served different purposes) and the latter was essentially a continuation of the former.¹⁴ An important feature of the judgment is also that there was no conflict between the provisions of the two agreements.¹⁵

20 It seems to me, based on the summary above, that the following is a fair reflection of the law on novation:

20.1 Novation becomes relevant where parties to an agreement intend to replace an agreement concluded between them with a subsequent agreement.

20.2 Because novation involves the waiver of rights, it is not lightly presumed.

20.3 The main focus of the inquiry is on the intention of the parties. Since it will be rare for them to record expressly that their agreement novates a previous one, this intention must be inferred from the circumstances of the case.

20.4 In order to determine the intention of the parties, evidence as to their conduct and intention is admissible and relevant.

¹⁴ National Health Laboratory Service (supra) at para 18

¹⁵ National Health Laboratory Service (supra) at paras 18-20

20.5 The presence of a whole-agreement clause in a subsequent agreement is not a decisive indication as to whether the parties intended that agreement to novate a prior agreement. Even in the face of such a clause, it is necessary for the court to determine the true intention of the parties and whether, in particular, it was intended for the two agreements to co-exist side by side.

20.6 The fact that provisions in the two agreements conflict with one another is a strong indication that the parties intended to novate the former agreement with the latter.

21 The last of these considerations appears to me to be particularly important. It is hard to see how one might avoid the conclusion that a later agreement novated an earlier one, when they cover the same subject area and it is not possible to comply with both of the agreements at the same time. I return to discuss this again below.

THE RESTRAINT OF TRADE

22 The crisp issue when it comes to the restraint of trade – and therefore whether I should grant prayer 2 of the notice of motion – is whether the clause survived the subsequent conclusion of the August 2014 agreement and thereafter the supervision agreement. *Mr Malan SC*, who appeared for the respondents, argued that the August 2014 agreement novated the offer of employment and the supervision agreement novated the August 2014 agreement. On that basis, the respondents argue that the restraint clause is no longer enforceable.

Heritage, on the other hand, argues that all of the agreements must be read together and that, properly interpreted, the parties did not intend to replace the offer of employment with the subsequent two agreements; or, more precisely, that the restraint is one of the terms of the offer of employment (perhaps the only one) which survived the conclusion of both the August 2014 agreement and the supervision agreement. Heritage argues that intention to novate should not lightly be presumed and that the absence of an express clause in the subsequent agreements (ie, the August 2014 agreement and the supervision agreement) recording that the previous agreements were novated suggests that the parties did not intend to novate the earlier agreements.

- 23 I have referred to the whole-agreement clause in the supervision agreement in paragraph 8.2 above. On its own terms, it would seem to preclude the possibility that any of the terms of the previous agreements survived the conclusion of the supervision agreement (subject to what I have said above about *National Health Laboratory Service*). But what is also relevant, in my view, is the context in which the whole-agreement clause was included in the agreement – if one reads the agreement as a whole, and compares it to the Aug 2014 agreement, they cover the same types of issue; in particular, the essentialia of an employment contract. And, not only that, but the clauses contradict one another in material respects. So, for instance, the remuneration clause appearing in clause 6 of the August 2014 agreement provides for remuneration of R15 426.59. On the other hand, the remuneration clause in the supervision agreement (ie, clause 9) provides that Mr Ramborosa would be paid by commission only. These two clauses are clearly inconsistent with one

another. Leave is another example. In the August 2014 agreement (clause 8), Mr Ramborosa is entitled to 15 days' paid leave. By contrast, the supervision agreement makes clear (in clause 11) that Mr Ramborosa was entitled to unpaid leave only.

24 On the strict test established by our courts to inferring an intention to novate, I am open to the suggestion that the August 2014 agreement did not novate the offer of employment. When read side by side, the two documents do not contradict one another, and the August 2014 agreement could simply be seen as an attempt to codify, in more detail, the employment relationship between the parties. On this construction one should see the offer of employment, including its restraint clause, and the August 2014 agreement as part of one, consolidated contract. On the other hand, the fact that the offer of employment applied during a probation period would seem to imply that the parties intended the subsequent employment contract to replace it.

25 I do not need to decide that question because, when the supervision agreement enters the frame, we see a series of conflicts between it and the previous agreements, which show that it cannot live side by side with either of them. It is, to give a stark example, simply impossible to implement both of the remuneration clauses at the same time. But the inconsistency also operates at a more fundamental level. The offer of employment and the August 2014 agreement both record Mr Ramborosa's position as "Life Administrator". By contrast, in the supervision agreement, Mr Ramborosa was described as a "representative under supervision". This is not a mere cosmetic difference. The

whole purpose of the supervision agreement was to change the nature of Mr Ramborosa's employment so that he could begin to attract his own client base which he could not do unless and until he had been registered as a representative under supervision under s 13 of the FAIS Act. Because, under the new arrangement, Mr Ramborosa was permitted to solicit his own business (technically under the supervision of Mr Cohen, a director of Heritage), his remuneration was changed from a fixed salary to being purely commission-based. The entire nature of the contractual relationship was altered by the conclusion of the supervision agreement, and it is simply not possible to implement both the supervision agreement and the prior agreements simultaneously.

26 Taking this into account, it is my view that the restraint clause did not survive the conclusion of the supervision agreement because:

26.1 Even if one treats the offer of employment as co-existing with the August 2014 contract, the supervision agreement is inconsistent with the terms of that consolidated agreement.

26.2 Where later terms are inconsistent with earlier terms, this strikes me as strong evidence of an intention that the latter agreement novates the former.

27 In all of these circumstances, I find that the supervision agreement novated the previous agreements. This means that the restraint clause is no longer enforceable and prayer 2 of the notice of motion cannot be granted.

28 But even if I am wrong about this, there is a further reason why Heritage cannot be granted the relief which is seeks in prayer 2 of the notice of motion. The restraint clause on which Heritage relies has been reproduced in paragraph 4 above. The relief sought in paragraph 2 of the notice of motion has been reproduced in paragraph 1 above. For the sake of convenience, I reproduce both here:

28.1 The restraint clause reads as follows:

“You further agree that you will not, during the next twelve (12) months [sic] period following termination of your employment, approach, contact or solicit, either on your behalf or on behalf of any third party, for any reason competitive with the business of the organization, and any party which was a client of those companies during your employment and with whom you had contact on behalf of the organization”.

28.2 The prayer for relief in paragraph 2 of the notice of motion seeks to restrain Mr Ramborosa from “approaching, contacting or soliciting any of the applicant’s clients on his behalf and/or for his benefit and/or on behalf of and/or for the benefit of any third party, in particular [Absolut Wealth], for a period of twelve months with effect from the date of the granting of this order, alternatively from the 1st of April 2021.”

29 It may readily be seen from the two extracts, read side by side, that Heritage has done considerable panel-beating to the restraint clause in its formulation of the relief in the notice of motion. The restraint clause, read literally, is impermissibly vague because it does not expressly say who Mr Ramborosa is said to be precluded from approaching, contacting or soliciting. The phrase “and any party which was a client of those companies during your employment”

does not provide much assistance in the project of working out what was meant to come before it, because it is impossible to imagine what the reference to “those companies” is meant to convey.

30 Heritage does not ever expressly confront the vagueness of this clause in its founding affidavit. It does say, however, that “all employees of [Heritage], in particular [Mr Ramborosa] were always aware of and accepted the term of their initial employment letter that they are prohibited from approaching any client for a period of 12 months after the termination of employment. . .” Although Heritage’s case was not pleaded with direct reference to the approach summarised in *University of Johannesburg* (supra), one would fairly characterise this allegation as evidence as the context and/or the parties’ common understanding of the way in which the agreement was implemented.¹⁶ However, the allegation is denied by the respondents and I cannot, in the circumstances describe it as a bald denial (as argued for Heritage) since it is hard to see what else Mr Ramborosa could have said on the topic other than that (as he did) he did not understand himself to have such an obligation. So, we are left with a clause which is decidedly vague and in respect of which there is not too much evidence as to its scope and meaning.

31 It seems to me that, in the light of what I have said above, the position is the following:

¹⁶ Commissioner, South African Revenue Service v Bosch 2015 (2) SA 174 (SCA) at para 17; Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd [2012] ZASCA 126 at para 15

31.1 The objective indications are that the parties, in concluding the supervision agreement, intended to replace the agreements which came before it. On that basis, the restraint obligation fell away when the supervision agreement novated the previous agreements.

31.2 In any event, the restraint clause is impermissibly vague and would require the Court to come to the assistance of Heritage by embarking on considerable panel-beating to give it coherence.

31.3 While that panel-beating exercise could, in appropriate cases, properly form part of the interpretive exercise (ie, as part of determining what the parties truly intended to do), I am not minded to perform it in the absence of evidence on the point and given that restraints of trade constitute significant inroads into the right of the subject to earn a living. I am mindful that restraints are prima facie enforceable – however, this is in a context where one is able clearly to derive their terms. It seems to me that a party wishing to enforce a restraint of trade clause should take care to ensure that it is drafted clearly.

32 For all of these reasons, Heritage cannot be granted the relief in prayer 2 of the notice of motion.

MR RAMBOROSA'S OBLIGATIONS REGARDING CONFIDENTIALITY

33 But that does not end the complexities of this case (at least from my perspective), because the next issue is whether Heritage has made out a case for prayer 3 of the notice of motion.

34 In support of prayer 3 of the notice of motion, Heritage says the following in its founding affidavit:

34.1 Mr Ramborosa “always knew that the confidential information of the applicant comprised, first and foremost, the applicant’s client list and/or database, inclusive of the clients’ particulars which relate to addresses, telephone numbers, occupation, annual income, asset position, insurance and investment portfolios etc. Secondly, [Mr Ramborosa] knew and always treated this information as confidential in the manner the insurance industry always treats this information as confidential, inter alia because it takes enormous effort and financial input to acquire clients in that industry and to keep and maintain such clients. Thirdly, [Mr Ramborosa] was always acutely aware of the fact that he had a duty not to disclosure [Heritage’s] confidential information to anybody not related to [Heritage].”

34.2 After Mr Ramborosa’s resignation, it came to the attention of Heritage that Mr Ramborosa “as an employee of [Absolut Wealth], was approaching the clients of [Heritage] attempting to and/or indeed transferring [Heritage’s] clients to [Absolut Wealth].”

- 34.3 This conduct, which Heritage says was with the collusion of Absolut Wealth, involved clients in respect of whom Mr Ramborosa earned commission because he solicited or served them during his employment with Heritage.
- 34.4 Once these clients changed advisor code (which, as I understand the position, means that they would be linked to Mr Ramborosa at his new place of employment), Mr Ramborosa and Absolut Wealth would earn recurring commissions, but Heritage would be exposed to clawback provisions related to commissions received by Heritage prior to the change of advisor code.
- 34.5 The conduct of Mr Ramborosa and Absolut Wealth is unlawful because it is tantamount to “spring boarding” or “poaching” Heritage’s clients who became Heritage’s clients because of its efforts, expertise and/or financial input, “inclusive but not limited to the salaries, commissions and/or the administrative financial input paid by [Heritage] in so far as [Mr Ramborosa] solicited clients which, ultimately, became the clients of [Heritage] thereafter”.
- 34.6 The result of the respondents’ unlawful conduct is that the respondents are benefitting financially by using Heritage’s confidential information related to its clients and to take over such clients, without any effort on their part to justify any claim that these are in fact the respondents’ clients.

35 In argument, it became clear that it is common cause that, in principle, client lists are confidential. But all that seems to be common cause is that if there is a client list drawn up, for instance, on an Excel spreadsheet or the like, this would be confidential to a party such as Heritage and someone in the position of Mr Ramborosa would not be permitted to remove it, or use it, after the termination of his employment.

36 Clause 19.5 of the supervision agreement provides, without defining “confidential information”, that Mr Ramborosa was precluded “during or after termination” of his employment from directly or indirectly using Heritage’s confidential information for his benefit (see paragraph 8.3 above). There is no doubt that, in principle, some of the types of information envisaged by prayer 3 of the notice of motion are what one would define as confidential (although I have my doubts as to whether all of them are). What troubles me about Heritage’s case – and I debated this with both counsel in argument – is that it is simply not clear from the papers how precisely it is said by Heritage that Mr Ramborosa used its confidential information to his benefit (ie, to enable him to poach clients). Given that the harm pleaded by Heritage is the poaching of clients, it needs to be shown that Mr Ramborosa used Heritage’s confidential information in order to poach the clients.

37 In substance, Heritage’s case appears to be that any information relevant to its clients, even if these clients were solicited by Mr Ramborosa, is confidential and that, because it would be impossible for Mr Ramborosa to poach the clients without this information, Mr Ramborosa clearly used confidential information to

his benefit. But this is not ventilated comprehensively on the papers. For instance, is the contention of Heritage that Mr Ramborosa removed client lists and then used those to contact Heritage's clients? Or, is the contention that, simply by using their contact details (stored, for instance, on his phone), Mr Ramborosa breached the agreement because even this information is confidential? I do not believe that these questions are semantical. The conceptual difficulty which I face is to understand precisely how Mr Ramborosa was said to have exploited the confidential information to poach clients, in circumstances where all of the clients who Mr Ramborosa apparently "poached" were brought to Heritage by him in the first place. Put differently, it has to be asked: did the parties intend that, in perpetuity (because there is no time limit to the obligation imposed by clause 19,5 of the supervision agreement), Mr Ramborosa could not solicit a client of Heritage's because any information relating to those clients (however acquired) is confidential in the hands of Heritage forever? And, if Heritage did not mean to go so far, where are the limits (if any) to the obligation?

38 I debated this with *Mr Geyer*, who appeared for Heritage. He suggested that one possible solution to my concerns would be to impose a time limit on the operation of prayer 3 of the notice of motion – for instance, by providing that the interdict sought there would apply for 12 months only. Let us leave aside the fact that, in substance, this amounts to reintroducing the restraint via the backdoor (something to which I return shortly). My bigger difficulty with this submission is that it inverts the proper order of enquiry. It is based on the premise that any client information is confidential and that the only question is,

essentially for reasons of equity, whether the duration of the obligation not to use it should somehow be limited. But, to me, the potentially never-ending scope of the obligation is an interpretive indication that this is not what the parties could have intended. In other words, it could never have been the intention of the parties, in including a clause prohibiting Mr Ramborosa from using Heritage's confidential information to his benefit, that Mr Ramborosa would forever be precluded from contacting Heritage's clients, regardless of how he came to know of them and regardless of his prior relationship with them.

39 On this last point, it is common cause on the papers that a significant component of the clients who Mr Ramborosa "poached" were close friends or relatives of his. *Mr Geyer* appeared to concede that Mr Ramborosa should not have been precluded from approaching them, but he pointed out that it has never meaningfully been disputed on the papers that Mr Ramborosa poached clients in addition to those whom he has described as close friends and family. *Mr Geyer* is correct in this regard – the papers clearly demonstrate that more clients than simply Mr Ramborosa's friends and family were "poached". However, the difficulty with *Mr Geyer's* submission operates at a higher level – it is conceptually incoherent to treat Mr Ramborosa's friends and family differently to the other clients, when it comes to the definition of confidential information. What is it about the additional clients that makes information in respect of them confidential in the hands of Heritage but not the friends and family? If, as contended in the founding affidavit confidential information includes "clients' particulars", should that not relate to all clients? But even *Mr*

Geyer seemed to accept that something seems odd about suggesting that Mr Ramborosa was precluded from phoning his close friends and relatives with a view to moving them over with him to Absolut Wealth.

40 I do not mean to suggest that I wish to hold *Mr Geyer's* "concession" against him. If clause 19.5, properly interpreted, means that Mr Ramborosa could not approach any client of Heritage (including friends and family), then that is what it must be held to mean. But I mention my discomfort with that premise as part of the interpretive difficulty that arises when it comes to the question of how to characterise information as to the identity of clients in the context in which the issue now arises – where I am effectively being asked to interdict Mr Ramborosa from poaching clients because of Heritage's preferred interpretation of clause 19.5.

41 There is a further consideration: Heritage, as is apparent from what I have said above, seeks in essence to interpret clause 19.5 of the supervision agreement as a mechanism to prevent Mr Ramborosa from approaching Heritage's clients. But, if that is so, what was the purpose of the restraint clause in the original offer of employment? A clause – clause 18 – practically identical to clause 19.5 of the supervision agreement appears in the August 2014 agreement. If the offer of employment and the August 2014 agreement have to be read together (as contended by Heritage and, and as shown above, something which is certainly plausible to argue), then both the restraint and a clause substantively identical to clause 19.5 of the supervision agreement appear in that consolidated employment agreement. If clause 19.5 (or its analogue in clause

18 of the August 2014 agreement) means what Heritage says it means, then what is the purpose of the restraint?

42 I am mindful that, in the caselaw on restraints, our courts have held that a restraint must seek to enforce a protectable interest to avoid being found to be contrary to public policy. And that one of those recognised protectable interests is the protection of confidential information. Indeed, it is apparent from the way in which Heritage pleaded its case, that it (understandably) assumed the relief in prayers 2 and 3 of the notice of motion to go together. But again, we must be careful not to invert the proper order of enquiry. The question now is whether clause 19.5 of the supervision agreement gives rise to a self-standing right on the part of Heritage to preclude Mr Ramborosa from approaching any of its clients. It is in that context that I say – if that is the meaning of clause 19.5, then what is the point of the restraint?

43 A well-recognised protectable interest in our law on restraints is a company's trade connections. In *Den Braven*,¹⁷ Wallis AJ (as he then was) upheld a restraint of trade clause where the respondent (to whom the restraint applied) had spent years working for the applicant company, had developed close relationships with the applicant's customers (including, but not limited to, customers he himself had attracted to the company) and was accordingly well-placed to exploit those relationships by enticing those customers away from the applicant. Wallis AJ held that the applicant company had a right to restrain the

¹⁷ Den Braven SA (Pty) Ltd v Pillay 2008 (6) SA 229 (D)

first respondent from taking up employment with a competitor company and soliciting clients from the applicant for a period of eight months (the wording of the restraint clause having provided for a two-year period and the Court concluding that this was too long).¹⁸

44 But this does not mean that a person in the position of Mr Ramborosa is forever precluded from approaching clients of a former employer by virtue of a confidentiality clause such as clause 19.5 of the supervision agreement. If anything, it would seem to suggest that, if a company wishes to ensure that a former employee does not exploit his or her trade connections, the employer must insist on the conclusion of a clear restraint of trade clause.

45 By way of conclusion, I should point out that *Mr Geyer* referred me in argument to the extract from the founding affidavit quoted in paragraph 34.1 above. He then referred to Mr Ramborosa's response in his answering affidavit, which was to deny that he knows exactly what constitutes confidential information proprietary to Heritage and to say that he does not know what information "meets the legal requirements to constitute confidential information". Mr Geyer characterised Mr Ramborosa's response as unsatisfactory and argued that, in the circumstances, there was no bona fide dispute of fact in regard to the allegations which I have summarised in paragraph 34.1 above. On this basis, he argued that I was bound to grant the relief in prayer 3 of the notice of motion because it should be treated as common cause that that information is

¹⁸ Den Braven (*supra*) at para 55

confidential. But this, with respect, is not the correct approach to contractual interpretation in the light of *University of Johannesburg* for the reasons given above (see paragraph 16 above).

46 For these reasons, prayer 3 cannot be granted.

ABSOLUT WEALTH'S OBLIGATIONS REGARDING CONFIDENTIALITY

47 In prayer 4 of the notice of motion, Heritage seeks relief against Absolut Wealth, the terms of which I have summarised in paragraph 2.2 above.

48 The allegations made in the founding affidavit in support of this relief are the following:

48.1 Heritage and Absolut Wealth concluded a confidentiality and non-disclosure agreement on 28 October 2019 because Absolut Wealth was interested in buying Heritage.

48.2 After Absolut Wealth gained access to information related to Heritage's business operations, a strategy was devised in which, instead of buying Heritage's business, Absolut Wealth decided simply to employ Mr Ramborosa and, in doing so, gain access to Heritage's client base.

48.3 The ongoing employment by Absolut Wealth of Mr Ramborosa in circumstances where it was allowing him to breach his undertakings to Heritage was not only unlawful under the common law (which read in

the context of what is said later in the founding affidavit, seems to be an allegation that Absolut Wealth was committing the delict of unlawful interference with the contractual relationship between Heritage and Mr Ramborosa), but a breach of the confidentiality agreement between Heritage and Absolut Wealth.

49 This component of the case may be dispensed with briefly. Heritage's reliance on the common law is, of course, contingent on a finding that a valid restraint is operative or on a finding that clause 19.5 precludes Mr Ramborosa from taking Heritage clients over to Absolut Wealth. Since I have found that Heritage has no cause of action either in respect of the restraint or its claim to confidentiality as envisaged by prayer 3 of the notice of motion, Heritage must locate its entitlement to prayer 4 in the agreement concluded between it and Absolut Wealth.

50 The clear purpose of that agreement was to provide for open disclosure between the parties as part of the potential purchase by Absolut Wealth of Heritage. In the ordinary course of negotiations of that sort, it is obviously necessary for an entity such as Heritage to open its books to enable an entity such as Absolut Wealth to make an informed decision as to whether to purchase the business. Without an agreement such as the confidentiality agreement which Heritage and Absolut Wealth concluded, Heritage would be unprotected against any future attempt by Absolut Wealth to exploit confidential information that it was only able to acquire by virtue of the negotiation process.

51 As I have mentioned, there is an allegation in the founding affidavit that Absolut Wealth did just that by deciding to poach Mr Ramborosa instead of buying the business. Because of the parsimonious way in which the allegation is made, it is not even clear to me whether Heritage contends that Absolut Wealth acquired information about Mr Ramborosa's customer base as part of the negotiation process. But, even if that is the contention, it is not remotely supported by the evidence. It may well have happened – but I cannot reach that conclusion on the papers.

52 So, in essence, that leaves Heritage's contention that (a) client information is confidential information (b) Mr Ramborosa is using that confidential information for his benefit (and because it also receives a share of the commissions, also for Absolut Wealth's benefit) and (c) the wide prohibition in the Heritage/Absolut agreement against the use by Absolut Wealth of confidential information entitles Heritage to the relief in prayer 4 of the notice of motion. This construction requires me to find that the Heritage/Absolut agreement speaks to information deemed to be confidential but acquired outside of the negotiation process. This is simply inconsistent with the repeated indications, in the clear text of the agreement, that it was concluded with the sole purpose of protecting the sanctity and frankness of the negotiation process.

53 The most important component of the agreement, which demonstrates what I have just said, is that, in clause 2.1, it is made clear that Proprietary and Confidential Information (which is the type of information covered by the agreement) is information provided by one of the parties (ie, Heritage or

Absolut Wealth) to the other (ie, Absolut Wealth or Heritage), either directly or by a third party on their instruction (a reference to, for example, auditors). So, clause 2.1 effectively operates as a definition section, explaining what is meant by the term Proprietary and Confidential Information. Clause 4 is then the main operative clause of the agreement, and provides that the parties undertake not to disclose the Proprietary and Confidential Information or to use it in a manner which is adverse or detrimental to the interests of the business of the other party or any third parties. The definition of Proprietary and Confidential Information makes clear that it is information provided by one party to the other “by virtue of their association with each other”. It is clear, therefore, that even if the information envisaged by prayer 4 of the notice of motion is confidential, it is not covered at all by the agreement between Heritage and Absolut Wealth.

54 For these reasons, Heritage has not made out a case for the relief sought in prayer 4.

CONCLUSION

55 For all the reasons given above, the application must be dismissed. There was no suggestion, from either of the parties, that costs should not follow the result.

56 I accordingly make the following order:

- 1. The application under the above case number (2021/36805) is dismissed.**

- 2. The applicant is to pay the costs of the first and second respondents.**

**ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 3 December 2021.

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Date of hearing: 17 November 2021

Date of judgment: 3 December 2021