NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE CIRCUIT LOCAL DIVISION, EAST LONDON

CASE NO: EL 1361/14
ECD 2961/14

In the matter between

STRATA INSURANCE BROKERS CC **Applicant**

And

LEONORA GOOSEN **Respondent**

JUDGMENT

HARTLE J

1. A rule *nisi* operates in favour of the applicant pending this judgment restraining the respondent from:

1.1 utilising for her own benefit or the benefit of any other person or business and not to disclose to any third party any of the applicant's confidential information; and

1.2 "soliciting business from the applicant's clients contained in the short term insurance book sold by Motorsure CC to the applicant on 29 September 2011" (sic).[1]

2. The applicant, which operates a short term insurance brokerage, purchased the entire book of clients of Motorsure CC as "an income earning activity" - including the commission earned from such clients, as a going concern on 29 September 2011. The purchase consideration paid for it was R1.1 million.

3. At the time of the sale the registered owner of the members' interest in the close corporation was the respondent's mother. The applicant alleges that the respondent however held out to it at the time that she was the *de facto* owner of the members' interest in Motorsure CC and in fact conducted the negotiations on behalf of the close corporation which culminated in the agreement of sale. She was the "central personality" within the close corporation, so it was alleged, and was also responsible for servicing the clients who made up the short term insurance book which the applicant purchased from the close corporation during the course of her employment with the applicant. The significance of these facts is that they seemingly underpin the fiduciary duty allegedly owed by the respondent to the applicant in the peculiar circumstances of the matter to preserve the confidence of the confidential information sought to be protected herein from use or disclosure.

[1] Paragraph 2.2 of the original rule dated 11 November 2014 simply read "(t)hat the respondent (is) interdicted and restrained from soliciting business from the applicant's clientele". In circumstances which are not clear the rule was amended on 9 December 2014, I assume to qualify and limit the reach of the interim interdict seemingly confining it to clients who the respondent supposedly knew the identity and particularity of by virtue of her involvement with Motosure CC before the sale and during her subsequent employment with the applicant.

4. In the sale agreement the respondent and Motorsure CC bound themselves to a restraint of trade agreement which was to be signed contemporaneously with the sale. The respondent was to be employed by the applicant as a senior short term insurance broker in accordance with certain terms which were outlined in a letter of appointment which predated the sale agreement. It was further agreed that she was to become a 10% member's interest owner of the close corporation in accordance with the terms contained in her letter of appointment.

5. Pursuant thereto, and as was agreed between the parties, the respondent was employed by the applicant. The applicant paid the purchase price, but a sum of R200 000.00 was deducted in lieu of the respondent's acquisition of the 10% member's interest in the close corporation.

6. The respondent's letter of appointment was signed on 1 September 2011. One of the conditions of her employment related to confidentiality which she evidently subscribed to. This condition is expressed in the following terms:

> "You are required not to use for your own benefit or for the benefit of any other person or business and not to disclose to any third party during the operation of this agreement or after its termination, except in the ordinary and proper course of the Employer business, any confidential information but not limited to information regarding the trade secrets, customer lists, business affairs, supplier list, technical methods and processes of the Employer."

7. Faithful to the obligation personally undertaken by the respondent in the sale agreement, she signed a restraint of trade agreement together with her mother in favour of the applicant in which she undertook that she would not:

> "....during any part of the restraint period and thereafter, to the extent that same are protected by law, disclose any trade secrets and/or confidential information of the business other than to persons connected with the business and who are required to know such secrets or to have such confidential information. Trade secrets and confidential information shall include (but not be limited to) all and whatever information relating to the business and their suppliers and customers which is not readily available in the ordinary course of business to their competitors."

8. Also relevant is the respondent's obligation undertaken to the applicant not to trade in competition with it for the period of her restraint, expressed in the following terms, namely that she would not:

> "....be interested or engaged in any capacity whatsoever, including, but without prejudice to the generality of the aforegoing, as trustee, proprietor, shareholder, member, manager, director, adviser, consultant, partner, employee, financier or agent in or for any person which is directly engaged, interested or concerned in a competitive activity in the territory."

9. "Competitive activity" was defined in the restraint agreement to mean:

> "any sales or marketing activity in relation to the business' client base and/or client/s of the business during the restraint period and specifically precludes any signatory hereto of earning any income, making contact or in any way attempting to take any business and/or income away from the business whether for personal benefit or for the benefit of a third party in relation to such clients."

10. Shortly thereafter the respondent advised the applicant that she intended to relocate to Port Elizabeth for personal reasons and resigned from her employment with the applicant. As a result the intended transfer of the 10% member's interest in the applicant to the respondent was jettisoned. In a bid to regulate the respondent's exit from the applicant the respondent on 13 August

2012 signed a further restraint of trade agreement containing an undertaking in terms identical to the first agreement, the seminal clause of which is outlined in paragraph 8 above. Both restraints were operative in effect from 1 October 2012 to 30 September 2014.

11. The departure agreement defined clients as "all clients linked to Motorsure CC when (the applicant) purchased the Motorsure CC client base/book and who are registered as short term insurance clients of Motorsure CC with any short term insurer at the time (the applicant) purchased the book and any clients (the respondent) acquired for (the applicant) whilst an employee of (the applicant)".

12. The respondent was required to advise the clients of her intended departure and to facilitate the taking over by her substitute of these clients for whom she had been responsible.

13. The applicant co-incidentally attached to its founding affidavit as an annexure to the initial sale agreement (Annexure JE 2) a list of clients. It was not identified in any way as a seminal client list[2] neither was it alleged that it was to be construed as the "confidential information" it sought to protect the respondent from using or disclosing. The list, which contains the header "Old Motorsure Clients," tables in alphabetical order the name of each client and ostensibly with which insurer that client's business had been placed at the time. Email or postal addresses of each client, and in limited instances phone numbers, are also detailed - some annotated in long hand. Dates are also tabulated opposite each client's name which I assume –since they pre-date the sale agreement, denote when the respective clients came onto Motorsure CC's

[2] This despite the applicant's case being one for relief aimed at interdicting the respondent from utilizing its "confidential client list" according to the certificate of urgency put up on its behalf, as well as the general tenor of its founding affidavit.

book. In all respects the attachment appears to simply be a record of which clients comprised the book at the time of the sale.

14. The applicant alleged that since working for a competitor of it, T & M Broker Services - after the expiry of the restraint of trade during October 2014, the respondent actively started contacting the applicant's clientele. In substantiation of this allegation it referred to the fact that three of its clients which were acquired by it from Motorsure CC and with whom the respondent had dealt during the term of her employment with the applicant had moved their business to the competitor. The applicant alleged that it is "plain" from this that the respondent is utilizing confidential information to solicit business for her employer and for her own benefit. That this purported wrongful interference (i.e. that the respondent was using its confidential information) is based on nothing more than surmise is confirmed by an allegation by the applicant elsewhere in the founding affidavit that the respondent is "no doubt" disclosing its secrets and confidential information to her employer and in turn benefiting herself.

15. The applicant avers as the basis for the interdict sought that the respondent's conduct in soliciting clients of the applicant to which "she is privy" and which particularly is the proprietary property of the applicant is not what is acceptable as fair and honest competition. It pleads that the respondent has both a common law and a fiduciary duty (arising from the peculiar circumstances of her involvement with the applicant referred to above) not to use or disclose its confidential information. She also bound herself contractually not to do what she is now doing on no more than three occasions and is in breach of these undertakings which co-incidentally survive her contract of employment with the applicant as well as the expiry of the restraint of trade

agreements. The applicant pleads that the respondent "is not entitled to compete with (it) in breach of all that she undertook not to do."

16. The applicant marks the respondent as a threat especially on the basis that she is "intent upon action with the intention of soliciting away from (the applicant) its clients which she has done and can do since she has knowledge of all (the applicant's) client lists and particularly relating to these clients" and that she is aware of what insurance cover these clients have in place and what may be earned from their patronage as clients. It adds, without providing any substantiation for the averment, that its client list is "by its nature secret and confidential" and that it has a substantial economic value.

17. Seemingly however the real sting of the matter (and this is a complaint that is emphasised throughout the applicant's papers and more especially in its replying affidavit) is that she is purportedly infringing its right to goodwill for which, in no small part, it paid a substantial sum and also employed her and made her a member of the applicant.

18. In addition the applicant claimed that the respondent had made herself guilty of acting dishonestly even while still in its employ, flagrantly in breach of all her contractual duties owed to it as her then employer, in breach of her fiduciary duty then owed to it as a member of the applicant and also in breach of the restraint of trade agreements (while they were still in operation) for various reasons which it outlined in its founding affidavit. The respondent has vociferously denied these assertions but is unnecessary in my view to resolve these disputes of fact since the allegations – included no doubt to give atmosphere to the application and to present the respondent as an unscrupulous person and or competitor, do not in my view bear on the limited issues which are required to be determined in this matter.

19. The respondent makes no secret of the fact that since the expiry of her restraint she has contacted some of the applicant's clientele who happen to be among the list of clients which made up the book purchased by it from Motorsure CC. She denies that she utilised the applicant's confidential information in order to do so, as appears to have been assumed by the applicant, but claims to have procured the details of these persons using the telephone directory. She submits that it is not unlawful for her to solicit the applicant's clients even if they are among those listed as part of the client book sold by Motorsure CC to the applicant since she is no longer subject to the restraint of trade. It is her contention that the applicant is unfairly seeking to interdict her in perpetuity from contacting its clientele, in the process masquerading her undertaking to maintain confidentiality as a basis to justify an additional and prolonged restraint of trade. The sentiment however is that she has already honoured her restraint undertaking for the relevant period and ought now to be allowed to continue practising her trade without impediments even if it is unfortunately in competition with the applicant. Indeed, so she asserts, she must be allowed to fairly and honestly compete with the applicant for its clientele.

20. Also submitted on the respondent's behalf is that the applicant has misconstrued or conflated the notion of clientele itself (in the sense of "goodwill") with the separate concept of confidential information, simply assuming without laying any basis for it that the clientele itself must be construed as confidential information and therefore protected from solicitation. The respondent submits that the applicant has no proprietary claim to the clientele itself, only to confidential information insofar as it establishes that it has such a protectable interest in all the circumstances of the matter.

21. After the issue of the present application, the respondent in her answering affidavit, despite denying that she had utilised or disclosed confidential information belonging to the applicant in order to solicit its clients, gave an undertaking in the following terms:

> "I nevertheless undertake, for the sake of displaying my good faith, that I shall not utilise and/or disclose for my own benefit, or the benefit of others, any confidential information which I may have had access to during my tenure at the applicant and/or Motorsure CC. While not conceding that it necessarily constitutes confidential information, it will nevertheless include (inter alia) the client list annexed to the founding papers, marked Annexure "JE 2"."

22. It is to be noted that this undertaking in effect accords with the relief contained in paragraph 2.1 of the applicant's notice of motion. The applicant submits therefore that the rule *nisi* should to this extent be confirmed since it amounts to a concession as it were that the applicant was and is justified in approaching the court on an urgent basis for the relief which it seeks now in final terms. The respondent contends on the other hand that a general undertaking to refrain from doing something which is unlawful does not amount to a concession that she has engaged in the alleged unlawful conduct per se, neither does it entitle the applicant to a blanket interdict in this regard without establishing the necessary requirements for the grant of the interdict. Indeed - so it was submitted on the respondent's behalf, the evidence fails to establish either a clear right or an injury actually committed or reasonably apprehended and the respondent's undertaking does not co-incidentally remedy this shortcoming. The respondent submitted further that the third requirement for the grant of the interdict has not and cannot be established because the applicant says (albeit somewhat ambivalently) that it can prove a damages claim and hence it has a satisfactory alternative remedy open to it, but by virtue of the position I take in

the matter it is unnecessary to decide whether an interdict should be refused for want of the third requisite.

23. The narrow issues to be determined are whether the applicant has established that it has/had a proprietary interest worthy of protection in the form of confidential information and whether the respondent appropriated or made improper use thereof in order to or in the process of soliciting the applicant's clientele.

24. These issues must be resolved by applying the test enunciated in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd[3] namely that the interdict sought can be granted only if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavit, justify the grant thereof.

25. Before proceeding to examine these questions, I mention that despite the separate prayers referred to in paragraph 2 of the notice of motion, the applicant has not in my view indicated clearly where its cause (or cases) of action was (or were) intended to be directed, the various allegations stated in the founding affidavit as a basis for the relief sought being somewhat all over the place. From the context of the founding affidavit the second sub paragraph is allied to the first and appears to be relief flowing from it. In other words it does not appear to be a self standing second complaint of unlawful competition under a different category than the misuse of confidential information based on delict. Despite the manner in which the applicant pleaded its case, Mr De la Harpe, who appeared for the applicant, disavowed the suggestion by Mr Steenkamp, who appeared for the respondent, that the applicant had confused the two prayers and was mistakenly of the view that they were synonymous of each other. On the

[3] 1984 (3) SA 623 (A) at 634 E – G.

contrary Mr De la Harpe maintained that the prayers were different and that an order specifically interdicting the respondent from soliciting the applicant's clientele was not one which flowed from the first. The arguments made on behalf of the applicant in this respect (both in heads of argument and orally) do not however necessarily line up with the case as pleaded by it. I therefore proceed on the basis that the mischief sought to be interdicted is strictly the alleged misuse of confidential information and that the solicitation of clientele by the respondent - according to the applicant by the respondent accessing or using its confidential information, is or was simply a manifestation of that supposed unlawful conduct.

26. It was, for example, contended in heads of argument filed on behalf of the applicant that the respondent had acted contrary to public policy by "sell(ing) a client list, for significant financial benefit, and then seek(ing) to derive a second benefit by actually using confidential information as to the identities and needs of the clients on that list to solicit business for another," and that to allow that to go unchecked would be tantamount to "sanctioning (the respondent) obtaining a benefit from the client list she sold twice." Reliance was also placed on the judgment of A Becker and Co v Becker and Others[4] seemingly as authority for the proposition that an implied term not to solicit a purchaser's business which the seller sells to it can be enforced against the seller. The undercurrent is that – despite the allegation that the goodwill in this instance was sold to the applicant by Motorsure CC itself (as opposed to the respondent) such an implied term falls to be enforced against the respondent as if she were the actual seller, seemingly in perpetuity. In my opinion however such a clear self standing act of unlawful competition is not made out in the papers.

[4] 1981 (3) SA 406 (A).

27. Competitive trading is unlawful when it involves a wrongful interference with another trader's rights and is actionable under the *Lex Aquilia* if it results in loss.[5]

28. It is trite that a person may freely exercise his or her trade, profession or calling in competition with his or her rival, subject to the restriction that the competition remains within lawful bounds. If it is carried on unlawfully, in the sense that it involves a wrongful interference with another's right as a trader, such conduct will constitute an *injuria* for which the Aquilian action lies if it has directly resulted in loss.[6]

29. Our courts in considering whether or not competition is lawful have placed emphasis on criteria such as fairness and honesty having regard to the boni mores and general sense of justice in the community.[7] Questions of public policy, such as the significance of a free market and of competition may also be important in a particular case.[8]

30. There is no *numerous clausus* of acts that constitute unlawful competition but certain categories of clearly recognized illegality have evolved, among which is included the misuse of confidential information in order to advance one's business interests and activities at the expense of a competitor's. Confidential information may be protected by means of an interdict and a claim for damages.[9]

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[5] Schultz v Butt 1986 (3) SA 667 (A) 678.
[6] Schultz v Butt, *Supra*, at 678 F – G.
[7] Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1) SA 209 (C) at 218 H – 219 A.
[8] Schultz v Butt 1986, *Supra*, at 679 E.
[9] Waste Products Utilization (Pty) Ltd v Wilkes and Another 2003 (2) SA 515 (W) at 570 I - J and 573 F – G.

31. Evident from the following extract referred to in Waste Products Utilization (Pty) Ltd v Wilkes and Another[10] are the essentials that a plaintiff is required to prove in order to succeed in a claim (and by analogy to obtain an interdict) to protect confidential information:

> "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."

32. It is not in dispute that the respondent as a former employee of the applicant is under a general duty to the applicant not to take or use for the benefit of herself or an employer any of its confidential information, such as it exists. It is for this reason that she ostensibly had no qualms in giving the undertaking which she did outlined in paragraph 20 above based on the relevant agreements signed by her, except it was emphasised on her behalf that the undertaking given to generally maintain confidentiality survive the expiry of the restraint agreements thereafter only "to the extent that same are protected by law." In any event, the potential interpretation that the undertaking given in the restraint of trade agreements, insofar as they relate to preserving confidential information (seemingly in perpetuity) is not relevant for present purposes as the applicant's claim is founded on the Aquilian action of unlawful competition rather than on contract.

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[10] Waste Products Utilization (Pty) Ltd, *Supra*, at 573 F – I.

33. Turning now to the other essentials, the applicant fails to spell out in the founding affidavit what exactly the confidential information is which is the subject matter of the interdict sought. On the contrary the Applicant sweeps widely with a prayer which seeks to interdict and restrain her from using or disclosing "any" of the applicant's confidential information. Assuming generously the contentious confidential information referred to in its founding affidavit to be its customer list, it also fails to state what it is about such list (whether tangible or just its store of information regarding the identity and particularity of its client base) gives it the necessary quality of confidentiality.

34. There is no limit to the number of potential categories of information which may meet the criteria for protection as "confidential" under our law either in delict or in contract,[11] but in order to qualify as such, the information concerned is required to meet certain requirements. Firstly, it must involve and be capable of application in the particular trade or industry, in other words it must be useful. Secondly, it must not (objectively determined) be public knowledge or public property. In other words in must be known to a restricted number of people only; and, thirdly, the information (objectively determined) must be of economic value to the person seeking to protect it.[12]

35. Client lists have been held by our courts to be worthy of protection and - so it appears, need not necessarily be embodied in a document to be construed as confidential information. It was submitted on behalf of the respondent, for example, that it had to be established by the applicant as a *sine qua non* that she was indeed in possession of confidential information, supposedly as a tangible

[11] Meter Systems Holdings Ltd v Venter and Another 1993 (1) SA 409 (W) at 428 A – C.
[12] Alum-Phos (Pty) Ltd v Spatz and Another [1997] 1 All SA 616 (W) at 623.

object. Stated with approval in Van Castricum v Theunissen and Another[13] in this regard however is the *dictum* in Printers and Furnishers Ltd v Holloway[14] to the following effect:

> "The mere fact that the confidential information is not embodied in a document but is carried away by the employee in his head is not, of course, of itself a reason against the granting of an injunction to prevent its use or disclosure by him. If the information in question can fairly be regarded as a separate part of the employee's stock of knowledge which a man of ordinary and honest intelligence would recognise to be the property of his own employer, and not his own to do as he likes with, then the Court, if it thinks that there is danger of the information being used or disclosed by the ex-employee to the detriment of the old employer, will do what it can to prevent that result by granting an injunction. Thus an ex-employee will be restrained from using or disclosing a chemical formula or a list of customers which he has committed to memory."

36. The approach adopted by courts regarding the manner and protection of a repository of client information (their details and particularity) was expressed as follows in Telefund Raisers CC v Others and Others[15] and is useful to have regard to if only to demonstrate the shortcoming in the applicant's papers in setting out clearly the right sought to be established:

> "...there can be no doubt that the applicant has at all material times regarded what is recorded in its customer lists as confidential, and has believed it to be so. In my view, that belief was not an unreasonable one in the circumstances. The release of the contents of the lists to a trade rival such as the fourth respondent would, in the applicant's belief, be injurious to the applicant and advantageous to the rival. That belief, too, is, to my mind, reasonable. The customer lists took time and effort to compile. They contain the names and telephone numbers of a large number of persons and business entities who, over a period, have done business with the applicant, all or

[13] 1993 (2) SA 726 (T) at 732 I – 733 B.
[14] [1965] RPC 239 (CH) at 255 – 256.
[15] 1998 (1) SA 521 (C) at 531 g – 532 d.

most of whom are also potential future customers: in fact, it is not unlikely that many of them, in the future, will place further orders for baskets with the applicant. However, be that as it may, it is undeniable that the persons and businesses whose names appear on the customer lists constitute a substantial and promising potential market for this type of goods. Mr *Gamble* has argued, as was argued in *Van Castricum's* case *supra*, that the telephone numbers of the applicant's customers can easily be ascertained from a telephone directory, and that is no doubt true. However, as was said by Roos J in that case, that statement is correct only 'provided . . . you know who the clients are' (at 734C). The identity of the applicant's existing actual customers and likely future customers is something known only to the applicant and its employees: that information is commercially valuable to the applicant, and would be equally commercially valuable to a competitor. Its disclosure to such a competitor could normally be expected to be deleterious of the applicant's interests and beneficial to those of the competitor. The competitor would be saved by such disclosure from having to spend time, money and effort searching for and finding potential customers: it would be furnished with what has been called a 'springboard' from which to launch and market its products. It would have a list of identified potential customers. It could canvass the applicant's customers knowing that they were the applicant's customers, and attempt to persuade them to deal with it rather than with the applicant. If it succeeded, it would benefit thereby, and the applicant would suffer."

37. Evidently in the present instance the applicant is not relying on a tangible client list such as in the Telefund Razors matter, or to the attachment to Annexure "JE2" to its founding affidavit per se. The confidential information it hopes to protect one must surmise is further not limited to that list but also includes any other clients additional to the book purchased by the applicant from Motorsure CC whom the respondent serviced during her employment with the applicant, the identity and details of whom she would have been privy to between the date of the sale and her resignation from the applicant's employment.

38. The applicant contents itself with the submission that the information which it seeks to protect in this instance is confidential as demonstrated by the fact that the applicant at all times regarded its customer list as confidential and stipulated as much in each of the three confidentiality clauses to which the respondent agreed to be bound. That may well be true but the applicant avoids identifying the information with any clarity. The result of this is that it cannot be said that the respondent has knowledge of the confidentiality of the information (alleged to have been improperly used or disclosed) or its value, an essential which the applicant is also required to establish. For example, on what basis does it follow that the respondent's undertaking to maintain confidentiality in general terms somehow equates to an undertaking at the same time not to solicit clients of the applicant.

39. The applicant submits further that the information contained in the list cannot be said to be freely available in the public domain as only its employees, members and the respondent would have been aware of the names contained on the list purchased by the applicant. By this submission the applicant narrows the confidential information to the tangible list yet fails to establish that the respondent is "in possession" of the list and benefiting from using any of the particulars on it to benefit herself or another. Conversely, the applicant fails to aver that the list (if it is the attachment to Annexure "JE 2") was secret in relation to the sale or that the respondent was not entitled to keep a copy of it (assuming she kept a copy, which she denies). Concerning the applicant's submission that the information is relevant to the industry within which the applicant conducts its business it simply does not say why that is so. The list was simply an attachment to the sale agreement, nothing more and nothing less. The contention that the information self evidently has value to the applicant or it would not have paid for it belies that the applicants cause of action is one for the misuse of confidential information. In reality the gripe is that the goodwill was

sold for a price and it now appears unfair that the respondent should have the gall to compete with it by marketing to the very clients whose business came with the insurance book. The fact of the matter is that the proprietary interest for a claim for the misuse of confidential information resides in the information itself and not the relationships with the customers. As Mr Steenkamp correctly pointed out, customers cannot be owned and are all fair game so to speak. In my view clients with insurance needs retain the freedom of choice especially in the industry to place insurance with whoever they choose using brokers if they prefer or dealing directly with insurers.

40. In the result the applicant has failed to establish the first requirement for a final interdict, namely a clear right on its part.

41. Concerning the second requirement for the grant of a final interdict, the only basis on which the applicant suggests there has been an unlawful interference with its confidential information (and its apprehension going forward) is its assumption that because three of its clients have moved their business to the competitor after the respondent solicited them it must follow as surely as day follows night that the respondent used or exploited its confidential information in order to solicit these clients. It has made absolutely no allegation concerning how the respondent supposedly made improper use of a tangible customer list (or her privileged knowledge of who its customers are and what their details are) so as to obtain an unfair advantage, or even alluded to an unfair advantage actually achieved by her. On the contrary the transcripts of discussions held with the clients alleged to have been touted by the respondent do not give any impression that she had any advantage over the applicant which she exploited unfairly. Evidently the respondent won their custom fair and square by adopting superior marketing methods which it cannot be speculated amounted to a misuse of (undefined) confidential information.

42. The respondent denied that she used or exploited the applicant's confidential information to solicit the contentious clients. She says that she got their contact details from the telephone directory and does not keep or utilise a list. It was submitted on behalf of the applicant that it is unlikely that the respondent would know who to look up in the directory unless she knows the potential client independently of its client list or the confidential information which it claims she would have been privy to.

43. While it may be so that the respondent knows which of the applicants clients are (or once were) in the market for insurance because she garnered this information during her employment with the applicant or because she once serviced them as clients of Motorsure CC, it cannot in my view be fair to expect her to refrain from seeking their custom in perpetuity simply because she once confidentially knew them to be clients and undertook to maintain confidentiality regarding the fact of that relationship and their personal information or details. It is one thing to expect her to respect confidentiality which she is evidently prepared to do (and which she doesn't breach per se by the mere act of soliciting that person as a client), but it is quite another to limit her freedom of trade under the guise of maintaining such confidentiality. It is trite that a former employee is entitled to freely utilise recollected confidential information reduced to memory. It was held in Meter Systems Holdings Ltd v Venter[16] that:

> "The legal protection afforded to this type of confidential information is limited by the fact that the law, whilst prohibiting an employee from taking his employer's customer list, or deliberately committing its contents to memory, nevertheless recognises that, on termination of an employee's employment, some knowledge of his former employer's customers will inevitably remain in the employee's memory; and it leaves the employee free to use and disclose such recollected knowledge, in his own interests, or in the interests of anyone else,

[16] 1993 (1) SA 409 (W).

including a new employer who competes with the old one: *Freight Bureau (Pty) Ltd v Kruger and Another* 1979 (4) SA 337 (W) at 341E-F; *Roberts v Elwells Engineers Ltd* [1972] 2 All ER 890 (CA) at 894*f-h*."

44. A distinction must therefore be drawn between the use of an employer's confidential information on the one hand (which he is not allowed to disclose if bound by a restraint) and the use of his own skill, knowledge or experience which he cannot be restrained from using. It is not improbable that he will learn the names of clients he deals with and retain an independent memory of these. Unless there is a restraint of trade agreement in place it would not be appropriate in law to restrain him from competing with his erstwhile employer in the same industry by using the knowledge which he has naturally so acquired. Of course it is a different matter if he copies a client list with the intention to use the details contained therein to compete with his erstwhile employer because that would be dishonest and clearly amount to an appropriation of the latter's confidential information. But it never was the applicant's case in the present matter that the respondent in fact appropriated a tangible list and has used or disclosed that confidential information to her new employer or misused it for her benefit. The respondent disavows that she accessed any of the applicant's information on the client list and has in fact undertaken to destroy the list which is the attachment to annexure "JE 2".

45. It is in my view entirely in line with the probabilities (and therefore not a far-fetched or untenable proposition to be rejected out of hand) that the respondent has retained a personal memory of persons in the market for insurance who she once did business with under the auspices of Motorsure CC or the applicant's business and that she independently sourced the details of the applicant's clients which she solicited from a telephone directory in order to make contact with them. From the applicant's own admission it is evident that

the respondent was the central personality within the business so it is not surprising that she would be able to call up in her memory the names of clients who are in the market for insurance. Certainly it appears to be part of her arsenal to know who is in the market for insurance and to follow through on these opportunities. This is her particular skill which no doubt made her an attractive proposition to be employed by the applicant. Since she is no longer bound by any restraint of trade, there is nothing unlawful or unfair in her competing with the applicant for its clientele. Indeed it was exactly this competitive activity which the applicant envisaged would be undertaken by the respondent when it came to its attention that she intended to end her employment with it and which caused it to prevail upon her at the time to bind herself to a restraint of trade for a period which was regarded by all concerned at the time to be reasonable.

46. I am inclined to agree with the submission made on behalf of the respondent that what the respondent sought to do in the present matter is to hold the respondent to an ill defined and general confidentiality agreement which it co-incidentally latched on to once the restraint of trade agreement had run its course under the guise that this undertaking behoves her not to solicit its clients. It is a stretch of the imagination that touting for these clients, which competitive activity is to be expected under all the circumstances and which is not unlawful, automatically equates to a breach of her confidentiality provisions. The absurdity of this proposition is that the applicant may achieve by this stratagem an interdict in perpetuity against lawful competition under the guise of an undertaking to maintain confidentiality which (certainly in respect of the respondent's employment agreement) is not constrained by time. I am comforted by the fact in this regard our courts have, in tempering threats of unlawful competition in situations similar to this where an employee has been privy to confidential information and thereafter seeks to apply what he has

learnt and knows concerning the business for his own benefit – more particularly soliciting clients, limited the time period of interdicts granted in such situations in order to balance competing interests[17]. On the one hand "fair protection" has been provided to employers to ameliorate the "unfair and unlawful advantage" of the erstwhile employee who is enriched so to speak by knowledge of its confidential information, but limited to reasonable periods in which the unfair advantage may reasonably be expected to continue in recognition too of the employee's right to earn a living from his acquired knowledge in any other business including a competitor. In this regard the respondent has abided the restraint imposed on her for a period of two years which strikes me as fair in all the circumstances.

47. In the result the applicant has failed to establish the second requisite for the grant of a final interdict. Further, notwithstanding the undertaking given the respondent in paragraph 20 above, neither does the evidence establish an injury actually committed or reasonably apprehended that the responded has misused any of its confidential information. The fact that the respondent was prepared to give the undertaking (which obviously still stands) does not automatically entitle the applicant to an order in this regard, nor is the court obliged to make the undertaking an order of court merely for the sake of it.

48. The applicant appears to be of the view that since directions were issued by a judge of this court permitting it to enrol the matter for hearing on the basis of urgency, that it passed that hurdle and had no obligation to account for the manner in which it had launched the application and prejudiced the respondent

[17] See Telefund Raisers CC, *Supra*, at 536 where a restraint applied for 1 year. See also Knox D'Arcy Ltd v Jamieson 1992 (3) SA 520 (W) at 528 in which the respondents were interdicted from soliciting the applicant's clientele for a period of only 4 months. In Van Castricum, *Supra*, a restraint was granted for 18 months. Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others 1981 (2) SA 173 (T) at 192 E and Meter Systems Holdings Ltd, *Supra*, at 430H are also authority for the proposition that clientele is protectable only for a limited time.

by short service thereof and what the respondent referred to as the "unrealistic time table" foist on her in circumstances where the applicant had known of the alleged unlawful conduct on her part since 7 October 2014 already. The applicant had further denied her a reasonable request for a short postponement in order to afford her an opportunity to deliver an answering affidavit and, as it transpired, took the interim order which it did on 11 November 2014 in her absence.

49. A direction issued pursuant to the provisions of paragraph 12 (a) (i) of the Joint Rules of Practice of this division does not necessarily mean that the judge has exhaustively considered the issue of urgency. This is because his or her decision is based solely on the certificate of urgency without a perusal of the application papers and is meant to be a rough and ready determination. However, the objective of Rule 6(12)(c) is to permit a party aggrieved by the issue of an order granted in his absence in an urgent application to have it reconsidered, including even the question of urgency. (See in this regard the approach adopted in Caledon Street Restuarants C v D'Aviera[18] where, although not presented as a "reconsideration" *per se*, the respondent in that matter also argued as a defence that the applicant was not entitled to have brought the application as one of urgency. The court found that although the matter was ripe for hearing, the manner in which the applicant had breached the rules to secure a swift hearing of the matter in the first place could not at the hearing stage, even though the question of urgency had seemingly become moot, conveniently be swept under the carpet. As a mark of its disapproval of the unnecessary invocation of the provisions of Rule 6(12), it dismissed the application without regard even to the merits of the matter and ordered the applicant to pay the costs).

[18] [1998] JOL 1832 (SE)

50. In an instance such as the present where the applicant never had a protectable interest to begin with, and where the urgency was ostensibly self created, it appears to be proper to award costs against the applicant on a punitive scale. A further basis for such an order is the negative effect to the respondent of the interim interdict which has remained in place since the rule was first obtained on the basis of hype rather than substance. The fact that the respondent gave the undertaking which she did referred to in paragraph 20 above does not change the position because a similar undertaking was given on her behalf to the applicant's attorneys on 15 October 2014 well before the launch of the present application not to unlawfully compete with it. The view was expressed in that correspondence that the applicant had no case (in respect of which portent she will be vindicated by the discharge of the rule) and the warning sounded that the respondent would seek a punitive cost order if the applicant persisted with the threatened application. The request to furnish particularity regarding the purported breach of confidentiality was also ostensibly ignored.

51. In the result I grant the following order:

51.1 The rule nisi first issued by this court on 11 November 2014 is discharged; and

51.2 The applicant is directed to pay the costs of the application, including the reserved costs of 9 December 2014, on the scale of attorney and client.

B C HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 19 March 2015
DATE OF JUDGMENT : 30 June 2015

Appearances:

For the applicant: Mr D De La Harpe instructed by Drake Flemmer & Orsmond Inc., East London.

For the respondent: Mr J P Steenkamp instructed by Carlo Swanepoel Attorneys, East London