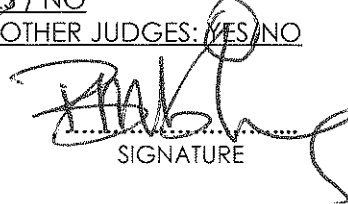


REPUBLIC OF SOUTH AFRICA



IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 15782/13

(1)	<u>REPORTABLE</u> YES / NO
(2)	<u>OF INTEREST TO OTHER JUDGES:</u> YES / NO
(3)	<u>REVISED.</u>
13 December 2013	
DATE	SIGNATURE

In the matter between:

BAROQUE MEDICAL (PTY) LTD

Applicant

and

MEDTRONIC AFRICA (PTY) LTD

First Respondent

TINA KAMPHER

Second Respondent

J U D G M E N T

MBHA J:

INTRODUCTION

[1] The applicant seeks final interdictory relief to enforce restraint and confidentiality undertakings given by the second respondent pursuant to an

agreement entered into between the applicant and the second respondent during the course of the second respondent's employment with the applicant. The period of the restraint which the applicant wishes to enforce is 12 months from 31 March 2013 and the prescribed area encompasses the entire Republic of South Africa.

[2] The first and second respondents, jointly, oppose the relief sought by the applicant by contending that:

2.1 The restraint does not operate to preclude the second respondent from taking up employment with the first respondent;

2.2 The applicant does not have a proprietary interest worthy of protection;

2.3 The confidential information to which the second respondent had access would not, if disclosed to the first respondent, confer on the first respondent any unfair advantage in competing in the market with the applicant.

RELEVANT BACKGROUND CHRONOLOGY

[3] The applicant is a South African-based distributor of endovascular, coronary and neurosurgical medical devices. It also distributes in Southern Africa surgical products of Integra Life Sciences (Integra) a world-renowned

manufacturer of surgical products and Neuromedex, a manufacturer of pain management, neurosurgical and therapeutic products. It is common cause that for the purposes of this application the relevant division of the applicant's business is the neurosurgical division known as "Surgical Solutions".

[4] On 14 January 2008 the second respondent was employed by the applicant as a clinical specialist in terms of a written employment contract. On the same day that the second respondent and the applicant entered into the employment agreement, they also concluded a separate restraint agreement ("the restraint agreement").

[5] The second respondent commenced her employment with the applicant on 3 March 2008 where she was employed in the neurosurgical division.

[6] In carrying out her responsibilities as a clinical specialist for the applicant, she dealt with many doctors and hospitals on behalf of the applicant and in the process developed business relationships with such doctors particularly in the Pretoria, Nelspruit and Polokwane areas.

[7] Following her success as a clinical specialist, in August 2011 the second respondent was promoted to the position of the applicant's neurosurgery product manager, a position which enabled her to maintain business relationships with doctors and hospitals with whom she had dealt in her previous position as clinical specialist.

[8] On 3 March 2013 the second respondent tendered her resignation from the applicant effective from 31 March 2013. The following day on 4 March 2013 she met with Felicity Dellieu ("Dellieu") the applicant's Human Resources Manager, and advised her that she had been offered a position with the first respondent ("Medtronic"), but that she had not yet signed an employment contract with Medtronic. Dellieu reminded her of her obligations in terms of the restraint agreement specifically that if she were to take up employment with Medtronic she would be in breach of the agreement, but her response was that she had since received advice to the effect that the restraint agreement was not enforceable.

[9] On 6 March 2013 the second respondent took medical leave from her employment with the applicant. During this medical leave period, the Chief Operating Officer of the applicant, Hans Buyl visited her at her home to discuss the possibility of retaining her in the employ of the applicant. Despite this discussion, on her return to work on 25 March 2013, the second respondent addressed an e-mail to several of the applicant's staff members advising them that she no longer wished to remain employed there. On 31 March 2013 the second respondent left her employment with the applicant upon the expiry of her notice period.

[10] On 1 April 2013 the second respondent commenced employment with Medtronic as product manager for the Midax Rex Drill and its disposables.

[11] On 15 April 2013 the applicant's attorneys of record addressed a letter to Medtronic regarding its employment of the second respondent. The letter, a copy of which was also sent to the second respondent, addressed the following issues:

11.1 That by taking up employment with Medtronic, the second respondent had violated the restraint agreement.

11.2 It sought from Medtronic an undertaking to terminate the second respondent's employment and not to re-employ her until the period of the restraint had expired.

[12] On 19 April 2013 Medtronic addressed a letter by way of response to the applicant in which it stated that the wording of the restraint agreement did not preclude the second respondent from being employed by a competitor; that the second respondent's employment with Medtronic will be limited to promoting a single product: the Midax Rex Drill/Power tool and its disposables (the Midax Rex Drill); since the applicant does not manufacture or distribute a device similar to the Midax Rex Drill the restraint does not operate against the second respondent, that the second respondent has not and will not convey to Medtronic any of the applicant's confidential information that she has and in the circumstances the applicant did not have proprietary interest worthy of protection.

**LEGAL PRINCIPLES: ENFORCEABILITY OF AGREEMENTS IN
RESTRAINT OF TRADE**

[13] The principles applicable to the enforcement of agreements in restraint of trade are well-established in our law. A restraint of trade agreement is *prima facie* valid and enforceable unless it is unreasonable. A restraint will be considered to be unreasonable and thus contrary to public policy, and therefore unenforceable, if it does not protect a legally recognisable interest of the employer, but merely seeks to exclude or eliminate competition.¹

[14] A party seeking to enforce a contract in restraint of trade must invoke the contract and prove the breach thereof. Thereafter, a respondent who seeks to avoid the enforcement of the restraint bears the *onus* to demonstrate, on a balance of probabilities, that the restraint is unenforceable because it is unreasonable.² Thus in *Reeves & Another v Marfield Insurance Brokers CC & Another*³, the court observed:

“In general, the enforcement of an unreasonable restraint on a person’s freedom to trade will be contrary to the public interest. The principal inquiry therefore is whether, having regard to all the circumstances of the case, the restraint can be said to be reasonable. The onus of proving unreasonableness is upon the party seeking to avert the enforcement of the restraint...”

[15] The test for reasonableness of restraint of trade provisions is found in *Basson*,⁴ and is the following:

¹ *Automotive Tooling Systems (Pty) Ltd v Wilkens & Others* 2007 (2) SA 271 (SCA) at 277G; *Basson v Chilwan & Others* 1993 (3) SA 742 (A) at 767A-D.

² *Basson*, loc.cit; *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (SCA) at 898A-B; *Sibex Engineering Services (Pty) Ltd v Van Wyk & Another* 1991 (2) SA 482 (T) at 502D-F.

³ 1996 (3) SA 766 (A) at 776C-E.

⁴ At 767C-H.

- 15.1 Is there an interest of the one party (the applicant) which is deserving of protection at the termination of the agreement?
- 15.2 Is such interest being prejudiced by the other party (the first respondent)?
- 15.3 If so, does the interest of the party asserting the interest outweigh the interest of the other party being economically productive?
- 15.4 Are there any public policy considerations militating against enforcement of the constraint?
- 15.5 Does the restraint go further than is necessary to protect the interest claimed?

[16] It is well-established that the proprietary interest that can be protected by a restraint agreement is essentially of two kinds, namely:

- 16.1 confidential information regarding the running or carrying on of a business, which could be used by a competitor, if disclosed to him, to gain a relative competitive advantage; and
- 16.2 the relationship with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "*trade connection*" of the business, being an important aspect of its incorporeal property known as goodwill.⁵

⁵ *Sibex Engineering, supra*, at 502D-G.

[17] Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in trade or industry, that is, it must be useful and not be public knowledge and property, known only to a restricted number of people or a closed circle, and of economic value to the person seeking to protect it.

[18] As to customer connection, the need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with a customer so that when he leaves the employer's service, he could easily induce the customers to follow him to a new business.⁶

[19] Lastly, it needs to be emphasized that the interpretation of all contractual terms, including agreements in restraint of trade, must be premised on the supposition that they are subject to constitutional rights. Courts are thus obliged to consider fundamental constitutional values when applying and developing the law of contract in accordance with the Constitution of the Republic of South Africa, 1996.⁷ Thus a court must not hesitate to strike down as being unreasonable and contrary to public policy, any contractual term which without any justification unduly impinges on an employee's ability to compete freely and fairly in the market place.

⁶ *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541C-D.

⁷ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at [6]-[7]; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at [18]-[30].

[20] As the applicant is seeking a final interdict, the applicant must establish a clear right, an injury actually committed or reasonably apprehended, and the absence of any other satisfactory remedy available to it.⁸ It is also trite that factual disputes on the papers must be resolved with reference to the test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁹ (the Plascon-Evans rule), namely, that a final interdict can only be granted in motion proceedings if the facts stated by the respondents, together with the admitted facts in the applicant's affidavits, justify the granting thereof. Furthermore, the remedy for final relief is a discretionary remedy and the court has a wide discretion.¹⁰

[21] At the commencement of argument Mr Whitcutt, appearing for the respondents, conceded that the second respondent, by taking employment with Medtronic, a direct competitor of the applicant albeit in limited areas of operations as will be shown in due course, is in breach of the restraint agreement. In other words, he conceded that the restraint as phrased, operated to preclude the second respondent from taking up employment with Medtronic. In my view, this concession is well made. On a plain language interpretation of the relevant clauses of the restraint agreement, which I do not deem necessary to quote, the second respondent's employment with Medtronic is prohibited for a period of twelve months from 31 March 2013.

IS THERE A PROTECTABLE INTEREST THAT IS WORTHY OF PROTECTION?

⁸ *LAWSA* by Joubert Second Edition Vol II 396-399.

⁹ 1984 (3) SA 623 (A).

¹⁰ *Nestor & Others v Minister of Police & Others* 1984 (4) SA 230 (SWA) at 244.

[22] The respondents, in attempting to discharge the *onus* of showing that the restraint is unreasonable and unenforceable, contend that the applicant does not have a protectable proprietary interest either in the form of confidential information or customer connections, that is being threatened by the second respondent; even if the applicant did have such protectable interest, same is not being infringed by the second respondent; the second respondent's right to economic activity and productivity far outweighs the applicant's interests, and the restraint, in any event, goes further than necessary to protect any protectable interest which the applicant may have.

[23] It is common cause that the applicant and Medtronic are direct competitors in respect of products for the repair of dura matter, flow regulated shunts, hand held manual drills, ventricular drainage products, EVD systems, ventricular catheters and lumbar protectors.

[24] Although this overlap in products exists, it is important to note that the overlap is very limited within the greater context of products that are on offer by the applicant and Medtronic, respectively. The areas in which these companies compete, form only a small portion of each company's business in the neurosurgical field. For example, flow regulated shunts only constitute approximately 8% of the first respondent's business. On the other hand, whilst the applicant promotes ultrasonic surgery systems for tissue ablation which constitutes approximately 50% of the applicant's neurosurgery

business, Medtronic does not manufacture, supply or promote any products which compete with this product range.

[25] Importantly, the product which Medtronic has employed the second respondent to promote and market, namely the Midax Rex Drill does not compete at all with any of the applicant's products, a fact which is conceded by the applicant. In this regard the applicant has agreed that the Midax Rex Drill is one of the very few instances where the applicant does not sell a directly comparable product. It follows accordingly, that none of the applicant's customer connections and confidential information, insofar as it has protectable interests in this regard, can or will be exploited by the respondents. As stated by the second respondent:

"I am employed by Medtronic as the product manager for the Midax Rex Drill and its disposables. I am therefore responsible for a product which does not compete with any of the applicant's products. My knowledge of the applicant's strategies and the product plans of Integra have no bearing on the promotion of the Midax Rex Drill and Medtronic's strategies in promoting that product."

Clearly, the Midax Rex Drill, an electrical power tool which is predominantly used in theatre for a wide range of procedures and which accounts for 60% of Medtronic's neurosurgical business, is a premium tool which the applicant does not sell or market at all.

[26] The applicant contends, speculatively in my view, that it is "*implausible*" or "*inconceivable*" that the second respondent is limited, in her employment role with Medtronic, to only marketing the Midax Rex Drill. However these contentions are without merit and are unsupported. Certainly, the court will

not grant such far reaching relief on the basis of speculative suspicions, more particularly when they are directly and pertinently refuted by the respondents. I am fortified in this conclusion by the contents of the second respondent's employment contract and the internal advertisement for the position, which contain the job specification and which clearly show that the second respondent's position is focussed solely on the Midax Rex Drill and the support of Medtronic's sales representatives in this regard.

[27] Furthermore, in her current position with Medtronic, the second respondent is not entitled to commission, whether in respect of the sale of products which overlap with the products which are sold by the applicant or at all. In this regard the second respondent will only receive a quarterly incentive bonus based on the Midax Rex Drill business. Thus, similarly, the applicant's contention that it is "*implausible*" that Medtronic would pay the second respondent a much higher salary than she earned at the applicant to sell only one product, is without merit and is unsupported. It has been adequately demonstrated that the second respondent is in fact not earning a much higher salary as the applicant contends.

[28] In any event, the *Plascon-Evans* rule stands to be applied to the disputes regarding the Midax Rex Drill in that the applicant is applying for final relief, and accordingly the respondents' version stands to be accepted.

[29] I am satisfied that the respondents have shown that the second respondent's employment by Medtronic as the product manager of the Midax

Rex Drill will not in any way solicit any business, which the applicant already has, away from it.

CONFIDENTIAL INFORMATION

[30] The applicant contends that the market in which the parties operate is highly competitive, that the pricing of products is highly confidential and sensitive, and that a purchaser of neurological surgical products will not purchase on the basis of the superior quality of the competing products but rather on the basis of competitive pricing. The applicant further contends that in addition to gaining knowledge of the applicant's pricing structures including supplier transfer prices, selling prices and discounts, the second respondent was privy to the applicant's future sales and strategies, project plans and confidential product planning information and that she was involved in negotiating prices and product purchases with its suppliers. It is then submitted that the second respondent has taken with her to Medtronic much of this relevant information and influence which would confer on Medtronic an unfair advantage as it would be in a position to undercut the applicant and pre-empt its future pricing strategies.

[31] The question that must first be answered is whether any confidential information which the second respondent may have would be of any objective

use to Medtronic, or whether it would give Medtronic any commercial or strategic advantage over the applicant. As Pillay J observed¹¹:

“Information must be objectively useful to a competitor in order to be confidential as between an ex-employee and an ex-employer.”

[32] I am of the view that whatever confidential knowledge that second respondent has, would not give Medtronic any competitive edge over the applicant. I say so because the respondents have demonstrated that the applicant and Medtronic compete on a very limited scale. It follows that if Medtronic would become aware of the applicant's prices or pricing structure, or any other confidential information for that matter, that knowledge in the hands of Medtronic would give it very little advantage, if any, within the market and very little ability to harm the applicant in any way. Furthermore, even within the limited range of overlap, Medtronic has demonstrated that it is only where products are of the same quality and product range, that there is any scope for direct competition and that there is no such interchangeability of products in this case.

[33] I am also satisfied that the respondents have shown that products in the neurosurgery field do not compete predominantly on price, and that the ultimate factor which determines a sale is the patient's pathology and the effectiveness of the product in meeting the patient's medical needs. It follows

¹¹ *Dickenson Holdings (Group) (Pty) Ltd and others v Du Plessis and another* 2008 (4) SA 214 (N) at para [35]; *Coolair Ventilator Regulator Co (SA) (Pty) Ltd v Liebenberg and another* 1967 (1) SA 686 (W) at 689 D-F.

accordingly, that the ability to gain a legitimate advantage over a competitor through price is thus very limited.

[34] Although the parties are at variance on the issue whether or not pricing is an open secret, in my view what is relevant is the undisputed fact that the second respondent is not promoting any product that the applicant sells. Furthermore, the second respondent states that since her promotion whilst in the applicant's employ to product manager in August 2011, she has not had any input on price lists. In my view, this is a complete answer to the applicant's apprehension of harm in relation to its protectable interest.

[35] In the circumstances, I find that the applicant has failed to prove that any confidential information which the second respondent may be possessed of, would be of any objective use to Medtronic, or that it would give Medtronic any commercial advantage over the applicant's business.

CUSTOMER CONNECTIONS

[36] The applicant contends that during her employment with the applicant, the second respondent forged successful business relationships with many doctors and the hospitals at which they operate; that these relationships and connections facilitate the promotion of one product over another, and that she will use such relationships to influence the product choices made by the doctors who would then prefer Medtronic's products over the applicant's. It is then submitted that the second respondent has transferred such competitive

advantage to Medtronic by virtue of her taking up employment with them in a substantially similar position as that which she held with the applicant.

[37] In my view the applicant's contentions cannot succeed because:

37.1 Firstly, no doctor will compromise the health of a patient by using a lesser quality product over a superior product based on the relationship which he or she has established with a particular sales representative. Thus the primary basis for choosing which medical device to use is the patient's pathology and the nature of the patient's medical condition. It accordingly follows that while the service which a doctor receives from a sales representative is important and assists in establishing a relationship with that doctor, it is secondary to the patient's needs. It also bears mention that medical devices or products which a hospital will purchase are also influenced by the fact that medical aid schemes have preferred suppliers and place limits on the amount in respect of which they will approve reimbursement for a device or therapy. It is clear accordingly, that relationships between sales representatives and doctors have a limited role, if any, in such instances.

37.2 Secondly, the established facts show that during the period 14 January 2008 to July 2011, the second respondent was employed by the applicant as a clinical specialist/sales

representative. Thereafter, from August 2011 to the time of her resignation on 31 March 2013 she was employed by the applicant as its neurosurgery product manager and her sales representative duties were taken over by other sales representatives. Since her promotion from clinical specialist to product manager in August 2011, the second respondent was no longer fulfilling a sales function and had limited interaction with the doctors. Clearly, since such promotion the applicant had an opportunity to build up customer connections between its clients and its new clinical specialists who took over from the second respondent until her departure from the applicant's employ on 31 March 2012. In this regard the second respondent states the following:

"It is extremely important to note that, once I was employed as product manager, my interaction with the doctors changed. I no longer had a specific sales target and was no longer responsible for selling products to the doctors. My role was rather that of a support function to the sales representatives. I would train and educate them on the products which they were to promote and assisted them in handling queries or concerns raised by the doctors. My interaction with the doctors, such as it was, was also focused on the application of the product and not the sale thereof."

Accordingly, insofar as the applicant may have customer connections with its clients, those customer connections exist between its sales representatives and its clients and not between the second respondent, as its erstwhile product manager, and its clients.

37.3 Third and importantly, any suspected approach by the second respondent to any customers with whom she may have enjoyed a relationship, will not be at the expense of the applicant, for the simple reason that she will only be selling such customers products which, it is common cause, are not supplied by the applicant, and, conversely, will not be selling products supplied by the applicant. In other words, she is not unfairly utilising the applicant's customer connections at the applicant's expense. I am accordingly of the view that to enforce the restraint in these circumstances would unduly and needlessly deny the second respondent the opportunity to work without protecting any correlative interests of the applicant.

[38] The applicant's reliance on the matter of *Medtronic Africa (Pty) Ltd v Griesel & others*, case no: 33413/13 (the Griesel matter), is in my view, misplaced. It is contended that in that case the applicant relied on customer connections as a basis to enforce restraints but was now down playing the importance of customer connections in this case.

[39] The two cases are clearly distinguishable. The *Griesel* matter concerned spine surgery products which fiercely compete with one another by virtue of the fact that the products sold are relatively interchangeable, which entails that the customer connection becomes all important. In the present case, however, the second respondent is employed by Medtronic as the

product manager for its *Midax Rex Drill* and its disposables, a product which the applicant by its own admission, does not promote and market at all.

[40] The second respondent has not infringed any interest belonging to the applicant. Even if the applicant did have confidential information and customer connections worthy of protection, such interests have not been infringed. The second respondent is, as I have found, employed by Medtronic to promote and market a singular product, the *Midax Rex Drill*, a product which does not compete at all with any of the applicant's products. Thus any confidential information or trade secrets which the second respondent may have had access to are useless to Medtronic. Furthermore, any customer connection which the applicant has vests with its sales representatives and not with the second respondent.

PUBLIC POLICY

[41] In light of my finding, I am of the view that enforcing the restraint in the present circumstances by what I consider to be the extreme measure of interdicting and restraining the second respondent from taking up employment with Medtronic, would be unreasonable and against public policy, because it would prevent her from working in the only industry in which she has meaningful experience, more so in circumstances where the second respondent has not breached the restraint agreement and without protecting any correlative interest of the applicant. There is no protectable interest on the part of the applicant which is worthy of protection, in the circumstances. I

accordingly find that the interest of the second respondent, in being employed in her chosen profession, far outweighs any negligible protectable interest which the applicant may have.

DOES THE RESTRAINT GO FURTHER THAN NECESSARY TO PROTECT THE APPLICANT'S INTEREST?

[42] I also find that the enforcement of the restraint would go further than necessary to protect any interest which the applicant may have, in light of the facts and circumstances of this case. All that would be achieved would be to deny the second respondent her constitutional right to compete freely and fairly in the market place, and to unfairly impinge her ability to freely exercise her know-how and skills. The applicant also seeks to enforce the restraint for the whole of South Africa when the second respondent was operative only in the Pretoria, Nelspruit and Limpopo areas. This, on its own, renders the restraint unreasonable in that it goes further than is necessary to protect the applicant's interests.

[43] In light of what I have stated, I find the applicant has failed to show that it has a clear right, or that any injury to such right has actually been committed, or is reasonably apprehended. Accordingly, the applicant is not entitled to the relief it seeks.

COSTS

[44] The applicant was advised as far back as 19 April 2013, prior to the launching of the application, that the second respondent was employed by Medtronic to only market and promote Medtronic's Midax Rex Drill, a product not even sold by the applicant. There was accordingly no need, in my view, for the applicant to have proceeded with this entire application, including the urgent application which was started but later not proceeded with. The applicant is accordingly liable for all the costs incurred.

[45] I accordingly make the following order:

1. The application is dismissed.
2. The applicant shall pay the respondents' costs, including those of the urgent application, such costs to include costs consequent upon the appointment of two counsel.



B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR APPLICANT	: S BUNN
INSTRUCTED BY	: CRAWFORD AND ASSOCIATES
COUNSEL FOR RESPONDENTS	: C WHITCUTT SC

A THOMSON

INSTRUCTED BY

: FASKEN MARTINEA

DATE OF HEARING

: 23 OCTOBER 2013

DATE OF JUDGMENT

: 13 DECEMBER 2013