REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 14/02473

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

THE SOUTHERN AFRICAN INSTITUTE OF CHARTERED SECRETARIES AND ADMINISTRATORS Applicant

And

CAREERS-IN-SYNC CC Respondent

JUDGMENT

WEINER J:

1. In this matter, the applicant claims that the respondent has misappropriated the applicant's confidential information and thus seeks interdictory relief

preventing the respondent from using that information. The applicant also seeks the return of that information.

2. This application concerns the doctrine of unlawful competition. The applicant bases its claim in delict and seeks to hold the respondent liable based upon the principles of the *lex acquilia.*

Background

3. The applicant is an organisation that regulates the training and affairs of accredited Company Secretaries in South Africa. One such service the applicant offers is assisting its members to secure employment. In this regard, the applicant created an appointments register in which the details of the applicant's members were gathered. Through this their CVs were provided to potential employers. This also provided a benefit to prospective employers as they could make contact with suitable candidates through the auspices of the applicant as a reputable professional body. Employers would therefore use the applicant to seek out suitable candidates for available posts knowing that the employees have qualified under the applicant's training programs.

4. According to the applicant, the appointments register was first started in 1957 under the leadership of the applicant's chief executive officer, HC Woodhouse. It comprised of a compilation of confidential information that contained the details and qualifications of the applicant's members. It was used to source potential employment opportunities for the applicant's

members as and when employers had vacancies available. To offer this service, the applicant created the appointments register as a physical database.

5. The appointments register was first kept in a lever arch file which contained completed application forms, and CVs of each employee. The application forms contained the applicant's name, membership number and status, as well as other information relevant to employment opportunities. Upon receipt of a candidate's application form and CV, it was filed in the register, to be considered when a potential job opportunity arose. With the advancement of computer technology, the contents of the appointments register were captured onto a computer disk (CD).

6. The applicant outsourced this function for the first time, in 2002 to a Ms. Sharon Lage (Lage) of a company styled Norweco Number 2 (Pty) Ltd. Lage operated the appointments register until December 2006 when she discontinued such function. She handed over, according to the applicant, the physical appointments register as well as the CD containing all of the information that had been compiled, initially by the applicant, to a Ms. Loupis and Ms.Braham of the respondent.

7. The respondent first began to act as the applicant's service provider for the maintenance of the appointments register in 2007, and a Service Level Agreement ("SLA") was concluded in May 2008.

8. It is common cause that the relationship terminated on the 31st of December 2013 in the SLA was not renewed. The applicant demanded return of its appointment register (updated by the respondent), but the respondent refused to return same.

The terms of the SLA

9. According to the applicant, it was obliged to outsource one of the services it provided to its members, that is the recruitment service in terms of which employment opportunities were found and the applicant's members were introduced to prospective employers.

10. The respondent operated a recruitment agency and the applicant designated the respondent to provide a support service which the applicant had previously offered to its members by "*the maintaining of an appointments register and facilitating the introduction of members to prospective employers".*

11. In terms of the SLA:-

    a. The applicant exclusively appointed the respondent to *"maintain the appointments register and to provide an introductory service to its members with prospective employers"*.

b. The applicant would allow the respondent to use the trading name "Chartered Secretaries Appointment Register".

c. All contacts received from prospective employers regarding any possible employment opportunities for members had to be referred to the respondent and not to members directly. In addition, the applicant would not refer any employment opportunities for members to any other recruitment agency. The applicant would provide a mechanism through which the respondent could verify the good standing, qualifications and contact details of members "who have requested to be registered on the appointments register" and undertook to furnish all relevant details to the respondent to enable it to advise prospective employers of the relevant member and his/her qualifications.

d. The applicant would not compete with this recruitment service with the respondent for the duration of the SLA.

e. Clause 4.1. of the SLA provided that the respondent's obligations would include the "maintaining of an appointments register of members seeking employment opportunities" for and on behalf of the applicant.

f. The respondent undertook to treat all information relating to the business of the applicant, its members and clients with confidentiality and exclusively for the purpose of selection and recruitment.

12. According to the applicant, it referred its members to the respondent as the applicant's service provider in the administration and maintenance of the appointments register, so as to facilitate the introduction of its members to prospective employers. This does not appear to be disputed by the respondent. The applicant states that during the subsistence of the SLA it was compelled not to refer any possible employment opportunities to any other recruitment agency, and the applicant had to refer all contacts from prospective employers to the respondent. The applicant states further that the way in which the respondent acquired this confidential information relating to the applicant's members, was a direct function of the operation of the SLA. The information concerning the applicant's members was provided to the respondent in two ways. Firstly (and there are some disputes in this regard), the applicant established a physical appointments register, which it says, dates back to 1957. Later the information was captured on a CD. Secondly, via the applicant's website.

13. The applicant's obligations are set out in paragraph 3 of the SLA. In terms thereof, the applicant was obliged, *inter alia*, to undertake joint advertising and marketing campaigns with the respondent and bear the costs of the respondent advertising the services of the appointment register as an add-on service on the Institute website. In addition, the applicant was obliged to provide interview facilities to the company during normal office hours, and render such other support as was required from time to time. All contacts received from prospective employers and any possible employment opportunities were to be referred to the respondent.

14. Further, the applicant was to provide a mechanism through which the respondent could verify the good standing, qualifications and contact details of the members who requested to be registered on the appointments register, and was to furnish such relevant details as were necessary to enable the respondent to properly advise prospective employers regarding the relevant member and his/her qualifications.

Concurrence of actions

15. The applicant seeks an interdict based on unlawful competition, coupled with the delivery up of the appointments register. The respondent has raised a preliminary argument, i.e. that the application is fatally defective, due to the fact that it has been brought under the law of delict, rather than contract.

16. The respondent contends that the applicant's claim, if any, does not arise out of the common law. Rather, the obligations between the parties exist in the contractual realm as the subject of the dispute was generated in a contractual setting, namely the SLA. It was submitted by the respondent that the applicant is rather relying on a tacit term in the SLA obliging the respondent to return the appointments register to the applicant at the expiration of the contract between the parties. However, as the application is framed purely in delictual terms and no reference is made to any contractual obligations of this nature, it is defective.

17. The respondent made reference to the case of ***Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd*** 1985 (1) SA 475 (A). In this case, Grosskopf AJA held that it would be undesirable to extend the aquilian action to the duties subsisting between the parties to a contract of professional service. At 502I, Grosskopf stated the following:-

> *"The same arguments which militate against a delictual duty where the parties are in a direct contractual relationship, apply, in my view, to the situation where the relationship is tripartite, namely that a delictual remedy is unnecessary and that the parties should not be denied their reasonable expectation that their reciprocal rights and obligations would be regulated by their contractual arrangements and would not be circumvented by the application of the law of delict".*

18. The respondent *in casu* argues that ***Lillicrap*** provides authority that the applicant's claim is flawed from the outset. Due to the fact that a contractual relationship governed the parties' relationship, the applicant should have brought its claim in terms of the contract, rather than in delict.

19. The respondent raised the point that our courts are reluctant to extend *acquilian* liability in circumstances where the parties are in a position to regulate their relationship contractually. In ***Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*** 2006 3 SA 138 (SCA), Brand J held at [18]:

> "*The point underlying the decision in Lillicrap was that the existence of a contractual relationship enables the parties to regulate their relationship*

themselves, including provisions as to their respective remedies. There is thus no policy imperative for the law to superimpose a further remedy."

20. The applicant, however, submits that while no claim is maintainable in delict where the negligence relied on consists in the breach of a term in a contract, concurrence of actions is permitted where the same set of facts give rise to a claim for damages in delict and in contract. The applicant submits that it's claim in terms of *Aquilian* principles arising from the common law does not rely on the breach of any contractual obligations the respondent may have owed to it under the SLA. It was submitted by the applicant that where the facts give rise to a claim for damages in delict and in contract, the claimant is entitled to choose which claim he wishes to pursue. The applicant relies on the case of ***Holtzhausen v ABSA Bank Ltd*** 2008 (5) SA 630 at [7] as authority for this.

21. In ***Holtzhauzen*** the plaintiff alleged that the bank manager undertook to, and did, have a cheque cleared and that the bank manager was under a legal obligation not to make a misrepresentation to him. The plaintiff did not rely on the breach of any contract between himself and the bank as constituting negligence for a claim based in delict. The plaintiff disavowed any reliance on a claim based in contract, and advanced only a claim in delict for pure economic loss suffered in consequence of a negligent misstatement.

22. It was submitted by the defendant in ***Holtzhauzen***, that the effect of ***Lillicrap*** *(supra)* was that a claim for pure economic loss was not maintainable in delict

when a claim could be based in contract. However, the court limited the ambit of ***Lillicrap***:-

> *"[7] Lillicrap is not authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent. On the contrary, Grosskopff JA was at pains to emphasize (at 496D-I) that our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which he wishes to pursue. Thus in* ***Durr v ABSA Bank Ltd*** *1997 (3) SA 448 (SCA), a case which concerned the duties of an investment advisor recommending investment in debt-financing instruments, Schutz JA found no difficulty in saying (at 453G):*
>
> > *'The claim pleaded relied upon contract, alternatively delict, but as the case was presented as one in delict, and as nothing turns upon the precise cause of action, I shall treat it as such.'*
>
> *[8] In the present matter the pleadings cover a claim for damages for negligent misstatement. The plaintiff does not rely on the breach of any contractual obligation which the defendant or its servants may have owed him, as constituting the negligence for this claim. The plaintiff's case as it was presented in evidence was that a right which he had independently of any such contract, was infringed. The decision in Lillicrap is accordingly of no application."*

23. The authority is clear that if the same set of facts give rise to a claim for damages in delict and in contract, the applicant is fully entitled to choose which claim he wishes to pursue. *In casu* the applicant does not rely on a breach of the SLA as a cause of action. The applicant relies on its common law rights that exist independently from the rights enjoyed under the SLA. Accordingly, the respondent's preliminary point must fail.

Unlawful competition

24. The issue of unlawful competition was dealt with instructively by Lewis J, as she then was, in ***Waste Products Utilization (Pty) Ltd v Wilkes and Another*** 2003 (2) SA 5151 W. In particular, the court in that matter held as follows:-

> *"As a general principle, every person is entitled freely to exercise his or her trade, profession or calling in competition with others… the right to compete is not absolute and competition must remain within lawful bounds, otherwise an acquilian action will lie… in order to succeed in an action based on unlawful competition, therefore, the elements of the acquilian action must be proved. These include wrongfulness, referred to also as unlawfulness…Corbett J held that in determining whether competition is unlawful one must have regard to criteria such as fairness and honesty:-*
>
> > *'Fairness and honesty are themselves somewhat vague and elastic terms. But while they may not provide a scientific or indeed infallible guide in all cases to the limits of lawful competition, they are relevant criteria which have been used in the past, and which, in my view, may be used in the future in development of the law relating to competition in trade.'*

25. Lewis J went on further at 571E to quote Van Dikhorst J in ***Atlas Organic Fertiliser (Pty) Ltd v Pikkewyn Guano (Pty) Ltd*** 1981 (2) SA 173 (T). Van Dikhorst J stated as follows at 188-189:-

> *"I have come to the conclusion that the norm to be applied is the objective one of public policy. That is the general sense of justice of the community, the bone mores, manifested in public opinion. In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal. As this*

norm cannot exist in vacuo, the morals of the market place, the business ethics of that section of the community where the norm is to be applied, are of major importance in this determination."

26. Various forms of unlawful competition have been dealt with over the years in our legal system and include the unfair use of a competitor's fruits and labour and a misuse of confidential information in order to advance one's own business interests and activities at the expense of a competitor.

27. The most oft quoted relationships are those that arise from the employer-employee relationship, but there are other relationships that our law recognises as fiduciary in nature. Stegmann J in ***Meter Systems Holdings v Venter and Another*** 1993 (1) SA 409 W, at 426FF stated as follows:-

"Our law recognizes fiduciary relationships, which, as a matter of law, give rise to an obligation, to respect the confidentiality of information imparted or received in confidence, and to refrain from using or disclosing such information otherwise that is permitted by law, or by contract. The fiduciary relationships which give rise to such legal duties are in some instances based on contracts and in some instances they are not. Examples of contracts which give rise to such fiduciary relationships and duties are the contract between a principal and an agent, an employer and his employee…When a fiduciary duty is based on contract, the obligation to respect the confidentiality of information imparted or received in confidence, is generally regarded as a term of the contract implied by law. Such an implied term is subject to any different provisions agreed upon by the parties. The content of such an implied term must necessarily be determined in the light of the provisions of the contract as a whole. When the fiduciary relationship is not based on contract, it is necessary to look to the law of delict, and in particular, the principles of acquilian liability, in order to ascertain the extent of the legal duty to respect the confidentiality of information imparted or received in

> *confidence… the content of the contractual term relating to confidential information implied by law in a contract giving rise to a fiduciary relationship and also the content of the legal duty relating to confidential information imposed on acquilian principles are currently in a process of development. They appear to be developing in parallel in the sense that the emerging definition of the legal duty relating to confidential information for the purposes of the law of delict arising out of a fiduciary relationship not based on contract, is not materially different from the emerging definition of the contractual term implied by law arising out of the fiduciary relationship that is based on contract."*

28. English authorities have based the obligation not to use unfairly confidential information on the equitable doctrine relating to confidential communications. ***In Terrapin Ltd v Builders' Supply Company (Hayes) Ltd*** [1967] RCP at 130, quoting Roxburgh J in the court *a quo:*

> *"As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public."*

29. The facts of the present case do not place it squarely in the category of any particular relationship that has been referred to in many of the authorities. It is not a relationship between an employer and an employee, or between a principal and an agent. The applicant has sought to place it within the category of a mandate. The applicant contends that the respondent, in its capacity as the mandatee, undertook to perform a mandate in maintaining the

appointments register for and on behalf of the applicant as the mandator. In this regard reference was made to ***Totalisator Agency Board, OFS v Livanos*** 1987 (3) SA 283 (W) at 291.

30. The reference to the contract of mandate, while not on all fours with the present case, may be the most analogous to the present situation. As appears from the judgment of Van Zyl J in the ***Totalisator Agency Board*** case *(supra),* a contract mandate is one:-

> *"in terms of which one party, the mandatory, undertakes to perform a mandate in the form of a commission or task for the other party, the mandator… The essence of mandatum was an instruction by the mandator to the mandatory to do something gratuitously for him, which instruction was accepted by the mandatory. Later they developed a moral duty for the mandator to pay the mandatory a fee for his servuces… on the other hand, payment of a quid pro quo for services rendered have the effect of alleging and hiring of services, rather than mandate."*

See also ***David Trust and Others v Aegis Insurance Company Ltd and Another*** 2000 (3) SA SCA 289 at [20].

31. In my view it is not necessary to decide what the precise relationship was in legal terms. One can simply describe it as a contract in terms of which the respondent was to perform certain services and was, in essence, the applicant's designated service provider.

The respondent's contention in regard to the confidentiality of the employees information

32. The respondent has refused to return the appointments register because it alleges that the information is confidential to the employees and therefore cannot be handed over to the applicant. The applicant challenges this contention on the basis that the specific legal framework in which the parties operated resulted in confidential information being furnished by the applicants members to the respondent, through the auspices of the applicant, and for a particular reason and specified period.

33. The respondent submits further that the information provided to it by the members is confidential and generated in a contractual setting in which the applicant plays no part. The respondent accordingly claims that its obligation to maintain the confidentiality of that information is owed not to the applicant, but to the potential employee, that is the applicant's member.

34. The applicant referred its members to the respondent so as to facilitate the introduction of its members to prospective employers. The applicant emphasises that the CVs and personal information of the applicant's members were disclosed to the respondent only because the applicant directed its members to the respondent in terms of the SLA and that this confidential information was given to the respondent for a specific purpose.

35. In this regard, the applicant relies on the principle enunciated in ***Seager v Copydex Ltd*** [1967] 2 All ER 415 at 417:-

> *"the law on the subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence will not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent."*

36. This principle was affirmed in ***Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd*** 1968 1 SA 209 (C) at 213H. Reference was also made in the ***Dun*** case *(supra)* by Corbett J to the case of ***Terrapin Ltd*** *(supra)* as *"a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication".*

37. The applicant also relied on the judgment of Thring J in ***Telefund Raisers CC v Isaacs and Others*** 1998 (1) SA 521 (CPD). In that case, the applicant conducted business as a fundraiser and had been selling presentation baskets with part of the profits generated going to charity. It had built up a cliental of about 4000 regular customers. The respondents in the case were employed as salespersons by the applicant but they all left and went to work for another company. The respondents had apparently taken with them to the competing company copies of the so-called client lists which the applicant alleged was its property. The information on the client list included the name and telephone number of the customer and the name of the contact person

and dates of previous sales. The respondents did not deny removing the customer lists, but stated that the lists were compiled through their own efforts and without any assistance from the applicant. They regarded the lists as their own property since they were created through their own efforts.

38. In the ***Telefund Raisers*** case *(supra)* the judge referred extensively to the dicta of Stegmann J in ***Meter Systems Holdings Ltd*** *(supra)* at 426E-I. Stegmann J referred to certain categories of confidential information. Relevant to the present case, are the following:-

    a. Customer lists drawn up by a trader and kept confidential for the purposes of its own business, contained confidential information which is the property of the trader;

    b. Information received by an employee (or anyone else bound by a fiduciary duty) about business opportunities available to an employer (or anyone else to whom a fiduciary duty is owned) even if such information could be obtained from a source other than the employer or the employee (or from the parties to the fiduciary relationship.

    c. Information which, although in the public domain (that is freely accessible to all members of the public) is nevertheless protected as confidential when skill and labour have been expended in gathering and compiling it in a visible form and when the compiler has kept his

useful compilation confidential, or has distributed it upon a confidential basis.

39. The respondent contends that the SLA provided for the appointment of the respondent as the applicants preferred provider of recruitment services. Thus when the applicant received inquiries from its members in relation to employment opportunities, the SLA provided that the applicant was to refer those inquiries exclusively to the respondent. According to the respondent, the applicant played no further part in the recruitment process once it made these referrals to the respondent. The respondent then provided recruitment services to potential employers and employees in terms of agreements between it and the employers and the employees concerned. This, however, ignores the terms of the SLA and the applicant's involvement as set out in paragraphs 11 to 14 above.

40. The respondent refers to an affidavit of the former CEO of the applicant, one De Villiers, who concluded the SLA on behalf of the applicant. He states that it was his belief and understanding in terms of the relationship between the applicant and the respondent that once any individual has personally agreed to place their personal information in the hands of a third party, it was out of the hands of the institute (the applicant), and all confidentiality and ownership issues then belonged to the contracted relationship between the individual and the service provider, that is the respondent. He states that this and the previous SLA was silent on the issue of ownership as the SLA related to performance and not accumulating information. He further states that "to hand

the confidential information accumulated from scratch by Ms. Loupis and Ms. Braham over to any other individual or organisation would in my own understanding of the contract and relationship be a breach of confidentiality between Careers-In-Sync CC and their own clients".

41. The respondent also states that there was a clear understanding by De Villiers that the ownership of information collated by the respondent (following referrals made in terms of the SLA) would not be owned by the applicant. The ownership of it would instead be governed by the agreements in place between the respondent and the potential employee. The respondent makes this submission based upon the applicant's claim that the respondent "seeks to reap where it has not sown" – a phrase used in cases dealing with the springboard doctrine (which will be dealt with below). The respondent states that this is not a case where the applicant has actually created the information in question which has then been filched by the respondent. The respondent states that it is the respondent that has collated the information which is the subject of the dispute. The respondent has therefore sown, and is entitled to reap.

42. Whilst the respondent puts this claim forward, it did not initially claim ownership in the information. It seems to suggest that the individual members own their own CVs and other personal information and that therefore the compilation of the appointments register or database cannot be owned by the applicant and/or that the applicant can have no proprietary interest in it.

43. Whilst the respondent may see the belief and understanding of De Villiers as dispositive in this case, it is my view that his belief and understanding does not necessarily tie in with the legal concepts of confidentiality and unlawful competition.

Requisites of acquilian liability for unlawful competition

44. The essential facts which must be present before a court will grant an interdict in relation to the misuse of confidential information are the following:-

(1) *The plaintiff must have a quasi-proprietary or legal interest in the confidential information;*

(2) *The information must possess the necessary quality of confidentiality;*

(3) *A relationship between the parties which imposes a duty on the defendant to preserve the confidence of the information;*

(4) *The defendant must have had knowledge of the confidentiality of the information and its value; and*

(5) *The defendant must be in improper possession of the information and use it to the detriment of the plaintiff (whether as a springboard or otherwise).*

See ***Dunn & Bradstreet (Pty) Ltd*** *(supra).* These requirements will be dealt with in turn below.

45. The plaintiff in order to succeed in an *acquilian* action based on the misuse of confidential information must have a legal interest in the information. In addition to the interest which the applicant must have, the information must also possess the necessary quality of confidentiality; the relationship between the parties must impose a duty on the respondent to preserve the confidence of the information; and the respondent must have had knowledge of the confidentiality of the information and its value. Moreover, the respondent must be in improper possession of the information and use it to the detriment to the applicant (whether as a springboard or otherwise).

46. The respondent contends that the applicant does not establish any of these requirements. In this regard, the respondent makes reference to the SLA and the fact that in terms thereof, the applicant appointed the respondent as a service provider to its members who were seeking employment opportunities through the maintaining of what “is termed, the appointments register”. The respondent states that the definition of “appointments register” in the SLA makes it clear that it is a service and not a database of information. However, it is common cause that the employee information and CVs exist in physical form.

<u>The legal interest</u>

47. In questioning the applicant’s quasi-proprietary or legal interest in the information, the respondent states that the applicant has no legal interest, whether proprietary or quasi-proprietary in the employee information and CVs

as this would be a breach of the respondent's obligation not to violate the employees' right to privacy. The respondent argued (contrary to what it submitted before) that it owns the rights in the compilation of the appointments register because it was the respondent's time, labour and skill which produced the compilation. What it says is the following:-

> *"when the respondent took over the appointments register in 2008, it was not provided with any information relating to the recruitment services to the applicant at all. This is confirmed by the CEO of the applicant at the time, Mr. Chris De Villiers. The respondent has since, however, built up a considerable database of CVs and job specifications which it has accumulated over the years in which the SLA was in force. This information comes from a variety of sources, including referrals from the applicant and employers, and candidates who approached the respondent directly. The vast majority of the information contained therein vests in employers and employees in question. What is left is proprietary to the respondent."*

48. The respondent accordingly claims that the applicant has no right in the compilation at all as it has been built up by the respondent and comprises of information which belongs to the employees and employers. The respondent reiterates that the applicant played no part in the compilation of the appointments register. These facts and the allegations of De Villiers have been disputed by various persons, including Sharon Lage, who states that when she took over the administration of the appointments register, she received a comprehensive set of files and registers from the applicant. These files contained historical records of members seeking employment, copies of CVs and historical employment information. She also confirms that when the respondent took over, she handed them a hard copy of all documents relating

to the appointments register as described above and updated by her. She also handed over the CD. The information included *"details of references taken on candidates, contact details of employers registered with the appointments register, details of job specifications received, details of the candidates referred to those positions, as well as a list of un-filled job specifications."* Lage, in fact, informed Braham that the information/records remained the property of the applicant, as she only managed the appointments register on their behalf. Other deponents on behalf of the applicant confirmed Lage's allegations and state that the appointments register in physical form has been in existence for over 20 years.

49. The respondent's argument begs the question as to what the purpose of the SLA was. If the applicant basically "fell out of the picture" after it outsourced the recruitment facility, it is difficult to comprehend why the SLA was necessary at all. One therefore needs to have regard to the precise terms of the SLA.

50. The definition of the appointments register is… *"(b) the support service offered by the applicant to its members in seeking employment opportunities through the maintaining of an appointments register."* This definition appears somewhat confusing and would obviously have to be looked at in the context of the agreement as a whole.

51. The respondent was obliged:-

a. To maintain the appointments register of members seeking employment opportunities for and on behalf of the Institute.

b. To ascertain and maintain all relevant personal data concerning members who have requested to be registered on the appointments register directly from members;

c. To interview and screen members on behalf of employers;

d. To obtain from prospective employers job specifications;

e. To refer suitable members to prospective employers and to provide all relevant documents relating to the member, to the prospective employer;

f. To inform the applicant of all placements of members made on a quarterly basis, and comply with all reasonable requests for information relating thereto from the applicant.

g. To treat information relating to the business of the Institute, members and clients with confidentially, exclusively for the purpose of selection and recruitment.

Confidentiality and knowledge thereof

52. It appears to be common cause that the information in the appointments register was confidential. The question is who had the right to claim the benefits of such confidential information. It seems clear from the terms of the SLA that the respondent's contention that the applicants had no right in the compilation of the appointments register, more particularly because the information contained therein was confidential and belonged to the employees, is factually and legally untenable. It is clear from the way in which the SLA was drafted, as well as the way in which it was practically implemented, that the applicant had access to the information at all times prior to the information being transmitted to the respondent. In addition, it is clear from the terms of the SLA that the respondent maintained the appointments register of members for and on behalf of the applicant. This appears in clause 4.1. read with clause 2.3. in terms of which the applicant exclusively appointed the respondent to maintain the appointments register and to provide an introductory service to its members with prospective employers. The appointment was two-fold:- to maintain the appointments register *and* to provide a recruitment service; and to do so on behalf of the applicant.

53. The appointments register and the compilation of information embodied therein was only available to a restricted number of people being the applicant and its designated service providers in the form of Lage and the respondent. Both service providers were contractually obliged to deal with information relating to the business of the applicant, its members and its clients with utmost confidentiality during the subsistence of their respective contractual relationships with the applicant.

The value of the confidential information

54. The appointments register and confidential information of and concerning the applicant's members has at all material times only been distributed upon a confidential basis to a limited class of persons only and as a compilation of information, it is not public property or public knowledge. See ***Dun & Bradstreet*** *(supra)* at 221 and **H*arvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd*** 1977 (1) SA 316 (T) at 321, 323 and 325. The respondent concedes that when CVs are placed with the respondent this is not a matter falling within the public domain.

55. The applicant does not consider the job specifications of employees to be part of the appointments register. These are found in the public domain as employers readily disclose them as part of their job advertisements to the media or to recruitment agencies.

56. In terms of the SLA, the respondent was at all material times contractually bound to maintain the appointments register and in confidence received information from the applicant's members through the auspices of the applicant.

57. The compilation of the confidential information in the appointments register is capable of application in trade or industry. The applicant contends that access

and use of the compilation of information concerning the applicant's members, their qualifications and employment history is of significant benefit to any person wishing to exploit such information for commercial gain. See ***Allum-Phos (Pty) Ltd v Spatz*** [1997) 1 ALL SA 616 (W) at 623.

58. The appointments register is of economic value to the applicant. It is also of potential or actual value to a rival competitor offering recruitment services. Such entity will instantly have access to a composite collection of information of and concerning the applicant's members, their qualifications and employment experience without the need to research and collate same from multiple sources into a single database. It required considerable effort and time to compile the appointments register both prior to and during the tenure of the respondent's appointment. At such time the respondent did so on behalf of the applicant.

59. According to the respondent, the applicant is paid an annual administration fee, which is partially a license fee for the right to use the "appointments register" trading name, and in view of referrals or inquiries received by the applicant. This, the respondent claims, is the only benefit to which the applicant is entitled in terms of the SLA.

60. The fee payable in this matter is also one which is an anomaly in regard to the relationship between the parties. In terms of the SLA the fee payable was an annual administration cost of R12 000, which the applicant contends was payable for the use of an office at the applicant's premises, the applicant's

staff resources and website administration. There was an annual ex-gratia payment based on placements of the applicant's members and students. According to the respondent, once the referral or introductions have been made, the applicant plays no further part in the recruitment services provided by the respondent to the employers and employees referred to it by the applicant. What is however pertinent in this regard, is that the respondent is the party which would be paid the recruitment fee. The applicant does not claim any right to this and it allocated a service to the respondent, for which the respondent was paid by the employers if a successful placing was made.

61. The applicant could quite easily have chosen to maintain the appointments register through the utilisation of its own resources. It instead chose to outsource this function to the respondent. The applicant contends that the utilisation of an outsourcing model at no stage resulted in the applicant compromising its position as the proprietor of the confidential information.

Improper possession

62. The applicant further contends that having taken possession of the appointments register upon the commencement of its contractual obligations and following its receipt of information distributed to it on a confidential basis by the applicant's members under the auspices of the applicant, the respondent cannot treat this body of information as its own. The conduct of the respondent when viewed against the backdrop of the terms of the SLA in continuing to make use of the information that comprises the appointments

register in the furtherance of its own business interests is wrongful and gives rise to the delict of unlawful competition.

63. Having regard to the authorities quoted above in relation to the *boni mores* that involves testing the conduct against the legal convictions of the community and involves the consideration of constitutional precepts, the respondent could not have had any expectation of acquiring any entitlement in the confidential information used by it for purposes of discharging its mandate to the applicant.

64. The applicant accordingly contends that, following the expiration of the SLA by the effluxion of time, the respondent no longer enjoys any entitlement to remain in possession of the confidential information embodied in the appointments register. Its possession and continued use and appropriation thereof are unauthorised.

65. By seeking to retain the appointments register in the furtherance of its own business endeavours the respondent will gain an unfair advantage or *"springboard"* over the applicant, which is neither legally justifiable nor one that it is legally entitled to. See ***Multi Tube Systems (Pty) Ltd v Ponting and Others*** 1984 (3) SA 182 (D) at 189. See also ***Waste Production Utilisation*** *(supra)* at 582.

66. In regard to the respondent's contention that it cannot disclose the information it has on the applicant's members to the applicant as this would be acting in

breach of its contractual or fiduciary duty to the applicant's members, the respondent's reliance on this point is without merit. The details contained on a CV and on a customer list, may be confidential to the particular employee or customer, but they are provided to a party for a particular reason. The respondent cannot deny that these employees are members of the applicant and had already provided the applicant with its details. In addition, the applicant explains that the respondent's services are advertised on the applicant's website. Accordingly, when members of the applicant go to the applicant's website, they are directed to another website, hosted by the respondent, where job vacancies are advertised. The potential employees upload their personal information and CVs to that website. This information, according to the applicant, is *"transmitted to the respondent".* Thus the employees details and CVs are provided to the respondent through the auspices of the applicant. It cannot be contended that revealing the contents of these CVs to the applicant would be a breach of confidence on behalf of the respondent to the employees. The SLA, in addition, provides for the respondent to inform the applicant of placements and comply with requirements for information. In addition, the respondent has to treat information relating to the business of the applicant, members and clients with confidentially, exclusively for the purpose of selection and recruitment. This obligation clearly points to a relationship where the parties are both privy to the confidential information.

67. It is spurious to suggest that these confidentiality undertakings to the employees would operate to the exclusion of the applicant who was at all

material times instrumental in facilitating the distribution of its members' information to the respondent as required by the SLA. The fact that the applicant's members may have a copyright claim over their individual information is of no significance either. The applicant does not assert a claim in terms of the Copyright Act 98 of 1978. The "compilation" referred to in the description of the appointments register, is not intended as one defined in terms of the Copyright Act. It falls within a different legal rubric.

Conclusion

68. In my view, the applicant has satisfied the requirements for an interdict in relation to the misuse of confidential information as set out in ***Dun and Bradstreet*** *(supra).*

69. The applicant is similarly entitled to interdict the respondent from approaching or soliciting business from any of the persons whose names appear in the appointments register for purposes of providing recruitment services to such persons. As the applicant's designated service provider, in terms of the SLA, the respondent was placed in a position of using the applicant's appointments register and the confidential information embodied therein for a specified purpose. But for the SLA, the respondent would not have had access to this information and/or it would not have had, or would have taken much time, effort, trouble and expense to develop if it did not have such unhindered access to the applicant's members. It must follow that the respondent should in the circumstances, not be permitted a *"springboard"* to the information

relating to the applicant's members whose names appear on the appointments register for purposes of providing them with recruitment services.

70. The respondent is free to trade and to do business as it chooses but cannot in the process make use of the appointments register or solicit business from any of the persons whose names appear therein. Its reputation therefore remains intact. To the extent that the respondent may suffer adverse patrimonial consequences following upon the termination of the service level agreement and the consequences that flow therefrom, the applicant cannot be held liable. The respondent chose not to continue its contractual relationship with the applicant. Having regard to the factual scenario, i.e. that the respondent made only 3 placements in the previous year, it's submission that it will suffer severe financial harm can be disregarded as a basis to refuse the interdict.

71. The harm to the applicant is self-evident. Unless the relief sought is granted the respondent would be allowed to benefit from information it received in confidence and for a specific purpose and time period. Permitting the respondent to continue possessing and making use of the appointments register will cause harm to the applicant's reputation and financial position.

72. The personal information of the applicant's members would be left in the possession of a third party who no longer enjoys a contractual relationship

with the applicant and in circumstances where there is no way of knowing to what commercial purpose the respondent would put the information.

73. The applicant finally has no alternative remedy. The applicant submits that a damages action would be expensive and time consuming and the applicant was required to mitigate its exposure though a more interventionist approach. A damages action in due course would not be an equivalent alternative remedy to the interdictory relief sought by the applicant at this stage. It is also not evident from the papers that the respondent would be able to satisfy a damages order. The damages claimable would also be on an on-going and indefinite basis, which is obviously highly undesirable.

74. The orders sought in prayers four and five (part thereof) are likewise necessary in that they render the applicant's principal remedy of an interdict effective. See ***Roamer Watch Company (SA) & Another v African Textile Distributors*** 2980 (2) 254 (W) at 275. However, a court order should be sufficient to determine the respondent's compliance with the interdict. The second portion of prayer 5 is not warranted.

Accordingly, the following order is granted:-

1. The respondent is hereby interdicted and restrained from unlawfully competing with the applicant, or otherwise acting unlawfully towards the applicant, by using in any manner whatsoever, or disclosing to any third party,

the applicant's "appointments register" as described in the founding affidavit of Stephen Sadie, or any part thereof for any purpose whatsoever.

2. The respondent is hereby interdicted and restrained from approaching or soliciting business from any of the persons whose names appear in the aforesaid appointments register for purposes of providing appointment placement services to such persons.

3. The respondent is ordered to deliver to the applicant all and any hard copy documents and the Compact Disk on which the aforesaid appointments register, or any part thereof is contained.

4. The respondent is ordered to delete from any electronic medium, including any computer, hard drive, flash drive, cloud storage or any other medium of any nature whatsoever, the aforesaid appointments register or any part thereof.

5. The costs of this application, including the costs of two counsel where applicable, shall be paid by the respondent.

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WEINER J

Counsel for the Applicant:	*Adv Morley SC & Adv C Bester*
Applicant's Attorneys:	*Edward Nathan Sonnenbergs Inc.*
Counsel for the Respondent:	*Adv GD Marriott*
Respondent's Attorneys:	*Carol Jooste Attorneys*
Date of Hearing:	*12 August 2014*
Date of Judgment:	*21 October 2014*