REPUBLIC OF SOUTH AFRICA

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

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

..... SIGNATURE

25/10/19 ..... DATE

CASE NO: 33905/2019

In the matter between:

OBSIDIAN HEALTH (PTY) LIMITED	**APPLICANT**
And	
MAUREEN MAKHUVHA	**FIRST RESPONDENT**
PRIME SURGICAL (PTY) LIMITED	**SECOND RESPONDENT**

JUDGMENT

WINDELL J:

INTRODUCTION

[1] This is an urgent application to enforce a purported restraint of trade agreement against the first and second respondents.

[2] The first respondent is a qualified technician having obtained a N6 Electrical Engineering Diploma from the Pretoria Technical college. She has over 13 years' experience in medical devices in the private and public healthcare industry. She was in the employ of the applicant until she resigned with effect 31 May 2019. The second respondent is the first respondent's current employer.

[3] The specific orders sought by the applicant are the following:

1. The first respondent be interdicted from taking up or continuing her employment with the second respondent anywhere in Gauteng.
2. The first respondent be interdicted from contacting in any manner any of the applicant's customers in schedule A. (Schedule A is a list of twelve hospitals in Gauteng).
3. The respondents be interdicted from contacting any of the applicant's employees.
4. The respondents be interdicted from utilising the applicant's confidential information and trade secrets.
5. All of the above relief to operate for period from 12 months from date of court order.

[4] Although the application purports to be one for interim relief, it is, in substance, one for final relief due to the limited duration of the restraint. It is trite that, being motion proceedings, disputes of fact are to be dealt with in accordance with the principles laid down in *Plascon Evans Paints Ltd v Van Riebeeck Paints Ltd.*[1] A final interdict may therefore only be granted if the facts stated by the respondents' answering affidavits together with the admitted facts in the applicant's founding affidavit justify such an order. This test applies even where the *onus is* on the respondent to proof that a restraint is unreasonable and accordingly *contra bonis mores.*[2]

[5] The applicant seeks enforcement of a lesser restraint. When a lesser restraint is sought the applicant must lay a clear basis in its founding affidavit.[3] It is submitted on behalf of the respondents that the applicant is bound by the case made out in its founding affidavit and that it failed to lay a proper basis for enforcement of a lesser restraint. It is submitted that the must, for this reason alone, fail.

[6] In support of its application the applicant relies on a contract of employment entered into between the applicant and the first respondent on 15 February 2019. The first respondent disputes the validity of the contract. It also disputes that the applicants established a proprietary right, worth protecting. It is only when the applicant has discharged its onus that the first respondent bears the onus of proving that the restraint is unreasonable and against public policy.

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[1] 1984 (3) SA 623 (A) at 634 E-I.
[2] See *Associated South African Bakers Pty Ltd v Oryx & Verenigte Backereien (Pty) Ltd & Andere* 1982 (3) SA 893 at 923 G-924 B.
[3] *Macpail (Pty) Ltd v Janse van Rensburg; Macpail (Pty) Ltd v Janse van Rensburg and Others* 1996 (1) SA 594 (T) at 59.

[7] The first respondent launched a substantive application requesting leave to file a further affidavit. The purpose of the further affidavit is to deal with new matter raised in the replying affidavit. The application was not opposed and the fourth affidavit was allowed. On the date off the hearing the applicant requested the court to accept a further affidavit on behalf of the applicant. The affidavit was not accompanied by a condonation application and the first respondent opposed the handing up of the affidavit. In the absence of a condonation application setting out the reasons why the further affidavit should be allowed, and exercising my discretion, the further affidavit on behalf of the applicant was refused.

BACKGROUND

[8] The applicant is a company that provides medical devices, equipment and consumables in the healthcare market. The applicant held an agreement with Japanese Company, Terumo, for the distribution of cardiovascular and medical products portfolios. The Terumo cardiovascular portfolio includes tubing packs, blood gas and potassium monitoring equipment, oxygenators and heart lung machines, all of which are used during open heart surgery. The open heart surgery is carried out by a cardiothoracic surgeon and a cardiovascular perfusionist who is responsible for running the heart lung machine during cardiac surgery. The Terumo devices are used for open heart surgery and every six months these machines require service, maintenance and repair in terms of Terumo protocols.

[9] It is common cause that as at January 2019 the only agency contract the applicant held in the cardiovascular sector was the Terumo distribution rights. In December 2016 Terumo initiated steps to reduce its dealings with the applicant in

respect of its four divisions being Cardiovascular, Endovascular, Cardiology and Medical Products. On 31 March 2017 the distribution agreement between Terumo and the applicant expired. On 22 August 2017 Terumo concluded a distribution agreement with a third party in respect of its endovascular products. On 20 November 2017 Terumo and the applicant concluded a one year distribution agreement for its cardiovascular/medical products business. This agreement was extended again for a limited period of one year expiring on 31 March 2019. In May 2018 Terumo concluded a new distribution agreement for all its cardiology business with a third party from August 2018. On 16 January 2019 Terumo accidentally copied the applicant to an email regarding its intentions to terminate its agreements with the applicant to distribute Terumo's cardiovascular/medical products. The applicant's CEO contacted Terumo who confirmed that Terumo would not continue its business with the applicant. On 4 March 2019 Terumo and the second respondent concluded a distribution agreement for the distribution of Terumo's cardiovascular/medical products from 1 April 2019. On 31 March 2019 the distribution agreement between Terumo and the applicant expired. The applicant may therefore not sell, repair, maintain or service any of Terumo's products.

[10] After the applicant became aware of Terumo's intention to terminate the distribution agreement it began a process to source alternative products in late January 2019. It is common cause that only one of its competing cardiovascular products has been registered with the medical aids and all the rest of its cardiovascular products are "in the process of registration".

[11] The first respondent was employed by the applicant as a Cardio Product Specialist and service Technician. The Terumo devices can only be serviced and

maintained by the authorized distributor in South Africa, being the second respondent, and Terumo certified technicians employed by the second respondent. The first respondent states that she is the only technician in South Africa who is certified by Terumo to service and maintain its equipment.

[12] Before the expiration of its distribution agreement with Terumo, the applicant issued upliftment notices sent to all the hospitals in South Africa and the applicant's personnel was instructed to uplift and collect its Terumo machinery and equipment (i.e cardiovascular CDI monitors and calibrators) from the hospitals. The first respondent submits that the upliftment notice was sent under false pretense of stock outages of Terumo sensor supply but the true intention was to disrupt the cardiovascular sector by removing all of Terumo's devices shortly before the commencement of the second respondent's distribution agreement with Terumo. Following the upliftment of the Terumo devices, the hospitals were left without any machinery and equipment for purposes of blood monitoring of cardiovascular procedure. The second respondent then attempted to purchase the Terumo devices from the applicant but negotiations between the parties failed. The second respondent ultimately procured new devices from Terumo and supplied it to the hospitals.

CONTRACT OF EMPLOYMENT

[13] The first respondent attacks the validity of the contract of employment on two grounds. First: The contract of employment was signed on 15 February 2019 under circumstances of duress and coercion; and Second: The contract of employment

lapsed on 10 January 2019 by virtue of clause 14 thereof, and the restraint covenants are unenforceable, null and void.

[14] In its founding affidavit the applicant alleges that the first respondent has been in the employ of The Scientific Group ("SG") since 1 May 2006. When the applicant was created and started trading on 1 March 2015, all the SG medical division business and assets were transferred into the applicant. This included the transfer of all medical staff. The applicant employed the first respondent as a Cardio Product Specialist and Service Technician. The applicant took over the existing employment contracts from SG and as the contracts were not uniform, it was decided in late 2018 that a revised letter of employment would be distributed to all employees following the completion of the integration process. This standard employment contract for all employees of the applicant included a restraint of trade and confidentiality clause. The applicant states that the previous employment contract with SG was taken into consideration when drafting the new contract with the applicant in compliance with Section 197 of the Labour Relations Act.[4]

[15] In her answering affidavit the first respondent contends that she was forced to sign the 2019 contract of employment under circumstances of duress and coercion. She did not want to sign the contract for three reasons: (i) It struck her as odd that the applicant was suddenly seeking to revise her terms of employment after 4 years of taking over the medical division of SG and her employment as technician; (ii) She had heard rumours that Terumo was going to terminate its business relationship with the applicant and (iii) The applicant's employees were unhappy with the onerous restraint of trade provisions inserted into their generic contracts of employment. She

[4] Act 66 of 1995

was eventually confronted by De Bruyn, the applicant's business manager, who demanded that she signs the document. De Bruyn informed her that it was merely an ISO compliance requirement, but did not explain the contents of the document. She was fearful of losing her employment and eventually gave in under the pressure and signed the document on 15 February 2019. She contends that the applicant withheld material facts from her in particular that it had, at the time, lost the right to distribute Terumo products. Had she known this fact she would not have signed the contract. It is submitted that the "sudden rush" of the applicant to have its staff sign new contracts of employment was done to stifle competition by locking all its staff into onerous restraint covenants shortly before the loss of the Terumo contract. It is further submitted that this "mischief" forms part of the applicant's intention to disrupt the cardiovascular market at the end of its agency agreement with Terumo when it uplifted all Terumo's cardiovascular products from the hospitals shortly before its distribution contract came to an end in March 2019. It is submitted that this was done to frustrate the second respondent as it took over the distribution of Terumo's products in South Africa.

[16] The first respondent also contends that the contract of employment is null and void because of what is stated in Clause 14 of the contract. Clause 14 reads as follows:

> "ACCEPTANCE OF OFFER
>
> *This offer is limited for a period of three (3) days from the date of issue. Failure to respond within this period will render the offer null and void."*

[17] The applicant filed a replying affidavit wherein it admits that it did not explain or discuss or consult the first respondent on the contents of the contract of employment and that first respondent was instructed to sign the contract without delay. The applicant also admits that there was mass unhappiness amongst its staff when it introduced the new restraint covenants in 2019. It concedes that it did not alert the first respondent to the fact that the offer has lapsed on 10 January 2019 nor to the inclusion of the new restraint of trade covenants contained therein. The applicant acknowledges that the contract had lapsed, but submits that it was ratified by De Bruyn and the applicant's HR Department after the first respondent signed it on 15 February 2019. The applicant also contends that it in any event concluded a contract of employment with the first respondent in 2017 which is exactly the same as the 2019 contract.

[18] An applicant is bound by the case made out in its founding affidavit. It must stand or fall by the allegations contained in its founding affidavit and it is not allowed to make out its case in the replying affidavit. A court will not allow the introduction of new matter in reply when no case at all was made out in the original application or if the reply reveals a new cause of action. In *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) Pty and Another*[5] Broome J held as follows;

> "The correct approach to the problem was enunciated clearly by CANEY J in *Bayat and Others v Hansa and Another* 1955 (3) SA 547 (N) at 553D:

[5] 1980 (1) SA 313 (D & CLD) at 315 E-H and 316 A.

> '... the principle which I think can be summarised as follows... that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits.'

It is true that in certain circumstances it would be unjust to confine an applicant to the contents of his launching affidavit. An example of further highly relevant facts coming to light later, and being introduced despite objection, is to be found in *Registrar of Insurance v Johannesburg Insurance Co Ltd (1)* 1962 (4) SA 546 (W) where, in an application made by the Registrar of Insurance for the liquidation of the respondent insurance company, a report prepared by a firm of accountants was admitted. Another example of the Court authorising an applicant to introduce new material in reply is to be found in *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O) at 568E where the Court considered that, as the ramifications of the respondent's affairs were extensive and complex, it was impossible for the applicant to have had all the facts at his disposal before he launched sequestration proceedings. See also *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 369A - B.

But none of these cases go the length of permitting an applicant to make a case in reply when no case at all was made out in the original application. None is authority for the proposition that a totally defective application can be rectified in reply. In my view it is essential for applicant to make out a *prima facie* case in its founding affidavit."

[19] I agree with respondents' counsel, *Mr Pocock*, that the introduction of a new contract contradicts the applicant's explanations and motivations for concluding the 2019 contract of employment. It is also an attempt to change its cause of action to a contract of employment in 2017. No reasonable explanation was provided by the applicant why it omitted the 2017 contract. The attempt to introduce a new cause of action based on a contract of employment entered into in 2017 amounts to an ambush and cannot be allowed.

[20] The first respondent contends that, by virtue of clause 14, that the contract of employment lapsed and the restraint covenants are unenforceable, null and void. The applicant profess that it lapsed but pleads ratification in its replying affidavit. Ratification was never pleaded or dealt with in the founding affidavit and applicant's answer in reply is wholly inadequate. It fails to advance any facts in support of the ratification, including the dates when it was supposedly ratified. In any event the defence of ratification is bad in law and does not revive the contract because clause 14 was a suspensive condition that cannot be revived through ratification. According to Amlers Precedents of Pleadings,[6] a party wishing to rely on a suspensive condition has to allege and prove the fulfilment of the suspensive condition. It is trite that pending the fulfilment of a suspensive condition there is no contract between the parties. In the matter of *Melamed v BP Southern Africa (Pty)* Ltd[7] the agreement under consideration was subject to a suspensive condition. The court held that this entails that the agreement would be discharged *ipso iure* on non-fulfilment of the condition. A suspensive condition can also only be waived by someone in whose favour the suspensive condition exist, and only before the agreed cut-off date. Once

[6] Amlers 9th Edition at page 309
[7] 2000(2) SA 614 (W) at 625 D-E. See also *Dirk Fourie Trust v Gerber* 1986 (1) SA 763 (A).

the agreement has lapsed, a unilateral waiver cannot reinstate it.[8] None of these issues are alleged by the applicant and it is precluded from making out its case in reply. The applicant's case is in any event contradicted by the fact that the applicant's CEO already signed the contract of employment on 7 January 2019 when it was issued. The applicant's CEO did not sign or countersign the contract on 15 February 2019.

[21] For purposes of deciding this application it is therefore not necessary to decide whether the contract was signed under duress and misrepresentation, as the contract of employment had lapsed. The restraint covenants are therefore unenforceable, null and void.

THE PROPRIETARY RIGHT

[22] In any event, even if I am wrong, and the 2019 contract was valid and enforceable, the applicants failed to establish a proprietary right.

[23] The applicant submits that the applicant and the second respondent are competitors in the cardiothoracic/cardiovascular medical field. The cardiovascular/cardiothoracic sector is a unique and very specialized industry. In its founding papers the applicant however failed to disclose or explain the unique characteristics, nuances, requirements, procedures and regulations applicable to distributors supplying medical products to the private and public sector. It is only in its replying affidavit, and after the respondents provided the court with an exhaustive account of all the restrictions and regulations in the private and public sector, that the

[8] Van Jaarsveld v Coetzee 1973 (3) SA 241 (A).

applicant conceded that there are many restrictions and regulations that need to be complied with, and that the restrictions and regulations vary depending on whether one is dealing with the private or the public sector. But, this is not the only material and relevant information the applicant failed to disclose in its founding affidavit. The applicants also failed to disclose the fact that all distributors are required to register their products with the private medical aids and hospital groups in order to supply the private sector and that all prices in the private sector are regulated and controlled by the private medical aids and hospital groups on the basis of benchmark pricing practises. In addition the applicant also failed to explain that all distribution to the public sector is done by either tender (based on various criteria such as BEE, tax clearance certificates, quality, availability), or by invitation only and on the basis of request for quotation whereby only three suppliers are invited to quote. Importantly, it failed to disclose or prove its registration status in the public sector and has not advanced a single document in support of its status.

[24] The applicant admitted that as at January 2019 the only agency contract it held in the cardiovascular industry was the Terumo distribution rights and that Terumo terminated its distribution contract with applicant on 31 March 2019. In reply the applicant agrees that all it products must be registered with the hospitals and medical aids in the private sector. It follows that the applicant cannot compete in the private sector without or until such time as its new cardiovascular products are registered with the medical aids and hospitals. Applicant accedes that only one of its competing cardiovascular products has been registered with the medical aids and that all the rest of its cardiovascular products are in the process of registration.

[25] The applicant further admitted that the public hospitals have extremely limited budgets and do not frequently buy new machines and devices. I agree with respondents' contention that it therefore follows that there can be no competition or conflict in respect of these customers as there is no interest or demand of financial budget to buy new cardiovascular products.

[26] In its founding affidavit the applicant alleged that the first respondent has knowledge of its pricing structures by virtue of the fact that she personally prepared the applicant's price quotations for its customers and therefore knows the composition of its pricing methods. In reply the applicant however professed that this allegation is false and admitted that all the quotations were prepared by the applicant's two dedicated in house quotation coordinators; one for the private sector and one for the public sector. The applicant further admitted in reply that the first respondent was not involved in any of the price negotiation with the medical aids and hospital groups as this was done at a senior level only. The first respondent was not exposed to the pricing of the cardiovascular products or how the applicant's pricing is made up. The applicant further admitted that medical aids in any event use benchmark pricing of registered products. I agree with the respondents that any knowledge of the applicant's pricing is therefore sterilised by the fact that the medical aids determine the pricing based on benchmarking its prices to other distributor prices. In addition the applicant admitted that the cardiothoracic surgeons and cardiovascular perfusionists are loyal to the product brand and product quality. The customers therefore follow the Terumo brand and not the distributor or its employees. The customer relationships are held by numerous other role players in

particular the Terumo's product manager based in Johannesburg, who calls on the hospitals cardiothoracic surgeons and cardiovascular perfusionists.

[27] The applicant acknowledged that the first respondent paid the applicant for all the training that she obtained while employed with it and that all her knowledge and skills and expertise in these products belong to her. Accordingly all knowledge that the first respondent supplied to the second respondent belongs to her and not the applicant.

[28] As stated before, the applicant seeks enforcement of a lesser restraint. The applicant clearly failed to lay a basis for it in its founding affidavit. In fact, the applicant's whole founding affidavit is based on generic legalise without personalising its case to the unique nature and character of the cardiovascular sector and the industry as a whole. The founding affidavit is also riddled with numerous anomalies and flaws. I agree with *Mr Pocock* that these disputes and defects were foreseeable when launching the application yet the applicant failed to deal with it in its founding affidavit. Instead it introduced new matter in its replying affidavit.

[29] The contract of employment relied upon define the applicant's protectable interest as information which "is not readily available in the ordinary course of such business to the company's competition". On its own version the medical aids and hospitals regulate the prices through benchmarking practises, its pricing information is either in the public domain, alternatively, is of no use or benefit to anyone. Applying the principles enunciated in *Plascon Evans*, I am satisfied that the applicant failed to prove that it has a protectable interest.

[30] The respondents submits that a punitive costs order be made against the applicant. I am of the view that such an order is not warranted.

[31] In the result the following order is made:

1. The application is dismissed with costs.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Counsel for appellant:	Adv. Strydom
Instructed by:	Petro Cloete Attorneys
Counsel for respondents:	Adv W.H Pocock
Instructed by:	Cliffe Dekker Hofmeyer
Date matter heard:	8 October 2019
Judgment date:	25 October 2019