

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2020/2170

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


.....
SIGNATURE

DATE: 27 October 2020

In the matter between:

NBC HOLDINGS (PTY) LTD

Applicant

And

CHAANE, VICTOR

First Respondent

GINYA, SIPHO

Second Respondent

JUDGMENT

SIWENDU J

Introduction

[1] The applicant, NBC Holdings (Pty) Ltd (NBC), is a private company with limited liability registered in terms of the Companies Act. Its registered address is at 22 Junction Road Parktown, Johannesburg.

[2] NBC provides managed employee benefits, pension fund administration services, health and risk management services, investment consulting services, and legal and actuarial services. It is considered a black-owned company and provides services to approximately 120 registered pension and provident funds representing retirement savings of nearly 350 000 members as a client base.

[3] The first and second respondents, Mr Victor Chaane and Mr Sipho Ginya, are the erstwhile employees of NBC. Mr Chaane took up employment in April 1998 as New Business Development Officer. Later, he became the Executive Head of Stakeholder Relations and headed the team that served one of NBC's clients, the Chemical Industries National Provident Fund (the CINPF). Mr Ginya, on the other hand, was employed as an Administrator in February 2001. He later became the Divisional Head in charge of the CINPF benefits consulting team. I refer to them as the respondents.

[4] NBC seeks to enforce a restraint of trade agreement entered into with the respondents. Both respondents signed an identical restraint agreement entitled 'Declaration and Pledge' following their employment with the applicant. The order sought is in the following terms:

'The first and second respondents are interdicted and restrained from directly or indirectly soliciting the custom of any client of the applicant, at any time prior to 12 December 2020, whether as principal, agent, partner, representative, shareholder, member, consultant, adviser, financier, employee or in any other capacity, and whether alone or jointly with or as agent for any other person.'

The first and second respondents are interdicted and restrained at any time prior to 12 December 2020, from directly or indirectly offering employment or causing employment to be offered to or causing to be employed any person who was employed by or in connection with the business carried on by any member of the applicant as at 12 December 2019 or at any time thereafter prior to 12 December 2020.'

[5] The genesis of the application is the notice of termination of the contract of services offered by NBC to a longstanding client, the CINPF. On 18 February 2020, NBC launched an urgent application for an interim interdict before Senyatsi J. The court struck the application off the roll because of a lack of urgency. Accordingly, the determination before this Court is in the ordinary course. The restraint is limited to a period of 12 months, of which more than ten months have elapsed.

Background

[6] The founding affidavit in support of the application was deposed to by the Chief Executive Officer of NBC. He says that NBC has the CINPF amongst its clients, and that this relationship commenced in 1992. Over and above the bouquet of services referred to above, the CINPF contracted NBC to provide health risk management services in August 2002. It renewed the contract in January 2005. On 21 November 2019, the Board of Trustees of the CINPF resolved to terminate all the services rendered by NBC, divesting the company of a longstanding agreement. The notice period for the termination operated from 29 November 2019 to 29 February 2020. An application to review and set aside the termination decision is pending before the High Court. Individual Fund members also launched a complaint to the Pension Funds Adjudicator. There are pending criminal charges which were instituted in terms of s 34 of the Prevention and Combating of Corrupt Activities Act No 12 of 2004 in respect of certain payments made to the respondents

[7] The respondents were responsible for coordinating all the activities of NBC's departments providing services to the CINPF. They were also responsible for planning and scheduling meetings, keeping records of the CINPF and Trustee meetings, reporting back on investments, and ensuring that the services NBC rendered were within the prescripts of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS), the Pension Fund Act 24 of 1956 (the PFA) and the Financial Sector Regulation Act 9 of 2017 (the FSRA) amongst others.

[8] The respondents are the registered FAIS representatives on behalf of NBC in terms of the Act. NBC alleges it trained them to meet the "fit and proper" requirements in terms of s 8 of FAIS. NBC contends that the respondents, as the sole custodians of the business and service relationship between it and the CINPF, orchestrated a well-

crafted ploy and conspired with individual trustees of the CINPF to drive a wedge between NBC and the CINPF, leading to the termination of the contract. It alleges the respondents motivated for and were a party to proceedings that oversaw the shortlisting of Akani Retirement Fund Administration (Pty) Ltd (Akani), a competitor of NBC, leading to the contract's termination.

[9] In March 2019, preceding the termination decision, the CINPF wrote a letter expressing dissatisfaction with services provided by NBC's Investment Consulting Services. After a meeting within NBC, the respondents undertook to deal directly with the CINPF about the complaints. Despite this undertaking, on 22 and 23 August 2019, at a Regional Advisory Committee (RAC) meeting of the CINPF, the Trustees proposed an appointment of forensic investigators into the conduct of NBC's services. The Board appointed Gobodo Forensic and Investigative Accountants in September, after a special meeting of the Board of Trustees. The remit of the investigation, spanning from 2014 to 2019, included disinvestments made by NBC's Fund Accounts and Administration Department from the Fund's cash portfolio to pay member claims, the processes followed, and fees NBC charged for services.

[10] NBC claims there had been no issue brought to its attention other than the complaint in March 2019. It claims that rumours about irregularities, unexplained financial loss of funds, the lack of transformation within NBC and a preference for Indian employees, allegations of the duplication of service charges, and the pending termination of the contract, circulated at a training session and meeting of the North Eastern Region RAC in September 2019, before the termination. It was discovered in November 2019, after investigations (and after the respondents resigned) that they did not act in NBC's best interests.

[11] NBC also established, after the fact, that the respondents assisted the CINPF's Principal Officer to draft a subcommittee resolution appointing a consultant to advise on the process of selecting a new service provider. Also, Mr Ginya assisted in drafting the resolutions terminating all the services adopted by the CINPF Board on 21 November 2019. The CINPF, after that, sent the resolution to Mr Ginya on 25 November 2019.

[12] On 27 November 2019, the respondents were present at a meeting of the tender subcommittee convened to consider tender specifications, the appointment of an independent consultant, and, at the same time, consider a list of providers of fund administration and consulting services presented. Three companies were shortlisted, including NBC's competitor, Akani.

[13] NBC learnt of the resolution terminating its services on 28 November 2019, when Mr Ginya forwarded it to the management by email at 22h00. On 29 November 2019, the respondents tendered their resignations with immediate effect in a letter addressed by their attorney.

[14] NBC alleges Mr Chaane had a meeting with Mr Letjane, the Managing Director of Akani, and a Director of Neighbour Funeral Scheme (Pty) Ltd (Neighbour Funeral Scheme) early in November 2019 at Mike's Kitchen, Parktown. There were two representatives from Akani, and the General Secretary of the Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU/the Union) present. The meeting was to discuss financial support and logistics for the Union's staff meeting to be held that month. As the main sponsor for the event, Akani hosted the event and Gala Dinner at Destiny Hotel, Kempton Park, a hotel in which it has an interest. The replying affidavit also alleges that at least two other meetings between the respondents and Mr Letjane took place, one in August 2019 at Destiny Hotel and another on 17 November 2019 at CEPPWAWU's year-end function.

[15] NBC subjected respondents to a disciplinary hearing on 5 and 6 December 2019, held in absentia. It dismissed them on 12 December 2019.

Solicitation Complaint

[16] NBC predicates the solicitation complaint on information it obtained about meetings the respondents held with office bearers, the Trustees, and officials of the CINPF, and affiliated Fund officials, the BMW Contributory Provident Fund, and the NUMSA Staff Provident Fund. It also relies on information it obtained from the members who lodged a complaint with the Pension Fund Adjudicator. It claims its *prima facie* view is that the respondents were in breach of their fiduciary duties, and the restraint, based on these meetings.

[17] The first reported meeting with office bearers took place in Secunda on 4 December 2019 between Mr Chaane and Ms Rambau, an influential member of the RAC and Local Advisory Committee (LAC) of the CINPF. Mr Mukhuba, now an ex-employee of NBC, arranged the meeting on Mr Chaane's behalf.

[18] The second meeting was with Mr Mogoeroe, a Trustee and Chairman of the Board of the BMW Contributory Provident Fund, and an employer appointed Trustee of the NUMSA Staff Provident Fund. NBC claims that Mr Mogoeroe received a call from Mr Albert Makhusha, a former NBC employee, on 8 December 2019. He advised Mr Mogoeroe about an information session to be held at Destiny Hotel on 9 December 2019. Mr Makhusha reported to Mr Mogoeroe that the respondents were going to address the meeting. Further, the respondents wanted to use the occasion to address the rumours circulating about their 'suspension' from NBC's employment.

[19] NBC also alleges the respondents solicited the NUMSA Staff Provident Fund. Mr Makhusha called Ms Caroline Mangalane Maswanganye, a collective Bargaining Administrator and Trustee of the NUMSA Staff Provident Fund, to attend a meeting at Destiny Hotel. Mr Makhusha advised her that she was leaving NBC for Akani. A reference to Mr Chaane "having a bag full of money on the table" was allegedly made.

[20] The respondents attended the meeting on 9 December 2019 at Destiny Hotel. Mr Chaane met with Mr Mogoeroe and NBC's ex-employees. It is unnecessary to detail the discussion at each of these meetings because they mainly follow a common thread.

[21] The discussions were about: (a) the ill-treatment of the respondents by managers at NBC and the suspension of some of the employees who were a part of the respondents' team; (b) the thwarting of black excellence and transformation aspirations; (c) a bias towards and preference for Indian employees; (d) complaints about an Indian investment consultant allegedly in charge of NBC; (e) lack of support for the respondents by the CEO; (f) concerns about NBC's dealings with the CINPF; (g) fees charged and how NBC ignored Mr Chaane's advice against a fee increase; and (h) the forensic investigation into R80 million.

[22] The claim is that the respondents aired the same complaints after 9 December 2019 at a meeting held on the side-lines with the Chairman of the Board of Trustees,

the Principal Officer of the Fund, representatives of Akani, and an unidentified trustee from KwaZulu-Natal. The report is Mr Chaane encouraged office bearers to ask for NBC's organogram and question its transformation credentials, with Mr Chaane undertaking to provide support in the background on information to be asked. There were allegations of 'kickbacks' and monetary support used to secure the move to Akani.

[23] The above activities are also detailed in a complaint by individual members of the Union to the Pension Funds Adjudicator. Reports are that Mr Chaane travelled across canvassing support for Trustees' termination resolution.

[24] At the time of the launch of the application for an interim interdict, which appears to have been in haste, the founding affidavit was not verified by confirmatory affidavits. Other than in respect of Ms Maswanganye, Mr Mogoeroe, and Ms Rambau, subsequently filed confirmatory affidavits to support their claims.

Respondents' Version

[25] The respondents resist the application in an affidavit deposed to by Mr Chaane. The chronology of the events is, by and large, common cause. The opposition broadly rides on two legs. Firstly, they claim a dispute of facts. The respondents dispute claims of the strategy, conspiracy, and breaching the restraint. The second leg is on the enforceability of the restraint and its application to the respondents.

[26] By this time, the respondents had taken up employment as consultants to Neighbour Funeral Scheme. They provide marketing and sales services. They dispute the allegations against them as an attempt by NBC to use them as a scapegoat for the contract's termination. They claim NBC's attempts to discipline and disbar them with the Financial Advisory Intermediary Services were part of a reprisal tactic extended to employees in Mr Chaane's team.

[27] Even though the respondents concede the good relations they have with the CINPF, they deny that they were the sole custodians of the business and service relationship. They point to ongoing complaints against NBC about its lack of transformation, and a disproportionate representation of White and Indian people in

management structures in KwaZulu-Natal and the Western Cape. They claim NBC developed unacceptable business practices, had poor service delivery, and that there was financial mismanagement. They claim the CINPF Trustees required black Africans in the management echelons across the divisions of NBC.

[28] They point to a downward spiral in the relationship, commencing at a meeting of the Trustees on 28 and 29 March 2019, when Mr Ramakongoana from NBC's Investments Consulting Division presented the CINPF's cash flow for December 2018 to February 2019. The cash flows reflected an outflow of approximately R83 million regarding disinvestment, which caused dissatisfaction, leading to a forensic audit call. The Fund Accounting Division of NBC did not seem to provide information to the Trustees' satisfaction. The discontent and relationship issues led to the termination. Mr Chaane states that he raised the areas of discontent at the time with NBC's CEO, without resolution.

[29] When the Trustees adopted the resolution to appoint forensic auditors, as NBC employees, they had to recuse themselves. From September 2019 onwards, the CEO asked him to persuade the Trustees to hold off the audit and pressurised Mr Chaane to salvage the situation, while at the same time apportioning blame towards him. The forensic report returned unfavourable results.

[30] Mr Ginya drafted the resolution for the Trustees to vote on the termination of NBC's services on 21 November 2019. The respondents claim not to have been aware of the outcome until the CINPF returned the resolution on 25 November 2019. Mr Ginya discussed it with Mr Chaane. When the termination of NBC's services by the CINPF occurred, the respondents' relationship with the CEO of NBC had broken down to the extent that the respondents elected to terminate their employment. They anticipated that the CEO would blame them for the termination of the contract.

[31] Mr Chaane claims the respondents were 'put in contact' with Mr Letjane after the termination of NBC's services, and after Akani was shortlisted to provide services to the CINPF. They claim not to have had a relationship with Akani or Mr Letjane and were not in contact with him. Their work at Neighbour Funeral Scheme is in areas unrelated to the business of NBC or the CINPF.

[32] The respondents dispute the solicitation claims, but concede having meetings with various Trustees and office bearers of the CINPF. They claim NBC deliberately misconstrues the context of these meetings to paint an unfavourable picture of them. Mr Chaane claims it had been an emotional time. He approached Ms Rambau as a person he had known, and requested her to use her influence to stop NBC from harassing him and his former team members. The meeting with Mr Mogoeroe of BMW Contributory Provident Fund, similarly, as with Ms Maswanganye of NUMSA Provident Fund, was about his colleagues' mistreatment and the real reasons for their resignation.

[33] They deny attempts to lift-off NBC employees to a new service provider and disputed the allegations of payment of 'kick-backs'. They claim several NBC employees elected to either leave the employ, voluntarily resigned, were dismissed, or entered into separation agreements because of poor treatment by NBC and its' CEO. They dispute employing ex-employees of NBC.

[34] In reply, NBC denies reports about its business and practices, and faults the respondents for not communicating the CINPF's dissatisfaction. It claims the increase in fees complained of was voted on by the Trustees. The respondents represented NBC at these meetings. NBC claims that employment with Neighbour Funeral Scheme, a company related to Akani, is a ruse to divert attention from the issues. After the respondents left, it accessed information from its server, which showed that Neighbour Funeral Scheme and Akani paid the respondents. It characterises the payments as either 'bribes/ gratifications' or rewards for assisting with the termination of the contract. On this basis, it claims that in all probability, the respondents intended to divert business to Akani.

[35] Bank statements of the respondents, obtained after they left NBC, reflect that the Mr Chaane received R50 000 and Mr Ginya received R40 000 from Neighbour Funeral Scheme on 20 December 2019. On 15 January 2020, Mr Chaane received a further payment of R23 450. Between 20 December and 15 January 2020, Mr Ginya received additional payments of R2 000 from Akani, followed by a further payment of R3 000 and R4 900 from Neighbour Funeral Scheme. Mr Ndivhuho Ravhuhali, an ex-employee dismissed by NBC on 15 January 2020, received R45 620.72 from Neighbour Funeral Scheme on 31 January 2020.

[36] The issue is whether the restraint of trade undertakings is enforceable. If so, the question is whether the respondents breached it by soliciting NBC's clients. The Court is further required to determine whether the facts triggered the restraint operation. The last issue for determination is the appropriate final relief the court may grant in the circumstances.

Is the Restraint Enforceable?

[37] Framed as a Pledge, the relevant Clauses, being Clauses 3, 3.1, and 3.2 read as follows:

'3. I will not, **for a period of 12 (twelve) months from the date of termination of employment** with NBC Consultants and Actuaries (Pty) Ltd either as principal, agent, partner, representative, shareholder, member, consultant, advisor, financier, employee or in any other capacity, and whether alone or jointly with or as agent of another person:

3.1 In connection with any business, company or close corporation, partnership, enterprise or other association of persons who or **which carries on any business which is carried on by NBC Consultants and Actuaries (Pty) Ltd, directly or indirectly, solicit the custom of any client, as part of my duties, at any time during the 12 (twelve) months immediately after the date of termination of our employment with NBC Consultants and Actuaries (Pty) Ltd.**

3.2 Directly or indirectly offer employment to or employ or cause employment to be offered to or cause to be employed any person who was employed by or in connection with the business carried on by any member of NBC Consultants and Actuaries (Pty) Ltd as at the date of termination of my employment or at any time within the 12 (twelve) months immediately after the termination of my employment with NBC Consultants and Actuaries (Pty) Ltd.' (Emphasis added)

[38] The restraint is thus in two parts: (1) the first part prevents the respondents from '*directly or indirectly soliciting any client*' of NBC; and (2) the second part prevents the respondents from enticing and poaching NBC employees. It provides for:

(a) the subject of protection, being the clients;

- (b) the capacities in which the respondents may act in the solicitation;¹
- (c) the mode of solicitation as either direct or indirect;
- (d) the beneficiary of the solicitation;
- (e) the period of the restraint;
- (f) the trigger of the operation.

[39] Besides disputing the solicitation charge, an aspect I deal with later in the judgment, the respondents attack the restraint agreement's validity on all fronts by dissection of its constituent parts. They charge that it is overbroad, protects no legally protectable interest, and that its enforcement would be repugnant to public policy. They also challenge its reasonableness, claiming that it is anti-competitive, and that the restraint period is excessive.

[40] As held in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,² a restraint agreement is *prima facie* enforceable unless the respondents on whom the onus rests show that its enforcement would be unreasonable and contrary to the public interest. A further iteration of the principles in *Magna Alloy* is in *Experian South Africa (Pty) Ltd v Haynes*,³ where Mbha J articulates the position and the onus as follows:

'The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint bears the onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.'⁴

[41] In *Basson v Chilwan*,⁵ the court raised the following four questions it deemed relevant to the determination of the reasonableness of a restraint:

'(a) Does the one party have an interest that deserves protection after termination of the agreement? (b) If so, is that interest threatened by the other party? (c) In that case, does such

¹ Whether as an agent, as principal, partner, representative, shareholder, member, consultant, advisor, financier, employee or in any other capacity.

² *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

³ *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ).

⁴ *Ibid* para 14.

⁵ *Basson v Chilwan and Others* 1993 (3) SA 742 (AD) at 767F–H, as set out in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para 16.

interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?’

[42] In respect of the first question, I note that customers and clients form the legitimate subject of proprietary interest worthy of protection. *Basson* confirms that clientele constitute a proprietary interest subject to protection.⁶ The protection arises because the law accepts that an employee can build a relationship with customers over time which form part of the employer’s goodwill. In *Rawlins v Caravantruck (Pty) Ltd*,⁷ the Appellate Division stated as follows:

‘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 the customers so that when he leaves the employer’s service he could easily induce the customers to follow him to a new business...’

Interpretation of the Restraint

[43] It is essential that I first deal with the terms of the restraint, juxtaposed with the respondents’ complaint to establish whether, as it stands, the restraint is reasonable and enforceable.

[44] As I understand the argument, the complaint about the overbroad nature of the restraint relates to the subject matter, the scope, and the period. Its ambit refers to ‘*any clients*’ of NBC. It does not delineate geographical area of operation. The respondents complain that it prevents them from applying their only marketable skill in the pension fund and administration industry.

[45] In line with the established principle to interpret restraint clauses restrictively, I construe the words of any client narrowly to mean existing clients. There can be no dispute on the papers that NBC does not offer its services to the broader public. Its business is specialised and specific to the pension fund industry. I am of the view that

⁶ *Basson* (note 5 above).

⁷ *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541C–D.

NBC's existing clients are determinable and known. This application pivots on three of its clients: the CINPF, the BMW Contributory Fund, and the NUMSA Provident Fund.

[46] Despite the contention by Mr Franklin SC (appearing for the respondents) that the restraint is unreasonable and anti-competitive, the subject of the restraint is confined to existing clients of NBC. Further, I do not read the terms to restrict the respondents from working in the pension administration industry or for a competitor. In my view, the respondents are merely prevented from soliciting the existing custom of NBC.

[47] There is no evidence that NBC monopolised the pension industry market and therefore prevented the respondents from working. The complaint is at odds with the respondents having taken up consulting work with Neighbour Funeral Scheme, an unrelated industry. They do not reveal any reasons for this election. I find agreement with Mr Peter SC (representing NBC) that nothing in the restraint prevents the respondents from applying their skills, knowledge, and trade in the broader pension fund market or from taking up employment with a competitor, as long as they do not solicit existing clients. The scope of application is not wide on this score.

[48] The additional facet is the 12-month period of the restraint; the complaint, though not fleshed out clearly, that it is excessive, merits consideration. Our courts have held that the period of the restraint should not be longer than is necessary to protect the infringed or threatened interest. In *Den Braven SA (Pty) Ltd v Pillay*,⁸ the court stated:

‘...the period of the restraint should not be any longer than is necessary to enable the applicant to place a new salesperson in the field, enable them to become acquainted with the products and the customers and to make it plain to the latter that they are now the person with whom to deal on behalf of the applicant.’

[49] Subject to the facts, the courts have enforced restraints longer than the 12 months claimed by NBC. J Saner, in *Agreements in Restraint of Trade in South African Law* describes the approach of the courts to the duration of a restraint as follows:

⁸ *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) para 55.

'In *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 3 SA 78 (C) at 83BC Davis J said: "An important guideline in the evaluation process is that a restraint should, as far as the activities, area and duration are concerned, be necessary to protect the infringed or threatened interest." It has been held that two years is the upper limit of the time period for which a restraint might be enforced: *Random Logic t/a Nashua Cape v Dempster* unreported case no. A419/2007 CPD (Full Bench Appeal) para 32. But there are exceptions: the particular facts of a case being determinative: see *Dickinson Holdings Group v Du Plessis* 2008 4 SA 214 (N) where a three year restraint was upheld on appeal to the Full Bench....'⁹

[50] Given that the relationship between the respondents and NBC spans a period of nearly two decades, and, as will be evident below, the close relationship the respondents had with the CINPF in particular, the 12 month period is not unreasonable. The restraint is enforceable on the face of its interpretation.

Solicitation Complaint

[51] NBC built the solicitation complaint on allegations of a broader strategy, collusion, and conspiracy which occurred while the respondents were still employed, and had interactions, direct contact, and approaches with the CINPF, the BMW Contributory Provident Fund, and the NUMSA Provident Fund. NBC obtained information pointing to the solicitation after the respondents resigned. The dispute of facts primarily centres on the allegations of solicitation.

[52] The meaning of a non-solicitation denotes a prohibition from '*canvassing*' or '*approaching*', in the sense of an impermissible conduct, with the hope or intention of obtaining the business of applicant's clients.¹⁰ In my view, solicitation also entails both *direct and indirect* conduct, covered by the wording of the contract. I am of the view that the wording it is broad enough to include a subtle and less direct '*aiding*' in this instance.

[53] The answer to the allegation of solicitation complaint lies more in what the respondents do not say, rather than in what they do say. I view their conduct in context of the intricate connection between the CINPF, its governing structures, affiliates, and

⁹ J Saner *Agreements in Restraint of Trade in South African Law* (November 2019) SI-25 at 6.5.1 footnote 117.

¹⁰ Ibid at 15.3.2. See also *GrainCo (Pty) Ltd v Van der Merwe* 2014 (5) SA 444 (WCC) and *GrainCo (Pty) Ltd v Van der Merwe* 2016 (4) SA 303 (SCA).

the labour union which had a direct interest in the business of the CINPF. First, the relationship is not one of ordinary customer and service provider serving the broad public. On the papers, the role of the respondents was indisputably akin to that of trusted advisors with one of the clients, the CINPF. This, together with their length of service, reveals they were intimately acquainted and trusted by the CINPF and the Principal Officer. They had good relations with various Trustees and office bearers cultivated over approximately 20 years while they were employed by NBC. On the facts, their reach included office bearers of other trade union backed provident funds who served as Trustees of the CINPF.

[54] There is little information about what transpired between March and August 2019, after the letter of complaint was sent in March. Although the letter was not in the application papers, there was no dispute the complaint was specific to the Investment Consulting arm of NBC. The respondents do not dispute that they undertook to deal with the issues raised in the March letter. However, they are silent on what steps they took, if any. Other than a general reference to having addressed issues of a lack of transformation with NBC's CEO, the answering affidavit is silent on their best efforts to address the problems within the CINPF. Curiously, the letters of termination of the service before me do not refer to the dissatisfaction with NBC's transformation credentials.

[55] The conduct of the respondents after the appointment of the forensic auditors raises questions. They participated in meetings that discussed the contract's possible termination, but they failed to disclose this to NBC. As of 21 November 2019, they were aware of the resolution involving the pending termination. Mr Ginya drafted the resolution. The impression from the papers is that they withheld this information from NBC and timed the disclosure made by email after working hours at 22h00 on 28 November 2019 with their resignations. NBC received the letters of resignation from their attorneys on 29 November 2019, pointing to an execution of a considered plan. Their conduct lends credence to the impression that NBC was lulled into a false sense of security.

[56] The complaint to the Pension Funds Adjudicator reveals that, in addition to the meetings referred to in the Founding Affidavit, the respondents attended and arranged meetings with trade union officials and the CINPF Trustees – while still employed.

They continued with these meetings after their resignation. The engagements with fund officials and office bearers were not a once-off event to seek emotional support as Mr Chaane made it out to be. Curiously, they do not take the Court into their confidence about their attendance at the meetings of the CINPF and the trade union after they resigned, and they do not reveal what their role and capacity at these meetings was.

[57] Lastly, the respondents claim to have been introduced to Mr Letjane after they left NBC. On the contrary, Mr Chaane had a meeting with Mr Letjane before the appointment of the forensic investigators. Mr Chaane met with Mr Letjane on 10 August 2019 at Mike's Kitchen and again early in November 2019, followed by another meeting late in November 2019.

[58] I am satisfied that the respondents were aware of the unfolding events and withheld critical business information from NBC. They timed their resignation with the termination of the CINPF contract. After that, they actively canvassed for the support of the termination decision with office bearers and union members. While the respondents were not responsible for the making of the decision, in the context of organised labour, its milieu, and their position as trusted advisors, I find their conduct reveals alignment with the contract's termination. They were not neutral about the issue. The available facts point to their active advocacy and aiding in support for the termination, which continued after they left NBC.

[59] A real genuine dispute of facts can only exist where the Court is satisfied that the party who purports to raise the dispute has in the affidavit seriously and unambiguously addressed the fact said to be disputed.¹¹ The respondents failed to do so. Considering the denial against the dispute of fact alleged, there is a dissonance and lack of candour. I do not accept their version. On the approach set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,¹² and an analysis of the denial of the breach, the respondents' version does not create a bona fide dispute of fact when taken in the context of the admitted facts.

¹¹ *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 13.

¹² *Plascon-Evans Paints Ltd v van Riebeeck (Pty) Ltd* 1984 (3) SA 623 (A).

[60] The argument that solicitation must be causally related to NBC's clients deciding to end NBC's services and take their business elsewhere is too narrow a construction, and requires that the respondents be the cause of the termination. It does not take account of the context of the trade union backed nature of this part of NBC's business and the circumstances of this case. It does not afford protection in the event of a threat. It implies that an applicant must wait for the horse to bolt before acting to limit the harm. I find the respondents' conduct constituted the indirect solicitation of the CINPF's decision-makers and supporting structures, in seeking to advocate for support for the contract's termination.

[61] I cannot reach the same conclusion in so far as allegations of solicitation of the BMW Contributory Provident Fund and the NUMSA Provident Fund. The evidence is not sufficient to support the claim.

[62] With regard to the solicitation of NBC's employees, I cannot find evidence to support the solicitation, even though it is alleged the respondents urged that the termination be contingent on a transfer of 39 employees servicing the CINPF. NBC acknowledged that there were conflicting reports made to Ms Maswanganye about their long term plans and intention. It appears that some of NBC's employees resigned or were dismissed. Even though Mr Makhubu set up meetings at Mr Chaane's behest, and one of the ex-employees received payments from Neighbour Funeral Scheme, there is insufficient evidence to support the claim.

Was the Restraint Triggered?

[63] The respondents contested that the restraint would only be triggered on two grounds. The first is that a direct competitor of NBC must have employed them. They claim Neighbour Funeral Scheme is not a competitor of NBC. If there is a solicitation, it must be '*As part of their duties*' with the competitor. The opening clause of the restraint reads that:

'...Either as principal, agent, partner, representative, shareholder, member, consultant, advisor, financier, employee or in any other capacity, and whether alone or jointly with or as agent of another person.'

[64] *'As part of their duties'* must be read in conjunction with the opening clause, which caters for a wide range of capacities in which the solicitation of NBC's custom may occur. The respondents were employed as consultants. They did not disclose their employment contract. Further, a consultant conjures a wide range of capacities in which solicitation may occur, potentially even when respondents are employed by different employers. It need not occur as *'part of their duties'*.

[65] The second argument is the restraint operates only in the case of a dismissal. The respondents had resigned. The idea negates the restraint as an incidence of the employment contract. The clause refers to contractual termination, whether through resignation or a dismissal. The contention that the restraint operates solely based on one form of termination of the employment relationship and not the other is unsustainable.

Reasonableness and Policy Considerations

[66] According to Saner—

*'The reasonableness, or otherwise, of a restraint, may hinge on its area, or time period or operation or the overall nature of the restraint, or on all of these elements together, (and any other relevant element) or on any two or more in combination. Or even other circumstances pertaining at the time enforcement is sought.'*¹³

[67] The reasonableness of the restraint and the policy considerations militating for or against enforcement stand on a different footing, and touch on important principles in this case.

[68] On the established facts, the scope of the restraint application involves a single client, and is relatively limited in duration. It does not prevent the respondents from working for a competitor or in the pension fund administration industry. The respondents are gainfully employed, at their election, as consultants in a parallel field. The balance of power is tipped in favour of the respondents and against NBC, given

¹³ Saner (note 9 above) at 6.3.2 footnote 80.

their role, collective influence, and sway.¹⁴ I find the restraint is reasonable and enforceable on its terms.

[69] The matter does not end there, however, because a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest. On this score, I refer once more to the fourth question in *Basson*, where the court posed the question as follows:

(d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?’

[70] As the court pointed out in *Reddy*, the value judgment required by *Basson* necessarily requires determining whether the restraint or limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”¹⁵

[71] There is a conundrum posed by the pending litigation to set aside the termination of the CINPF contract, and the effects of that application on the enforcement of the restraint. I understood it was on this basis that Mr Franklin SC contended that NBC lacked a protectable interest. Although not strictly correct, NBC’s gumption in the litigation aside, the trade connection remained in legal form. Barring the difficulty with the remaining duration of the restraint, any final determination of the protectable interest would have been contingent on the outcome of the review application, tenuous as the relationship between NBC and the CINPF may seem. The outcome of the review is not before me given the sequence of the applications.

[72] A second conundrum is that even if the outcome is favourable, the restraint period is limited in duration. Part of the rationale for the application was to prevent the respondents from interfering with NBC’s attempts to retain the CINPF’s business, as NBC hoped to persuade the CINPF to keep its service without interference. There has been a reasonable time to do so.

¹⁴ In *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C), Davis J points the imperative to examine the power relationships in the contractual context in a manner that engages the transformative nature of the Constitution.

¹⁵ *Reddy* (note 5 above) para 17.

[73] In my view, NBC met the requirements for an interdict, but I nevertheless observe that the restraint expires on 12 December 2020, less than two months away. This case confirms why the courts have consistently held that restraints are, by their nature, urgent. It was anticipated that by the time the court decides the matter in the ordinary course, much of the restraint will have expired. The lapse of time renders a final interdict academic. A court order will be a hollow, symbolic victory, and of minimal practical effect.

Costs

[74] As to the costs of the litigation, even though I conclude as aforesaid, the conclusion has no bearing on the substance of NBC's complaint. Therefore, it does not translate to a costs order in favour of the respondents. Despite their opposition, the respondents failed to convince the Court on material aspects of their case. Accordingly, each party must pay its own costs

In the result, I make the following order:

1. The application is dismissed.
2. Each party is to pay its own costs.



T SIWENDU

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 27 October 2020.

Date of hearing:

22 June 2020

Date of judgment: 27 October 2020

Appearances:

Counsel for the applicant: J Peter SC

Attorney for the applicant: Loxton Attorneys

Counsel for the respondents: A Franklin SC; P McNally SC; B Manentsa

Attorney for the respondents: Webber Wentzel