REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 43962/2018

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

25 November 2021

DATE **signature**

In the matter between:

DR MAURREN ALLEM INC	**First Applicant**
SKIN RENEWAL CC	**Second Applicant**
And	
DR BURT JOOSTER	**First Respondent**
THE LONGEVITY INSTITUTE (PTY) LTD	
T/A THE LONGEVITY CENTRE	**Second Respondent**
DR JOOSTER AND ASSOCIATES INC	**Third Respondent**
ESTEE VEALE	**Fourth Respondent**
TAMARA MOEN	**Fifth Respondent**
XENEPHIN LUDICK	**Sixth Respondent**

This judgment is delivered electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date of issue is deemed to be 25 November 2021.

Summary: Application to vary or amend an interlocutory order of discovery of the clients' or patients' lists. The distinction between simple interlocutory orders and interlocutory orders of final effect on the issues in the main action discussed. Principles governing variation of simple interlocutory orders restated.

JUDGEMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the applicants seek an order varying or amending the order made by this Court on 12 January 2021. In essence, that order made provision for the discovery of certain documents by the defendants and directed that it be done in line with the confidentiality regime set out therein. The documents to be discovered included the defendants' client's lists. The order which the plaintiffs seek to amend reads as follows:

"1. The First, Second, Third and Sixth Defendants are to comply with the notice issued by the Plaintiff's in terms of Rule 35 (3) and (6) dated 26 November 2019 by making available to their attorneys of record the documents listed in the notice in paragraphs 1,2,3,4,9, 10 and 11 of the notice.

2. In compliance with 1 above the Defendants shall file the discovered items with the Registrar of this Court who shall upon receipt:-

2.1 not file the same in the Court's file;

2.2 keep the discovered items in a secured place where they cannot be accessed by any members of the public;

3. The Plaintiffs' attorneys of record shall be entitled to inspect the discovered items at the Registrar's office on the following conditions:—

(a) In the presence of the Defendants' attorneys of record

(b) the Plaintiffs' shall, if they attend the inspection of the discovered material with their legal representatives, sign an undertaking not to disclose such materials to any other member of the public;

(c) The Plaintiffs' attorneys of record shall not have the right to make copies of the discovered items.

4. The application for discovery of items appearing in paragraphs, 12 to 35 of the notice shall stand down until after the determination of the merits in the main action.

5. The Defendants shall pay the costs of this application."

[2] The essence of the applicants' complaint is that the unintended consequences of the confidentiality regime imposed by the order are "unworkable" in that it imposes certain "practical difficulties" in its "implementation."

[3] The defendants opposed this application based on the following three grounds:

(a) Non-disclosure of certain material facts by the plaintiffs;

(b) The order which the plaintiffs seek to vary is not a simple interlocutory order but rather a substantial and or final order and thus is incapable of being varied; and

(c) The plaintiffs failed to show good cause for the variation of the order.

[4] The background facts relating to the issues in the main action appear in the judgement and thus do not deserve to overburden this judgment. Save to say that the main issue in the main action concerns the restraint of trade which the plaintiffs seek to enforce against the defendants. In this respect, the plaintiffs have sought to discover the lists of clients which it claims the defendants unlawfully misappropriated from it.

[5] The defendants opposed the application and, in essence, contended that the documents sought by the plaintiffs were either not available or were irrelevant. They further claimed that they could not discover the documents because they are confidential, and their disclosure would breach the patients' rights.

[6] I deal first with the issue of the nature of the order i.e whether it is a simple interlocutory order susceptible to variation or amendment.

Is the order interlocutory, simple, and have the plaintiffs shown good cause?

[7] The parties agree with the legal principles governing the issue of variation or amendment of interlocutory orders. They disagree on the application of the principles to the facts of the present matter. Thus, the issue is whether the order referred to above is final or a simple interlocutory order that is susceptible to variation.

[8] It is generally accepted that there are two kinds of interlocutory orders; (a) those that when executed upon have a final and definitive effect on the issues in the main action; and (b) those known as "simple (or purely) interlocutory orders" or "interlocutory orders proper."[1]

[9] It is trite that a simple order may be corrected or varied at any time before a final judgment is made. An interlocutory order that has a final and definitive effect on

[1] See K v K (1246/2021) [2021] ZAECPEHC 36 (29 June 2021).

the issues in the main action renders the dispute *res judicata* and thus may be set aside or be amended on appeal or review. Accordingly, what determines whether an interlocutory order can be varied or be amended depends on the nature of the order.[2]

[10] In considering an application to amend or vary a simple interlocutory order, the Court has discretion to exercise judicially and upon consideration of whether good cause has been shown for such amendment or variation. As a general principle, the courts would not readily vary their orders even when they are of a simple interlocutory nature.[3]

[11] The Court in Sandell and Others v Jacobs and Another,[4] in dealing with a variation of an interlocutory order, held that:

"The authorities to which I was referred in the course of argument make plain that a purely interlocutory order may, at any time before final judgment in the suit, be varied or even set aside. And an interlocutory order may be so varied or set aside, either by the Judge who originally made the order, or by any other Judge sitting in the same Court and exercising the same jurisdiction. . . From the nature of things, a Court will not lightly exercise such a power."

[12] In K v K,[5] the Court in following the decision in Meyer v Meyer,[6] held that:

"Our courts have exercised the power to vary simple interlocutory orders when the facts on which the orders are based have changed or where orders were based on an incorrect interpretation of a statute which only became apparent." (footnotes omitted).

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[2] See K v K supra.
[3] See Bell v Bell, 1908 T.S. 887 at page 894.
[4] 1970 (4) SA 630 (SWA) at page 634D
[5] K vK supra
[6] 1948 (1) SA 484 (T).

[13] In the present matter the plaintiffs argued that the confidentiality regime set out in the order regulates the discovery of documents and the anticipated use thereof in preparation of and hearing of the issues during the hearing in the main action. They further argued that the order is, in its nature preparatory and procedural.

[14] On the other hand, the defendant argued that the order could not be varied because it is substantial and or final in nature, aimed at giving effect to and protecting the constitutional rights of patients who are not parties to the proceedings in the main action.

[15] It is clear from the reading of the judgment, particularly the introductory paragraph thereof, that the Court categorised the application that gave rise to the order as being interlocutory. In line with the defendants' contention, the issue that then arises is whether the order is "substantial and one aimed at giving effect to and protecting the constitutional rights of medical patients who are not a party to the litigation."

[16] In my view, the defendants' contention that the order is final and definitive is unsustainable. This issue has to be determined in the context where the following issues are pending in the main action:

(a) Whether the defendants have misappropriated the confidential and or proprietary information belonging to the plaintiffs.

(b) Whether the defendants breached the fiduciary duties as former employees of the plaintiffs in allegedly disclosing confidential information.

(c) Whether after resigning from their employment with the plaintiffs, the defendants set up their business in a manner that unlawfully competes with that of the plaintiffs.

[17] For obvious reasons, the judgment and the order are silent about the merits of the above issues. For this reason, the order cannot be said to be final and definitive in terms of the authorities referred to earlier in this judgment.

[18] Therefore, the issues that remain for determination concern the plaintiffs' *bona fides* in instituting this application and whether they have shown good cause for the variation of the order.

Non-disclosure of certain material facts

[19] According to the plaintiffs, the difficulties in implementing the order include their attorneys having "to visit the Registrar's office on each occasion that they wished to inspect the discovered documents." In support of this complaint, the plaintiffs aver that the order is not consistent with the Covid-19 protocols limiting the number of people attending at Court.

[20] In my view, the above complaint has no merit because after the order was made and apparently in an attempt to address the problem raised by the plaintiffs, the parties agreed to meet at the defendants' attorneys' offices to deal with what is required by the order. The meeting was after a proposal that was made in a letter by the

defendants' attorneys of record. The relevant part of the letter proposing the arrangement, quoted in the answering affidavit, reads as follows:

"5. In regard to [paragraphs 2 and 3 of the discovery order but referenced in my correspondence as paragraph 34 (2) and (3) of the judgment], we wish to propose that as an alternative to filing the clients' list at the Registrar's office, that the list be kept our offices and that a mutually convenient time be ranged between ourselves for you and your clients to inspect the documents at the offices.

6. The aforementioned inspection will be conducted strictly in accordance with the provisions of paragraph 34 (3) (a) (b) and (c) of the judgment."

[21] The plaintiffs' attorneys of record responded to the above in a letter dated 11 February 2021 and in paragraph 5 thereof advised as follows:

"Subject to what is contained herein below, our clients are prepared to agree to your proposal that the relevant information be kept and made available at your offices."

[22] It is important to note that not only was the arrangement made between the parties to address the problem of complying with the Covid-19 protocols but also that the plaintiffs' attorneys did attend at the offices of the defendants' attorneys' of record to inspect the documents in line with the provisions of the order.

[23] The plaintiffs in their founding affidavit failed to disclose the above facts to the Court. The plaintiffs' attorney, the deponent to the replying affidavit, states that the failure to disclose the correspondence relating to the arrangement for the documents to be inspected at the defendants' attorneys' offices was a mistake.

[24] Whilst it is trite that an application to vary or amend an order of Court may be made any time before judgment, it is important to note that the alleged mistake is made in the context where the complaint is made six months after the order was made and in the circumstances where none of the plaintiffs attended at the defendants' attorneys' offices to inspect the documents. There is no explanation as to why the plaintiffs did not attend the inspection.

[25] In my view, it seems the plaintiffs were better placed to testify after inspection as to whether their clients' names appear on the list. There is no evidence that they could not do that without having to memories the names on the lists. Their testimony would also, better than that of their attorney, have assisted the Court in determining whether or not the confidentiality regime was prejudicial to them.

[26] There is further no evidence of any attempt of approaching the Registrar to seek guidance or request for arrangements to be made to ensure compliance with the Covid-19 protocols.

[27] The above raises a serious issue of the *bona fides* of the plaintiffs in complaining and seeking to vary the order. It is also important to note that the plaintiffs provided no evidence to suggest any change in the circumstances or facts that prevailed prior to the issuing the order.

[28] For the above reasons and in particular, having regard to the fact that the plaintiffs have failed to show good cause for the variation of the order, I am of the view that the plaintiffs application stands to fail.

Costs

[29] There are two aspects that need consideration relating to the issue of costs. The first relates to those costs that may have been occasioned by the postponement of the hearing on 17 September 2021 and the second to the outcome of the present application.

[30] The postponement on the 17 September 2021 was occasioned by the non-attendance at the hearing by the defendants. The default was explained in the letter which was uploaded on caselines. The essence of the explanation is that the notice of set down which was served by the secretary of the court was not emailed to the relevant person at the defendants' attorneys of record.

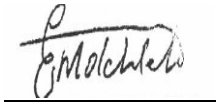
[31] I find the explanation to be reasonable and satisfactory and accordingly no order is made in relation to the postponement.

[32] Concerning the outcome of the present matter I see no reason why the general rule that costs follow the results should not apply.

Order

[33] In the circumstances the following order is made:

1. No costs order is made concerning the postponement of 17 September 2021.
2. The plaintiffs' application is dismissed with costs.



E MOLAHLEHI J

Judge of the High Court of South Africa, Gauteng Division Johannesburg

Representation

For the applicant: Adv Saul Miller

Instructed by: Schindlers Attorneys

For the respondent: Adv Gregory Amm

Instructed by: Fluxmans Attorneys

Date of the hearing: 30 September 2021

Delivery: 25 November 2021