IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

17/11/19 .....
DATE

.....
SIGNATURE

CASE NO: 84954/2019

In the matter between:

AMITH SINGH	First Applicant
CHIARA SOOKAN	Second Applicant
and	
PRIME PRACTICE (PTY) LTD	First Respondent
KARUNA MAHARAJH ANAND	Second Respondent
GOODX ENTERPRISES (PTY) LTD	Third Respondent

JUDGMENT

D S FOURIE, J:

[1] This is an urgent application in terms whereof the applicants apply for an order that:

(a) The first and second respondents are directed to restore the applicants' access to their medical records held on the GoodX

Software System pending the outcome of Part B of this application;

(b) The first and second respondents are interdicted and restrained from terminating the applicants' access to the medical records of the applicants contained on the GoodX System pending the outcome of Part B of this application;

(c) The costs of Part A of this application are reserved for determination by the Court hearing Part B.

[2] In Part B they apply for an order that:

(a) The third respondent is directed to provide a copy, subject to payment of the third respondent's usual licensing fees, of all records held relating to the first and second applicants' practices to a new profile held with the third respondent;

(b) The first and second respondents are directed to pay the costs of this application, jointly and severally, as taxed or agreed, together with any other party that may oppose.

[3] The applicants are husband and wife practising as a specialist physician and specialist psychiatrist respectively. The first respondent is a private company rendering billing- and other related services through a GoodX Software System which is being operated under licence with the third respondent. The second respondent is the sole director of the first respondent.

The third respondent appears to be the owner of the GoodX System which is being operated by the first respondent for the benefit of the applicants. Only the first and second respondents oppose this part of the application.

[4] According to the applicants they entered into an oral agreement with the first respondent, represented by the second respondent, to attend to all of their billing to the medical aid companies and to clients on their behalf, manage outstanding debtors, and to attend to receive payments on behalf of their practice. For this the first respondent would receive an amount of 7% of all the money received during a particular month. The 7% was later reduced to 5%.

[5] The applicants pointed out that the GoodX System is a far broader system than just keeping track of debtors and invoicing medical aid companies for work done. They explained that the idea behind the system is that medical practitioners would be able to manage every aspect of their practice online and through their cloud-based system including scheduling of consultations, keeping track of medical records, obtaining detailed reports, managing time, planning treatments and estimating costs, as well as maintaining records of clinical notes and the managing of the financial aspects of the practice. Copies of a GoodX medical brochure and features of the system, such as paperless notes, online bookings, a diary, clinical notes and billing are attached to the founding affidavit.

[6] According to an invoice of the third respondent dated 1 September 2019 issued to the first respondent, it appears that the information regarding the applicants' practice is maintained by the third respondent under licence 0654019 with regard to the first applicant and licence 0684821 with regard to the second

applicant. An invoice rendered by the first respondent to the first applicant indicates, *inter alia*, that the first applicant has been debited on 30 September 2019 with the amount of R13 855.10 for *"GoodX fees"*. This, according to the applicants, refer to a licence fee payable to the third respondent by the applicants.

[7] According to the first and second respondents' answering affidavit it does not appear that the agreement to render a service is in dispute. The respondents gave the following explanation in this regard:

> *"In brief, the first respondent concluded an oral agreement with the applicants to submit medical aid claims on behalf of the applicants to the medical aid provider. This was based on information furnished by the applicants to the first respondent. The first respondent contracted with the third respondent to use its software and system for a fee. The applicants agreed to pay the first respondent a licence and access fee monthly."*

[8] For reasons not relevant now, the business relationship between the applicants and the second respondent became sour as a result whereof the parties decided to terminate their agreement. According to the applicants the business relationship was terminated by the second respondent on behalf of the first respondent *"on 30 days' notice … effective from 30 November 2019"*. This was accepted by the applicants who also requested *"a professional handover as well as a handover of the GoodX profiles relating to our practices to a personal company of our chosing"*. This "*handover*" forms part of Part B of the application.

[9] The first and second respondents maintain that the applicants are in breach of the agreement for two reasons. First, the first respondent's invoice for September 2019 in the amount of R131 137.07 has not been paid. Second, they allege that the applicants have not furnished information of their patients for November 2019 to enable the first respondent to lodge claims on their behalf *"which appears to be aimed as a means of preventing the first respondent from earning its fee for November 2019"*. Relying on this evidence, counsel for the respondents then raised the defence of *exceptio non adimpleti contractus* (the defence that the respondents' obligation to perform has not yet arisen because of the applicants' lack of performance).

[10] In their replying affidavit the applicants attached proof of payment by Investec Bank, dated 11 November 2019, for the amount of R131 137.07. During argument counsel for the respondents did not take this issue any further. With regard to the alleged failure of the applicants for not having furnished information of their patients for November 2019 to the first respondent, it was pointed out by counsel for the applicants that the application was only issued on 11 November 2019 and the answering affidavit signed on 12 November 2019. Therefore, so the argument goes, the applicants still have time until 30 November 2019 to submit information of their patients to the first respondent. It was also contended that there is no allegation by the second respondent that the applicants are obliged in terms of the oral agreement to furnish information on a daily basis of all their patients exclusively to the first respondent.

[11] Another defence raised by the first respondent is that the applicants have neither furnished any proof of payment of the licence fee, nor made any

tender for such payment for the month of November 2019. This is not correct as the applicants have already in their founding affidavit tendered *"to continue paying any licence fees due to ensure this increased access"*.

[12] The second respondent also maintains on behalf of the first respondent that the information furnished by the applicants does not constitute clinical records but only extracts for the purposes of billing the Medical Aid Societies. For all other purposes, so it is alleged, the applicants had, and still have, recourse to their original clinical records contained in hard copies of their patient files kept in their custody.

[13] In reply thereto the applicants explained that, while they do have some records, these only relate to a small fraction of their practices, being a selection of patients who they see in their rooms. It does not include general hospital patients seen at the Hillcrest Hospital or patients seen at their other two practices at other hospitals. According to the applicants they also keep daily ward round sheets which are not clinical records. In any event, so the explanation goes, these ward round sheets are not usually retained for more than a week as the relevant contents are uploaded to the GoodX System.

[14] The relief sought by the applicant is of an interim nature pending finalisation of Part B of the application. The applicants require interim access to their medical records, pending finalisation of their claim that a copy of their medical records (GoodX profiles, according to the Applicants' e-mails of 31 October 2019) be handed to them as more fully set out in Part B of the application. This relief was referred to during argument (and also in some of the

annexures to the affidavits) as the final stage of handing over all information relating to the applicants' medical practices as maintained on the GoodX System by the third respondent. However, the second respondent indicated in an e-mail also dated 31 October 2019 that "*...you will receive all your reports in the first week of December but I will not be handing over my goodx profiles to anyone...*" It therefore appears, as far as the so-called "*final handing over*" is concerned, that a dispute exists between the applicants and the first respondent. However, this dispute, which also concerns the third respondent, belongs to Part B and needs not to be dealt with at this stage.

[15] It is trite that the requirements which an applicant for an interlocutory interdict has to satisfy are a *prima facie* right; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; that the balance of convenience favours the grant of an interim interdict; and finally, that the applicant has no other satisfactory remedy.

[16] The right can be *prima facie* established, even if it is open to some doubt. The second requisite of irreparable harm is objectively determined. The question is whether a reasonable person would apprehend the probability of harm. The third requisite, balance of convenience, requires a consideration of the prejudice an applicant will suffer if the relief is not granted as opposed to the prejudice the respondent will suffer if it is. Finally, the requirement of no alternative remedy actually means the absence of another adequate remedy (*LAWSA* (2) Vol 11, par 403-407).

[17] Has a *prima facie* right been demonstrated by the applicants? In this regard I take into account the following: First, it appears not to be in dispute that the oral agreement will only terminate on 30 November 2019. Why would the applicants then not be entitled to have access to their medical records held on the GoodX System, as they had in the past, until 30 November 2019? In an e-mail dated 1 November 2019 it appears that the second respondent, on behalf of the first respondent, does not seriously dispute this right:

> *"Your access to the GoodX software will terminate with the termination of my service to you and you will not be charged beyond November for the access and licence."*

[18] Second, the defence that the applicants have failed to perform their own obligations is, in my view, without any merit. There is proof of payment on a letterhead of Investec Bank indicating that on 11 November 2019 the amount of R131 137.07 has been transferred into the account of the first respondent. Furthermore, there is no allegation or indication that the applicants are obliged, in terms of the oral agreement, to furnish information of all their patients on a daily basis exclusively to the first respondent. In the absence of such an obligation, the defence of *exceptio non adimpleti contractus* cannot succeed. In any event, the applicants still have time to do so if they wish.

[19] The issue with regard to what kind of information may be retrieved, is of no real importance. The applicants should be entitled to all information on the GoodX System relating to their practice as maintained by the third respondent under licence number 0654019 with regard to the first applicant and licence 0684821 with regard to the second applicant. It is important to bear in mind that

payment of these licence fees, as already indicated above, is for the account of the applicants and they have already made a tender for payment thereof.

[20] With reference to the relief sought as referred to in paragraph 1(a) above, it was contended on behalf of the applicants that they should have access to their medical records *"pending the outcome of Part B of this application"*. Counsel for the respondents pointed out that, in all probability, Part B will only be heard, at best, sometime during the course of 2020. If this relief is granted, so he argued, it will mean that the applicants may have access to their medical records long after termination of the agreement on 30 November 2019. In my view there is merit in this argument and therefore access to the medical records should terminate on the date when the agreement comes to an end, i.e. 30 November 2019. Having regard to all these considerations, I am of the view that the applicants have demonstrated a *prima facie* right (if not a clear right) to have access to their medical records until 30 November 2019.

[21] With regard to the second requirement, a well-grounded apprehension of irreparable harm, the first applicant gives the following explanation:

> *"I have several patients who are awaiting surgery. Their surgeons require medical reports from me in order to assess the patients' fitness for surgery. The information I require is restored on the GoodX System in order to compile these reports for urgent decisions to be made about the management of those cases ... Without access to the records on the system of the particular patient and the history of care and previous assessments I cannot give these results."*

[22] With regard to his wife, the second applicant, he adds the following:

> *"My wife and I rely heavily on daily access to the GoodX System to achieve patient contact information, medical history, admission date, tests done et cetera. This is especially so with the patients we have only ever seen in hospital so the only way I can obtain their contact information is through the GoodX System ... In brief, her suspension of access not only puts my wife and my practices at risk, but also puts the patients' lives at risk ...".*

[23] The second respondent's answer to these allegations is not very clear. It seems to me that she disputes the nature or kind of information to which the applicants would be entitled. As I have already indicated above, this issue is of no real importance and I have already dealt with it. Finally, if I apply an objective test, it should be clear that a reasonable person would indeed apprehend the probability of irreparable harm if the applicants are not granted access to their medical records held on the GoodX System.

[24] The third requisite, balance of convenience, requires a consideration of the prejudice the applicants will suffer if the relief is not granted as opposed to the prejudice the respondents will suffer if it is. The applicants have already indicated the potential irreparable harm which they will suffer if the relief is refused. What prejudice will the first and second respondents suffer if the relief is granted? Nobody knows. Put differently, if the relief is granted until 30 November 2019 there can be no prejudice for the respondents. The reason is simple, because in terms of the oral agreement they have the right of access as long as the agreement is in existence.

[25] Finally, it is difficult to see what other adequate remedy is available. Counsel for the respondents contended, if I understood him correctly, that the

applicants' patients can be referred to other physicians or psychiatrists for the necessary assistance. Common sense dictates that this is no answer, let alone indicating an adequate alternative remedy to obtain the necessary relief.

In the result I grant the following order:

a) The first and second respondents are directed to restore the applicants' access to their medical records held on the GoodX Software System immediately until 30 November 2019, pending the outcome of Part B of this application regarding the other issues stated therein;

b) Pending finalisation of Part B of the application, the first and second respondents are interdicted and restrained from terminating, before 30 November 2019, the applicants' access to the medical records of the applicants contained on the GoodX System;

c) Costs of this application (Part A) are reserved for determination by the Court hearing Part B of the application.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 19/11/19