IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 15921/10

In the matter between:

Frogitt & Vonkel CC	**Applicant**
and	
Samantha Lucille Macbride	**First Respondent**
Chantal Packery	**Second Respondent**
Elberti Wines (Pty) LTD	**Third Respondent**
Wydijnhof & Cilliers	**Fourth Respondent**

JUDGMENT DELIVERD ON 9 DECEMBER 2010

Baartman J

[1] In this application, Froggitt & Vonkel CC, (**the applicant**) sought to enforce the restraint of trade embodied in the employment contracts between it and Samantha Lucille Macbride (**the first respondent**) and Chantal Packery (**the second respondent**). Clauses 15 and 16 of the employment contracts are relevant to the dispute between the parties. I deal in more detail with the clauses below.

[2] The applicant further alleged that the respondents have defamed it in the course of discussions with its clients, therefore the applicant sought to interdict the respondents from defaming it. I deal with the merits of the defamation allegations below.

[3] The applicant sought no relief against the third respondent whom it joined because the third respondent might have had an interest in these proceedings. The third respondent did not defend this application. The fourth respondent is the sole proprietor through which the first respondent operates a wine selling business.

[4] The applicant conducts the business of a private wine merchant selling wine by means of telephone sales. The applicant had employed the first and the second respondents as telephone-sales persons. On 3 September 2009, the first and the second respondents terminated their employment with the applicant.

[5] On 26 July 2010, the applicant approached this court on an urgent basis and alleged that the first and the second respondents were contacting its clients and selling wine to them in breach of the provisions of the restraint of trade agreements operative against them at the time. Blignault J granted a *rule nisi* interdicting the first, second and fourth respondents from: (I quote from the order)

"1.1 That First, Second and Fourth Respondents, and all persons acting on any of their behalf, be interdicted and prohibited from contacting, interfering with or soliciting in any way (or attempting to entice away from the Applicant) any of Applicant's customers and whose details such Respondent obtained during and through First and Second Respondents' employment at Applicant.

1.2 That First, Second and Fourth Respondents be interdicted and prohibited from making, uttering, disseminating or publishing any defamatory remarks about Applicant to any customer of Applicant or to any other person.

1.3 That First, Second and Fourth Respondents be ordered to delete and/or destroy all material (in which ever form, whether digital, in writing or

otherwise) which contain any personal detail, including contact numbers, of any customer of Applicant and whose details Respondents obtained during and through First and Second Respondents' employment at Applicant.

1.4 That First and Second Respondent be ordered to pay the costs of this application jointly and severally..."

[6] The first respondent opposed the application and the second respondent appeared in person at the hearing and asked for the order to be dismissed against her.

The common cause factors

[7] The applicant had since January 2005 operated the business of a private wine merchant, specialising in the sale of wines from boutique wine estates directly to a specifically targeted group. The applicant operated from premises in Dorp Street, Stellenbosch.

[8] The applicant identified individuals suited for its target group from databases or profile lists that it had periodically purchased from database vendors. The applicant alleged that it acquired the databases at considerable cost. These databases contained the names and contact details of various individuals of a specific profile in South Africa.

[9] The applicant's sales persons would make telephonic contact with the persons on the profile lists. A successful contact would result in wine sales to the person and the contact sales person would establish a relationship with the client. It is the applicant's case that only 1% of the people contacted from these databases would eventually become clients.

[10] The sales person who established the telephonic contact with the client would remain the client's consultant for the duration of his or her employment with the applicant. When the respondents left the applicant's employ, they were the consultants for approximately 900 clients. At the time, the applicant had approximately 6 000 clients, the majority of whom lived in Gauteng.

The restraint provisions

[11] The applicant alleged that all its customer details remained its property and formed part of its confidential information, and that unauthorised use thereof was not permitted. Certainly, former employees were not permitted to use the applicant's client information to compete with the applicant. Therefore, the applicant had included clauses 15 and 16 into the first and the second respondents' employment contracts. These clauses provide for:

*"**(15) Confidentiality***

(a) You acknowledge that you will have access during the course of your employment to confidential information and that F & V has a legitimate commercial interest in preventing the unauthorized disclosure of such information.

(b) You must not at any time (except as required for the proper performance of your duties) during or after your employment disclose or make use of (my emphasis) your knowledge of any confidential information of F&V or any other member of the Group. In this clause confidential information includes (without limitation) the designs and techniques used in developing any products developed or sold by the F&V or any other member of the Group including designs, patents and ... the names, addresses, contact details and other requirements of customers, the terms of business between the sellers, ... (whether or not recorded in writing or on computer disk or tape) which F&V or any other member of the Group treats as confidential."

16. Restriction on competition

(a) The agent agrees that he/she will not, without the written permission of F&V, during the continuance of this agreement or for a period of 12 months thereafter, in connection with the carrying on of any business which competes with any business of any group company with which he/she was involved with 12 months prior to the termination of this agreement, and whether on his/her own behalf or on behalf of any individual, company, firm, business or other organization, directly or indirectly;

(i) *Solicit or entice away from F&V the business of any customer or prospective customer with whom he/she had business dealings on behalf of F&V in the course of the 6 months prior to the termination of this agreement, and about which customer, or prospective he/she is privy to confidential information at the date this agreement terminates;*

(ii) *Seek to entice away from F&V any director or other agent of F&V, or any other person employed by F&V or any other senior employee at the date this agreement terminates (or who would have been so employed had that person not left F&V due to solicitation on the part of the Agent in the 4 months prior thereto) and with whom the Agent had dealings in the last 12 months of this agreement.*

(iii) *Encourage or influence any Agent, independent the Agent, supply or any other person or company to terminate or alter a relationship with F&V, whether or not such termination or alteration involves a breach of the agreement.*

(b) *Each of the sub-clauses contained in clause 16 constitutes an entirely separate and a visible undertaking. If any restriction is held to be invalid or unenforceable by a court of competent jurisdiction, it is intended and understood by the parties that such invalidity or unenforceability will not affect the remaining restrictions or the validity of the rest of the agreement and that if any such restriction would be valid if some part thereof were deleted such restriction shall apply with such modification as may be necessary to make them effective.*

(c) *The Agent acknowledges that –*

(i) *each of the restrictions in clause 16 goes no further than is necessary to protect the legitimate business interest of the F&V;*

(ii) *each of the restrictions is fair and reasonable as regards its extent, duration and nature; and*

(iii) *the restriction contained in this clause 16 shall apply mutatis mutandis to all other Group Companies.*

(iv) from the date of termination of this agreement, the Agent will not represent him/herself as being in any way connected with the business of F&V (except to the extend agreed by such Company)."

The alleged breaches

[12] The provision of clause 16, referred to above, prohibited the respondents from competing with the applicant, as set out in paragraph 11 above, for 12 months after the termination of their employment. The first and the second respondents terminated their employment with the applicant on 3 September 2009. It follows that the clause 16 restriction period expired on 3 September 2010 and that no relief in respect of that period is required. In its urgent application, the applicant alleged that the first and the second respondents had contacted approximately 15 of the applicant's clients in breach of the clause 16 provisions.

[13] The first respondent admitted that she had breached the provisions of clause 16. She said that she remembered client names and found their contact details through a Google search. She further had one client's details on scrap paper. She did not say whose details were recorded on the paper or why she had it. She further said that:

"45. In regard to Mr Binini Titus, Mr OB Oliver, Mr Harold Mathews, Mr Greame McNally, Ryno Frylinck and Rodney Deacon, I confirm that I contacted them during June and July 2010 in regard to the sale and purchase of wine. I knew their names from my employment with the applicant and in certain cases I had remembered certain information, which made the tracing process easier. For instance I knew Mr Gawie,...worked for NEWPORT CONSTRUCTION and that Dr Charl Oliver, ...worked at a hospital. In regard to the other customers set out above, aside from Graham McNally who contacted me, I used the internet as a method of tracing. ...

In conclusion I respectfully submit that the entire application would have been avoided had the applicant simply e-mailed a demand to desist from further interaction with its customers. I would have immediately ceased contacting them and would have waited until the

restraint period was finished. I thus respectfully submit that the applicant should either be ordered to pay the costs of this application alternatively there ought to be no order as to costs and I consent to an order as set out in the notice of motion restraining me until 3 September 2010."

[14] As indicated above, the second respondent did not file any opposing papers. I therefore accept that she too, as alleged by the applicant, had breached clause 16 of her employment contract. (See **Moosa and Another v Knox; Paruk v Knox** 1949 (3) SA 327 (N))

The clause 15 dispute

There is no ambiguity in the employment contract

[15] Mr Baynham, who appeared on behalf of the first respondent, submitted that the effect of the 12 months restraint imposed by clause 16 was that after the 12 months had expired, "clause 16 authorises ...the first respondent ...to contact customers or prospective customers."

[16] Mr Maree, on behalf of the applicant, submitted that after 3 September 2010, the first respondent was entitled to contact any of the applicant's clients; however, she could not use the applicant's confidential information to make such contact. That, so the argument went, would offend the provisions of clause 15, as appears from paragraph 11 above.

[17] Mr Baynham submitted that there existed an ambiguity between the provisions of clauses 15 and 16 because clause 16 prohibited the use of confidential information for 12 months and clause 15 placed an indefinite prohibition on the use of the applicant's confidential information.

[18] Mr Maree submitted that there was no ambiguity because:

(a) The contract provided for the absolute prohibition on the use of confidential customer information (the common law position) – clause 15.

(b) Clause 16 imposed restrictions upon ex-employees in competing business activities within 12 months after the termination of his/her employment.

[19] He also submitted that only if the court was of the view that the absolute prohibition was unreasonable that a period of 3 or 5 years should be read into the contract instead of "not at any time", as indicated in the emphasised paragraph 11 above. The effect would be that an ex-employee would be prohibited for a period of 3 or 5 years after the termination of his/her employment with the applicant from using confidential information instead of never being able to use the information.

[20] Mr Baynham submitted that I should resolve the alleged ambiguity, to the extent that it existed, by applying the *contra proferentum* rule. Van Dyk J, in the matter of **Stocks Construction (OFS) (Pty) Ltd v Metter-Pingon (Pty) Ltd** [1978] 4 All SA 339 (T), described the rule as follows:

"The contra proferentum rule, as I understand it, is only to be used in cases of obscure or ambiguous agreements and is not to be used unless the ordinary rules of interpretation have been exhausted in an attempt to arrive at the true intention of the parties. ..."

[21] In my view, the rule does not find application in this matter as there is no ambiguity in the contract under discussion. The customer information is the relevant confidential information in this matter. It is common cause that customer information, customer lists, can qualify as confidential information. (See **Van Castricum v Theunissen and Another** 1993 (2) SA 726 (T) and **Knox D'Arcy Ltd and Others v Jamieson** 1992 (3) SA 520 (W)) Clause 15 seeks to protect the applicant's confidential information indefinitely while clause 16 seeks to prevent competition for 12 months after termination of employment. (See **Coopers and Lybrand v Bryant** 1995 (3) SA 761 (A), **Mia v Verimark (Pty) Ltd** [2010] 1 All 280 (SCA) and **Proflour (Pty) and another v Grindrod (Pty) Ltd t/a Atlas Trading and Shipping and another** [2010] 2 All SA 510 (KZD)) .

[22] However, I am of the view that the indefinite period (not at any time) imposed by clause 15 is unreasonable in the circumstances of this case. (See **Basson v Chilwan and Others** 1993 (3) SA 742 (A)) The information, referring to the client list, that the applicant seeks to protect is readily available, although at a price and with some effort. It also appears from the papers that some of the clients have already severed their

relationship with the applicant. In respect of those clients there is no interest to protect. It would lead to absurd results to prohibit the respondents indefinitely from the use of information so readily available.

[23] As indicated above, Mr Maree submitted that a 3 to 5 year period would be reasonable in the event of me finding the contract period unreasonable. However, he persisted that the period was not unreasonable. In the circumstances of this matter, the period of 5 years is reasonable in respect of the prohibition imposed by clause 15 of the agreement.

The respondents have confidential information

[24] The applicant alleged that the respondents have contacted approximately 15 of applicant's customers because of the extent of the contact, the applicant alleged that the respondents must have "copied and taken with them 'all' customer details". As indicated above, the first respondent conceded that she had contacted the applicant's clients.

[25] However, the first respondent has denied that she was in possession of any client lists; she said that she knew some of the customers from memory and simply consulted Google for their contact details. The first respondent said that when she resigned from the applicant, Ms Woodward, a 50% member of the applicant, demanded that she leave the applicant's premises forthwith. Ms Woodward did not allow the first respondent to return to her desk and searched the first respondent's personal possessions before she could take them off the premises. Similarly, the applicant searched the first respondent's cellular telephone by having the first respondent scroll through her list of contacts.

[26] The first respondent said that she obtained the customer details as follows:

"...Thus on or about the 15th June 2010, I had set up the business and began the task of finding customers. At this stage, I made use of Google to find new markets and admit that I contacted certain of Applicant's clients. I knew some of them extremely well as I had dealt with them whilst in the employ...Some had even become really good friends of mine. I thus was in a position to Google their names and obtain their contact details.

...In only one instance I had a piece of scrap paper with a client's address. After receipt of the application ...I destroyed the piece of paper....

Some of the clients referred to in the applicant's founding affidavit contacted me."

[27] Mr Maree submitted that it was improbable that the applicant's clients would have had the first respondent's personal details. The applicant further submitted that:

"Personal telephone numbers of customers are generally not freely available on the Internet."

[28] The applicant further alleged, in its replying affidavit, that the following was seized from the first respondent's backpack on the day of her resignation:

"...Interestingly, a master copy of Applicant's training guides and 'sales script' was found in her bag, together with the employment contract of another employee, Moira Daniels ...Also some personal details of Zelda Stanley, another employee..."

[29] The first respondent failed to indicate which clients contacted her and how they happened to have her personal details. She also did not inform the court that the applicant had seized, from her backpack, the items mentioned above and why they were in her possession. The first respondent gave no detail of the client information that she had on a scrap of paper.

[30] Although I do not doubt that the first respondent would be able to obtain some contact information off the internet, I cannot accept, in the circumstances of this case, that she obtained the details of 15 clients in that manner. As indicated above, she also did not explain how some of the clients were able to contact her after she had left the applicant's employ. I am of the view that on the facts of this matter I am justified in rejecting the first respondent's version that she did not have client information in some form as false. (See **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A).)

[31] It follows that the applicant is entitled to an interdict prohibiting the use of such information. As indicated above, I intend to amend the period referred to in clause 15 to 5 years.

Allegations of defamation scant

[32] The applicant alleged that the first and the second respondents had defamed it. Mr Maree succinctly summarised the circumstances that gave rise to that allegation as follows:

"From the confirmatory affidavits it is clear, it is submitted, that various customers have suddenly taken a negative attitude towards applicant. This only points to First Respondent "badmouthing" Applicant, and hence an order interdicting First Respondent from defaming Applicant is warranted. "

[33] Christie Smith, an employee of the applicant, attested to one of the confirmatory affidavits referred to above, and said the following:

"3.5 Mr Harold Matthews informed me on 30 June 2010 that First Respondent informed him that she was "unfairly fired" by Applicant – and that she borrowed money from him."

[34] Lara Stemmet, also one of the applicant's employees, said the following about the alleged defamation:

"...Mr Hein Zentgraf (referring to one of the applicant's customers) ...immediately indicated that he is not willing to do any further business with Applicant ...as we have put First Respondent ...in a difficult position."

[35] The applicant has relied on hearsay in support of its defamation allegations. The first respondent has denied that she defamed the applicant. In my view, the applicant has failed to show that the first respondent had defamed it. The applicant is therefore not entitled to a final interdict in respect of its defamation claim.

BAARTMAN J