IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 17275/14

In the matter between

DEVERE INVESTMENTS	Applicant
SOUTH AFRICA (PTY) LTD	
and	
NIZAAM GOLIATH	First Respondent
CARRICK FINANCIAL	Second Respondent
SERVICES (PTY) LTD	
2 HELP 1 (PTY) LTD	Third Respondent

JUDGMENT DELIVERED ON 13 FEBRUARY 2015

NDITA, J

[1] The Applicant seeks interdictory relief in terms of a restraint of trade agreement concluded with the First Respondent. The interdictory relief sought against the Second Respondent is based on

the employment of the First Respondent by the former. The relief sought is couched along the following terms:

1. Dispensing with the forms and service provided for in the rules of court and allowing this application to be heard as one of urgency in terms of rule 6(12)(a).

2. The First, Second and Third Respondents are interdicted and restrained from contacting any known client of the Applicant's, whether prescribed or otherwise, from 23 June 2014 to 23 June 2015.

3. The Second and Third Respondents are directed to take all steps to terminate the Second Respondent's employment relationship with the first respondent so that the First Respondent is not in breach of his restraint and confidential undertakings in terms of his employment agreement with the Applicant.

4 The First Respondent is directed to deliver to the Applicant all of the Applicant's confidential information, including details of the Applicant's clients and prospective clients which was in his possession at the time of the termination of his employment with the Applicant and which is currently in his possession whether in electronic or hard copy, including all copies thereof.

5. Alternatively, to paragraphs 2, 3, and 4 above and in the event of the Respondents opposing the application, the First, Second and Third Respondents are so interdicted on an interim basis pending the final determination of this application.'

[2] The Applicant carries on business of providing a comprehensive range of financial planning and advisory services to, inter alia, United Kingdom expatriates living in South Africa. The First Respondent was employed by the Applicant and later by the Second Respondent. The second and third respondents also carries on business as providers of wealth and capital management advice and are competitors of the First Respondent.

[3] The factual background germane to this application can be summarised as follows: As earlier indicated, the First Respondent ("Goliath") was first employed by the Applicant in or about February 2013. With effect from 10 June 2013, he was employed as a coordinator for an indefinite terms commencing on 10 June 2013 until 23 June 2014. According to facts deposed to by Ms Erica Steeman Duncan, the Applicant's head of Risk and Compliance Department, ("Steenman Duncan") he tendered a written resignation noticeon23 July 2014 backdated to 23 July 2014. After leaving the applicant's employ he joined the Second Respondent ("Carrick") but the precise date is unknown to the Applicant. A screenshot of Carrick reflects his capacity as that of an associate assistant.

[4] The Applicant alleged that its entitlement to the relief sought against the first respondent arises from a restraint of trade agreement concluded between the parties. The First Respondent does not oppose the relief sought, but for a wholesome understanding of these proceedings, I consider it necessary to summarise the facts in their entirety. With regard to the Second and Third Respondents, the basis on which the relief is sought is that they are unlawfully using the Applicant's confidential information to compete with it in violation of the restraint of trade and confidentiality agreement.

[5] The relevant restraint of trade and confidentiality agreements provisions, which give rise to the central issue in this case and upon which the Applicant relies, provide as follows:

'Clause 17.2 It is recorded that:

17.2.1 The business is highly competitive;

17.2.2 The company has valuable trade connections;

17.2.3 In the course of his/her employment by the company, the Employee will be responsible for the development of the Business and will acquire in-depth knowledge of the business, its confidential information, including but not limited to –

17.2.3.1 knowledge of the technical information and know-how of the company relating to its activities and services;

17.2.3.2 the prescribed clients and their needs; and

17.2.3.3 will have access to the client database of the company and will be intimately concerned with the business and affairs of the company;

17.2.4 The Employee has formed and /or will continue to form lucrative connections with the prescribed clients, and/or has forged and/or will continue to forge relationships with key decision-makers in business, and in particular, with those in the specialized fields of industry to which the company offers its services.

17.3 In the light of the foregoing, the Employee irrevocably and unconditionally undertakes and agrees and warrants in favour of the company that neither he/she is directly or indirectly interested will, during any month of the restraint period and restraint area, directly or indirectly, through any entity, and any capacity whatsoever and whether for reward or not –

17.3.1 solicit from the prescribed clients for the prescribed Products and or the Prescribed services;

17.3.2 canvass business in respect of the prescribed products and/or the prescribed services from any prescribed clients;

17.3.3 sell or otherwise supply any prescribed products to any prescribed clients;

I proceed to consider the issue of urgency.

URGENCY

[6] The Respondents in the replying affidavits aver that this application is not of sufficient urgency to have justified the procedure adopted by the Applicant. The urgency relied upon by the applicant is founded upon the following facts:

1. The Second Respondent has detailed knowledge of the applicant's business and it is vital that it be prevented from utilising the confidential knowledge that it has to the prejudice of the applicant.
2. The harm which the Respondents are causing to the Applicant is continuing and will continue for as long as the Applicant's contractual and common law rights are not enforced.
3. The restraint component is for a limited duration and it will in respect of the First Respondent, lapse in June 2015.
4. There was a clear breach of the employment agreement on the part of Goliath. The mere that he had might have been fired is immaterial.

Goliath's conduct

[7] With regard to the unlawful conduct imputed on Goliath, the applicant in its founding affidavit, bases its motion on the following facts:

It alleges that after Goliath left its employ and joined Carrick, he sought to poach Devere's clients in breach of the employment agreement and common law. One such client is Ms Cindy Cromble-Holme ("Cramble-Holme") who owns a restaurant called Joe's Easy Diner in the Blue Route Mall in Cape Town. According to the Applicant this came about after it had launched a marketing of its products at the aforementioned mall when Cromble-Holme expressed an interest in one or two products. She dealt with Goliath, who in turn arranged a meeting between her and Mr Charles Winshaw ("Winshaw") on 25 March and 2 April 2014. At that time, Goliath was working as Winshaw's assistant. The Applicant further avers that after Goliath had left its employ and that on 2 August 2014, he wrote an email to Cromble-Holme, specifically referring to the conversation he, as the Applicant's employee, had with her at Blue Route Mall, asking for a meeting to discuss changes to the pension laws in the United Kingdom. Goliath did not disclose that he was no longer

working for the Applicant. He only did so when queried by the client and apologized for the 'false impression' his earlier email created. The Applicant states that it could only have been possible for Goliath to contact Crombe-Holme by using her confidential contact details he had obtained during his employment with the Applicant. The consequences of the poaching according to the Applicant, directly benefited Carrick.

[8] With regard to the delict imputed on Carrick, it is worthwhile to commence with a brief background. Mr Craig Featherby, ("Featherby") the founder of Carrick is also an erstwhile employee of the applicant. He resigned during

[9] It has long been established that the urgency of commercial interests may justify the invocation of the Uniform Rule of Court 6 (12) no less than any other interests. (See *Sibex Construction (SA) (PTY) LTD and Another v Injectaseal CC* and others (1988) 4 All SA 190 (T) The instant matter is no exception, and I too, must assume, as I have to do, that the Applicant's case is a good one and that the

Respondents willfully engaged in unlawful competition with the Applicant.

[10] A further ground on which the Applicant alleges unlawful competition on the part of the Carrick and the Third Respondent, 2 Help 1("Help") is premised on the conduct of Weatherdon. The nub of the Applicant's case is based on the use of confidential information by its former employees for the benefit of Carrick and Help. I find it necessary to cite the paragraphs relevant to this averment.

"[27] On 23 July 2014, Ms Nicole Weatherdon (an ex-employee of Devere, now employed by Carrick ("Weatherdon") sent an email to the Real Go Company Limited and six of Devere's former employees, now employed by Carrick. The email was sent by Weatherdon whilst she was still working for Devere. For the purpose of this application only, I rely only on the statements therein that Weatherdon proposed that Carrick "use a similar layout that Devere did" and the reference to the use of Devere's template of the "Reasons Why" letter, which is a financial planning report setting out a client's "needs" analysis and a recommended proposed financial solution. A copy of this email is attached hereto marked Annexure "N". This indicates the use of Devere's information. Featherby's response to this, in the Anton Pillar application, was to acknowledge that this was useful, but puzzlingly, *"of no value"*. At any rate, in the Anton Piller application, Carrick did not deny use of this template. Again, I only recently

ascertained that Weatherdon is also an authorized representative of Help and this regard I attach hereto marked Annexure“O”, a copy of a screenshot from the website of the FSB confirming the aforegoing.”

The email sent by Weatherdon to Carrick employees on 23 July 2014 reads thus:

“As per our discussion this morning, I just wanted to summarise the plan moving forward. For the reasons of Management to skim over, I have bolded.

. . .

. Automating and prepopulating the Advice Records – this is the next stage for development that will need to be looked at:

.I suggest we use a similar layout that Devere did – with the Reasons Why Letter, this prevents ANY human error, incorrect information and typos from then contaminating the Advice Record, and will guarantee ALL info is included in ALL Advice Records, thus securing it to be “clean” from a Compliance point of view. Once we have gone through the Compliance documents in depth, we can develop this further.

. . .

Thomas, I will be sending you templates of the Devere Reasons Why letter, and NBTF – for your perusal, to start getting ideas of what is required here, so we can automate the NBTF.”

Featherby responded to this email on 24 July 2014 as follows:

“This is really good stuff Nicole, very well done.”

[11] In addition to the above averments, the Applicant states that towards the end of July 2014, she discovered a Dropbox folder in Featherby's ex-personal assistant at Devere, Ms Catherine Bryington's which showed that:

1. The "Devere Group termination report" had been modified on or about 7 July 2013.

2. The Devere employee consent form had been modified.

3. The Devere confidentiality agreement had been modified.

4. The Devere expense claim form had been modified.

According to the Applicant, this Dropbox folder was still in use by Bryington from another computer after she had left Devere. Furthermore, the modifications were designed simply to turn Devere's documents into Carrick's documents. The Applicant further avers that this information in the hands of Carrick and Help will provide both a 'headstart' without expending money, effort and research. The Applicant specifically avers that:

"30 Devere's confidential information is an invaluable asset in the hands of Help, Carrick, its representatives and its employees for the establishment of client base and for competing with Devere in the financial services market place. Possession of this confidential information will enable Help, Carrick and Devere's ex-employees employed by Carrick, to contact clients identified therein with

ease; they will not have to expend the time and effort required to obtain the relevant information about such clients."

On this basis, the applicant alleges that Carrick and Help are unlawfully competing with it.

The Second Respondent's Answering Affidavit

[12] The Second Respondent admits that it concluded a contract of employment with Goliath. However, in its answering affidavit deposed to by its managing director, Featherby, it vehemently denies knowledge of any conduct on the part of Goliath in breach of his employment contract with Devere prior to the launching of the present application. According to Featherby, when he learned of Goliath's breach, Carrick immediately investigated the matter and made necessary enquiries. On 1 October 2014, Goliath was threatened with immediate disciplinary action and his employment was summarily terminated. Featherby states that Goliath, through his conduct, contravened Carrick's standing instructions to all employees not to interfere with or attempt to solicit the custom of the applicant's existing clientele. Carrick's non-solicitation policy was according to Featherby pertinently brought to the attention of Goliath at the

commencement of his employment. In addition, Carrick caused Goliath to sign a non-interference form, recording that:

1. Carrick did not cause, encourage or induce him to terminate his employment with the Applicant;

2. Goliath requested Carrick to employ him.

Featherby flatly denies that Carrick is complicit in the conduct of Goliath's breach in any way and states that there is no basis on which such awareness can be inferred.

[13] Featherby avers that the Applicant was advised of Goliath's dismissal. Pursuant to the aforesaid dismissal, the Applicant was further invited to withdraw this application as the relief sought in prayer 3, 4 and 5 was rendered redundant. Needless to point out that the applicant declined the invitation. It is also common cause that after the alleged dismissal, Featherby referred Goliath to Paul Nicholson of St James Global (Pty) Ltd for employment without disclosing that he (Goliath), was still bound by the employment agreement he had with the Applicant. With regard to the specific allegations of unlawful competition, Featherby alleges that it is not in dispute that the Applicant and Carrick are rival traders and direct

competitors. Furthermore, this application constitutes an abuse of the court process as the Applicant and Featherby concluded an Employment Agreement Amendment in terms of which the rendering of services and doing business with the applicants customers was not prohibited, provided that the customers were not solicited and that they themselves approached Featherby or Carrick. Put differently, the Applicant granted to Featherby consent to *'set up, carry on, or be associated with or employed in any business or activity of his choice'*, but for the soliciting of the Applicant's customers. With regard to the use of the Applicant's confidential information and/or trade secrets, Featherby avers that there is virtually nothing about the Applicant that is not known to him. He states that this is so because he was responsible for establishing most, if not all, of the Applicant's systems, procedures and protocol. Furthermore, his association with the Applicant enabled him to gain intimate knowledge of the Applicant's business; as such it astounds him why the Applicant believes that it has interests deserving of protection.

[14] It will be recalled that the Applicant in imputing unlawful competition on Carrick, heavily relies on the averments made in

paragraphs 27 to 30 of the founding affidavit. Feartherby responds to same thus:

"58 Ad paragraphs 22 to 32 (Including the subparagraphs)

58.1 It is not disputed that the application is part of a grater dispute

58.2 . . .

58.3 This I verily believe is part of the Applicant's strategy to overwhelm the Second Respondent with litigation and to make every effort at making it impossible for the second respondent to carry on business.

58.4 The Applicant is obviously threatened by the presence of the competition and is doing its utmost to stifle competition.

58.5 . . .

58.6 For the rest, it suffices to be stated that:

58.6.1 these paragraphs contain a highly selective and misleading account of what had previously transpired;

68.6.2 effectively all the allegations made in these paragraphs are and were disputed in the previous allegation.

58.7 It is to be noted that this fact (the selective account and the distortion and omission of material facts) did not escape the Court and it is submitted that this prompted the Court to set aside the *Anton Piller* order."

[15] The Third Respondent, Help, in an affidavit deposed to by Mr Clifford Dean van Belkum ("Van Belkum"), a beneficiary of the trust which owns 100% of all the shares in the Third Respondent, avers

that it has no business relationship or agreement with the Applicant, and that therefore are there can be no basis for the granting of the relief sought. Similarly, Help played no role in the employment of Goliath by Carrick. For these reasons, it alleges that it has been misjoined in these proceedings. In addition, Help's business involves the sale of funeral policies and is unrelated to the Applicant's business. Furthermore, the Applicant's business market in which Help has no interest in the Applicant's business market. Van Belkum outlines the relationship between Help and Carrick as follows:

"26 Second Respondent has concluded a Juristic Representative mandate agreement with the Third Respondent which, complies with the Act and which entitles Second Respondent to carry on business as Financial Service Provider. This agreement is simply one of convenience and was intended to apply for three months until Second's Respondent obtains its own FSB Licence. Second Respondent pays the Third Respondent a pre-determined fixed nominal fee for the right to operate under Third Respondent's Licence.

27 Save as aforesaid, the Second and Third Respondent's business have nothing whatsoever to do with each other and each entity operates entirely separately and independently."

[16] The averments relating to Carrick's license and accreditation are not relevant for the purpose of this application. This is so because

Carrick obtained the requisite licence on 8 October 2014. Counsel for the Applicant confirmed in argument that the Applicant was not dependent on this aspect to prove unlawful competition on the part of the Respondents.

[17] The Applicant in the replying affidavit alleges that the termination of Goliath's employment at Carrick is contrived and is nothing more than an attempt to exculpate Carrick. According to the Applicant the above inference can be drawn from the fact that Goliath left Carrick or his employment was terminated after the service of the present Application alleges that on 1 October 2014. Furthermore, so alleges the applicant, this is irreconcilable with Featherby's averments that Goliath indicated that he accepted the dismissal whereas the he earlier maintained that the dismissal had not been discussed with Goliath, nor has any cogent proof of termination or dismissal presented. Of note is that Devere introduced a new matter in the replying affidavit to the effect that another of its clients, Mr Conrad Prins was approached by Jonathan Nelson ("Nelson"),a Carrick employee and Dever's ex-employee.

[18] In reply to Featherby's averments that Carrick was not aware of Goliath's conduct, the Applicant states that:

"12.2 It is denied and disputed that neither Featherby nor any other representative of Carrick was aware of the conduct of Goliath. Featherby's allegations should be rejected, inter alia, for the following reasons:

12.2.1 Goliath held the position of "Associate Assistant". According to Carrick's website, a copy of a screenshot from . . . entailed: -

'Typical Tasks and Responsibilities:

. Attending seminars presented by financial institutions;

. Working closely with an associate in a dynamic team;

. Researching and identifying prospects;

. Engaging prospective clients and

. Meeting targets and goals'.

[19] The Applicant, with the leave of the court filed a further supplementary replying affidavit wherein it alleges that new facts pointing towards Carrick's continuing unlawful conduct had emerged. Steeman Duncan avers that on 8 October 2014 she received an email from one of the Applicant's former employees Mr Paul Nicholson ("Nicholson") advising that Featherby had contacted him on 30 September 2014 recommending Goliath for employment stating that he is a good coordinator. Nicholson deposed to an

affidavit confirming that he received Goliath's CV and interviewed him on 8 October 2014 but did not employ him because it transpired from Steeman Duncan that he was still under a restraint of trade. The Applicant states that Featherby's conduct of soliciting employment for Goliath is demonstrative of the former's complicity in Goliath's unlawful conduct. According to the Applicant, as the controlling mind of Carrick, Featherby acted 'hand in glove' with Goliath. The Applicant also sought to rectify some factual averments to the effect that it is Mr Conrad Prins ("Prins") who contacted Nelson, in contrast an earlier averment that Nelson approached him (Prins) whereas he was fully aware that Prins was the Applicant's prospective client. The Applicant reiterated that Carrick's conduct of employing Nelson knowing that Nelson was breaching his restraint of trade agreement constitutes unlawful competition.

[20] In reply, the Second Respondent averred that the Applicant has not placed any information relating to the basis on which it alleges that Prins was a prospective client. Furthermore, according to Carrick, an associate is not permitted to render advice and/or intermediary services.

Facts which are common cause

[21] Flowing from the above summary, the following facts are common cause:

1. Nelson and Goliath's employment agreements restrained them from filching the Applicant's customers.

2. Their restraint agreements were signed by Featherby, the founder of Carrick.

3. Goliath was employed by Carrick as an associate. He is no longer working for Carrick.

4. Help appointed Carrick as a juristic representative.

The Issues

[22] The succinct issues for determination are the following:

1. Whether Goliath's breach of his restraint of trade agreement can be imputed on the Carrick notwithstanding the fact that he was no longer working for the latter.

2. Whether the Applicant has confidential information worthy of protection.

3. Whether Carrick made use of or is likely to make use of such information or trade secrets knowingly or unwittingly.

4. Whether any liability can be imputed on Help for the alleged unlawful conduct of Goliath and Carrick.

[23] In terms of prayer 5 of the notice of motion, the Applicant seeks interim relief pending final determination of this application in the event of it being opposed. The basis on which interim relief might be sought, pending an application for final relief is not readily discernable from the papers. It can therefore be assumed that final relief will be sought on the same papers as are now before court. Should the court be inclined to grant the relief sought, it will, in effect be granting final relief. Furthermore, it is clear that by the time this application is finally determined, the restraint, which forms the basis of the relief sought will have run its course. I agree with counsel for the Second Respondent, that this application must be determined on the basis as if for final relief. It follows that the test which must be applied is for final relief. I am fortified in this view by what was said in *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993(1) SA 47 (W) at 48:

"The Court should look at the substance rather than at the form of the relief sought ,and as the substance was that an interdict was being sought which run for the full unexpired time of the restraint, the Court should accordingly approach the matter as if final relief was being sought."

[24] Counsel for the Second Respondent contended that this application falls to be dismissed from the outset on the basis that there are factual disputes which cannot be resolved on the papers. More specifically, the circumstances under which Goliath was dismissed and the allegations regarding the alleged collusion between the Respondents as well as the allegations regarding the conspiracy to compete unlawfully and to procure a breach of the First Respondent's restraint are contentious. The factual disputes, if found, fall to be considered in the context of final relief. The approach to disputes of fact is restated in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings dispute of facts arise on the affidavits, a final order can only be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify the order. It may be different if the respondent's version consists of bald or uncreditworthy denials,

raises fictitious disputes of fact, is palpably impausible, far-fetched or so clearly untenable, that the court is justified in rejecting them merely on the papers."

This restatement of the law is fully explained in *Fakie NO v CCR Systems (PTY) LTD* 2006 (4) SA 326 at 347 G-I thus:

"[55] That conflicting affidavits are not a suitable means for determining dispute of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' dispute of facts to delay the hearing of the matter or deny the applicant its order. There had to be 'bona fide' dispute of fact on a material matter. This means that an uncreditworthy denial, or palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints v Van Riebeeck Paints(Pty) Ltd, this court extended ambit of uncreditworthy denials. The now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."

In order to resolve the dispute or assess whether such dispute is real, genuine or bona fide, they must obviously be considered in the context of whether the denial by the respondents is uncreditworthy. In *Soffiantini v Mould* 1956 (4) SA 150 EDLD), the following was said:

"It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."

[25] Against this backdrop, I turn to analyse the facts of the present matter. As earlier explained, it is not in dispute that the First Respondent contacted a prescribed client of the Applicant. the at least one of the Applicant's clients, such conduct being contrary to the Second Respondent's policy of non-solicitation of the Applicant's custom. Thus, his employment was terminated and he was, according to Featherby, to be subjected to a disciplinary enquiry. The First Respondent's restraint period is defined in the clause as a period of twelve months following the termination date. It therefore expires on 23 June 2015. Whether the Second Respondent had knowledge of the First Respondent's breach of employment contract is disputed. I am not of the view that this creates a genuine dispute of facts such the matter cannot be resolved on the papers.

[26] With regard to the allegations pertaining to the use of confidential information the Applicant relies on a letter written by Weatherton wherein she proposes that they use the Applicant's template of the "Reasons Why" letter and the NBTF, which is explained as a financial report. These averments are not disputed at all by the Second Respondent. Instead, it refers to an Anton Piller application and states that the allegations were disputed in previous litigation. Even if that were so, the fact remains that in the present proceedings they have not been disputed. Besides, to merely dispute an allegation without advancing the reasons thereof gives an impression that such dispute is not genuine. As I said, the allegations are undisputed in the present proceedings. What remains to be considered are the allegations relating to Nelson. It will be recalled that the allegations relating to Nelson approaching Prins, a supposed client of the Applicant, emanate from the Applicant's supplementary affidavit introduced as a new matter, which arose subsequent to the commencement of the instant proceedings. I revert to this issue later in this judgment. Suffice to state that I therefore hold that the facts of this matter are capable of being resolved in the present application

proceedings. According to the Applicant, the imputation of Goliath's conduct on the Second Respondent is a matter of law.

Applicable principles and analysis

[27] It must be restated that the First Respondent does not oppose the relief the Applicant seeks against him. It follows that it is unnecessary to determine prayers 2 and 4 of the notice of motion, to the extent that they apply to the First Respondent. It was contended on behalf of the Applicant that based on the facts presented, a clear case for unlawful competition has been established. Similarly, prayer 3 directing the Respondents to take all steps to terminate the Second Respondent's employment relationship with the first respondent so that the First Respondent is not in breach of his restraint and confidential undertakings in terms of his employment agreement with the Applicant is equally mute given that it is undisputed that Goliath is no longer working for the Second Respondent, irrespective of the circumstances of the termination of his employment. Furthermore, in the light of the fact that the Second Respondent was granted its licence on 8 October 2014, the interdict sought against the Third Respondent is rendered redundant. However, the Applicant does

seek a costs order against the Respondent. The adjudication of the question of costs must inevitably revert to the factual background. Thus, I deemed it prudent to outline the full factual matrix.

Interference with contractual relations

[28] Counsel for the Applicant contended that the real basis for the relief sought is firstly the solicitation of the Applicant's custom by both Goliath and Nelson, secondly the use of the Applicant's confidential information. According to the Applicant, the alleged breach of the restraint of trade clause on the part of Goliath and Nelson is as a matter of law imputed on Carrick. Counsel for the Second Respondent argued that the high-water mark of the Applicant's case is the allegation that Carrick knew of Goliath's breach. According to the Respondent's there is no basis on which they could be condemned *'by way of association'*. In addition, at best, the only conceivable basis for liability in this context could be a case for wrongful interference with contractual relations. Put differently, the only basis on which it could be said that the Applicant has established a prima facie right arises only if can establish that the Second Respondent was complicit in Goliath's conduct seeing that there is no

contractual relationship between it (the Second Respondent) and the Applicant. To this end, the second respondent relied heavily on *Bid Industrial Holdings (Pty) Ltd v Strang* 2008 JDR 0058 para 15 wherein the court held that :

"The delict of wrongful interference with contractual relations is well known to our law. For the interference with someone else's contractual relations to be actionable though, it must be wrongful. It is not enough that it might have been done negligently or even intentionally. The interference must be of a kind that the law brands as wrongful and thus renders actionable.

. . .

In this case the wrong the applicant suffered, was in the first place the breach of its contract. It was a contract with a company and not with its directors. The breach was committed by the company and not the directors. The company incurred liability for the breach. The nature and extent of its liability are governed by the terms of the contract and the law of contract. Given this primary liability of the company in contract, the question is whether its directors who caused it to commit the breach should also be vested with liability for the same breach but arising in delict."

Confidential Information

[29] The question as to whether or not information made to an employee during the course of his or her employment is confidential is a matter that must be decided on the facts of each case. In *Townsend Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33 (C) at 53J-54B, the court accepted the following three requirements for information to qualify as confidential, quoting *Van Heerden and Neethling* at 225;

"First of all, and this is really self-evident, the information must not only relate to, but also be capable of application in, trade or industry. Secondly, the information must be secret or confidential. The information must accordingly - objectively determined - only be available and thus known, to a, restricted number of people closed or acircle; or, as it is usually expressed by the Courts, the information "must be something which is not public property or public knowledge".

. . .

Thirdly, the information must, likewise objectively viewed, be of economic (business) value to the plaintiff.

The approach to be adopted in the circumstances of this case is set out in *Multi Tube Systems (Pty) Ltd v Ponting &Others*, 1984 (3) SA 182 (D) at 184 B-C:

"The features of the applicant's case which require close scrutiny then in the nature of the alleged confidential information, the circumstances in

which it was acquired by the first respondent and the extent of its confidentiality. In other words, the question to be decided is whether the applicant is seeking to protect its own property, namely, some sort of confidential trade secret, or whether it is simply seeking to inhibit lawful competition because the first and second respondents' are merely drawing upon their general knowledge, experience, memory and skill".

I proceed to apply the above principles to the facts of this matter.

[30] The gravamen of the Applicant's application is in the first instance that the email sent by Weatherdon to the Second Respondent's employees, also the Applicant's ex-employees wherein she attached the Applicant's layout and financial planning report is unlawful use of confidential information. As earlier alluded to, the allegation is not denied by the Second Respondent. Weatherdone specifically proposed that the Applicant's format be modified and used for the benefit of the Second Respondent. The Second Respondent has not suggested that the information is not confidential or that it easily accessible by third parties. It must therefore, be accepted that it is confidential. The question that arises is whether it is worthy of protection. The kind of information that relates to the operation of a business as well its financial planning must in my view,

be as confidential. This I say because the second respondent is likely to benefit from modifying another company's existing procedures and financial planning. This in essence means that it need not expend time, money and resources in creating its own financial system and operations. This must be so because even Featherby congratulated Weatherdon on a job well-done. I find that it could reasonably be used to provide the Second Respondent with a headstart or an advantage over the applicant. In the absence of a justification by the Second Respondent, I hold that the information was not public knowledge and viewed objectively, of economic value to the Applicant. It is therefore, my judgment that the information is confidential and worthy of protection. I now turn to consider whether the conduct of the First Respondent can be imputed on Goliath.

[31] Counsel for the Applicant argued that without recourse to inferential reasoning pertaining to the conduct of Featherby after the First Respondent's conduct of approaching one of the Applicant's customers came to his knowledge. It must be accepted that the First Respondent did have a non-solicitation policy directing its employees not to approach the Applicant's customers. Similarly, the Employment

Amendment Agreement enabled Featherby to compete with the Applicant but to refrain from soliciting the custom of its clients. In addition, Featherby must have knowledge of the terms of the First Respondent's restraint as he, whilst working for the Applicant had signed it.

[32] Counsel for the Respondent contended that the First's Respondent's conduct does not necessarily mean that the Second Respondent acted unlawfully for it was not contractually bound to the Applicant. Much reliance was placed in the judgment of Schwartzman J, in *IIR South Africa BV* v Hall *and Another* 2004 (4) SA 174 (W) wherein it was stated thus:

"[13.5] The fundamental difference between the two remedies is that in the delictual claim it does not suffice for the ex-employer to merely prove that the ex-employee who has protectable information has taken up employment with a rival, who is aware of the restraint. In addition what must be proved is an existing use, or a threatening use, of such information by the third party."

The judgment continues thus:

"[20.1] An ex-employer having protectable confidential information gets the benefit of its contractual bargain against ex-employees by obtaining an interdict

against his or her continued breach of the restraint in taking up employment with a competitor.

[20.2] The competitor's employment of the ex-employee with or without knowledge of the restraint cannot of itself amount to the delict of unlawful competition. Unlawful or unfair competition can only result if the new employer, through the ex-employee, uses either intentionally or innocently confidential information of the ex-employer."

It is undisputed that the First Respondent approached Ms Cromble-Holme, the Applicant's prescribed client with the intention to poach her from the Applicant. He only disclosed or confessed that he was no longer working for the Applicant after the client enquired whether he was still working for the Applicant. Moreover, it is plain on the papers that Goliath was employed by the Second Respondent as an associate, not as a secretary. In my view, the second respondent, through the First Respondent used confidential information of the Applicant for the benefit of the Second Respondent. It matters not that the benefit did not actually materialize. It did not materialize in spite of the conduct of the First Respondent because the client who was hoodwinked into the thinking that the First Respondent was still working for the Applicant had the presence of mind to first make enquiries before consenting to a meeting. Even if I may be wrong on

this score, an analogous situation arose in *Telefund Raisers CC v Isaacs and Others* 1998 (1) SA 521 at 534 F:

"The allegation that Mrs Killian was unaware that the first, second and third respondents had copied the applicant's customer lists or were using them for the fourth respondent's benefit, until the execution of the Anton Piller order, whether it is true or false, is irrelevant. What is relevant, on my findings, is that the use thereof was unlawful, and that the applicant was entitled to approach this Court to put a stop to such use."

Equally, in this matter, that what does matter, is that the Second Respondent derived or was likely to derive a benefit form the First Respondent's unlawful conduct. This is not a question of the First Respondent carrying information in his head, he actively and knowingly pursued the Applicant's prescribed client, irrespective of the rank he held at the Second Respondent. This, on its own is enough to form a basis for the delict unlawful competition. I have nonetheless already held that the conduct of modifying the Applicant's *'Reasons Why'* document, as well as the financial planning document gave the First Respondent an unfair advantage or head start.

[33] For the sake of completeness, I very shortly deal with the new matter relating to Nelson's conduct. It is common cause that the Applicant secured its interests through a restraint of trade agreement against Nelson. The allegation is that he has approached Prins, also, a prescribed client of the Applicant. Prins has deposed to an affidavit outlining the basis of his dealings with the Second Respondent. In it flatly denies being approached by Nelson. Moreover, the basis on which it is alleged that Prins is the Applicant's prescribed client is unclear. In my view, it cannot be on these papers be said that Nelson unlawfully approached Prins. It may well be that he breached his restraint by taking up employment with the First Respondent, but no relief has been sought against him personally by the applicant.

[34] It remains to consider the costs sought by the Applicant against the Third Respondent. It will be recalled that the latter is the juristic representative of the Second Respondent but no interdictory relief is sought against it because the Second Respondent obtained its licence on 8 October 2014. The Third Respondent's defence is that its business involves the sale of funeral policies and has no interest in the Applicant's business. Furthermore, the Second and Third

Respondents have nothing to do with each other and each entity operates entirely separately.

[35] During argument counsel for the Applicant reiterated that as a juristic representative, the Third Respondent has abdicated its responsibility and allowed Nelson to operate in breach of his restraint. According to the Applicant, such abdication effectively breached its obligations in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the Act"). In addition, the Third Respondent is in terms of section 13 of the Act is liable for the delict committed by its appointed representative. The Applicant is therefore entitled to the relief it seeks by operation of law. Put differently, the question of costs must be considered in the context of the provisions of s 13 of FAIS. If the court finds that the Third Respondent is not liable in law for the delicts of the Second Respondent, then the Applicant must pay its costs, and vice versa.

[36] In determining whether the Third Respondent is liable for the Applicant's costs, I deem it prudent to first define the relationship between the Second and the Third Respondent's. The Third

Respondent is the financial services provider whilst the Second Respondent is the juristic representative. The Act defines a financial services provider as:

"any person, other than the representative, who as a regular feature of the business of such person-

(a) furnishes advice; or

(b) furnishes advice and renders any intermediary service; or

(c) renders an intermediary service.

A representative is defined as any person who renders a financial service to a client for or on behalf of a financial services provider, in terms of a mandate or an employment contract. That means the second respondent renders financial services on behalf of the third respondent. To this end, the juristic representative mandate between the aforesaid parties reads as follows:

"1.1 The Appointing FSP is an authorized Financial Services Provider and hereby mandates the Juristic Representative as its representative and authorizes the Juristic Representative to render financial services to clients of the Appointing FSP in respect of the following indicated financial products:

. . ."

Clause 1,3 reads thus:

"The Appointing FSP hereby accepts responsibility for those activities of the Juristic Representative that are performed within the scope of or in the course of implementing this mandate agreement."

The rest of the provisions of the mandate relate to the corresponding duties of the Financial Services Provider and the representative as well as the operating instructions.

[37] As discernible from the Second and Third Respondent's representative mandate agreement, the relationship between the parties, as correctly submitted by counsel for the Applicant, is regulated, inter alia, by s 13 of FAIS.

Section 13 (1) reads as follows:

"(1) A person may not –

(a) carry on business by rendering financial services to clients for or on behalf of any person who-

(i) is not authorised as a financial services provider; and

(ii) is not exempted from the application of this Act relating to the rendering of a financial service;

(b) act as a representative of an authorized financial services provider, unless such person –

(i) prior to rendering a financial service, provides confirmation, certified by the provider, to clients-

(aa) that a service contract or other mandate, to represent the provider exists; and

(bb) that the provider accepts responsibility for those activities of the representative performed within the scope of, or in the course of implementing, any such contract or mandate; and

(i) meets the fit and proper requirements; and

(ii) if debarred as contemplated in section 14, complies with the requirements determined by the registrar by notice in the Gazette, for the re-appointment of a debarred person as representative. "

Section 13(2)(a) on the other hand requires an authorized financial services provider to take such steps as may be reasonable in the circumstances to ensure that representatives comply with any applicable code of conduct as well with other applicable laws on conduct of business. Such laws obviously include those relating to unlawful competition. I agree with the submission made by Counsel for the Third Respondent that as explained in *Nicolaas Odendaal v Absa Brokers &Financial Services Board*, an unreported decision emanating from the Free State High Court cited as Case A112/2009 delivered on 24 March 2011explaining the purpose of the FAIS Act in the following manner:

"The main aim of the Act is to regulate the rendering to clients of financial advisory and intermediary services as defined therein . . ."

However, such meaning and purpose cannot and should not be read to exempt the a financial services provider from the duty imposed in s 13 (2)(a) to ensure that its representatives comply with any applicable code of conduct as well with other applicable laws on conduct of business. In short, the Third Respondent , in terms of the law and the representative mandate cannot claim that *"it has not been involved in or played any role in the second respondent's decision to employ the first respondent"* and that *"it has no knowledge of, neither has it played any role in any of the alleged unlawful conduct allegedly perpetrated against the applicant by first or and or second respondents."*

Similarly, it cannot abdicate its responsibility towards the Second Respondent as the parties' mandate makes it plain that it accepts the responsibility for the activities of the Second Respondent, its juristic representative. A representative acts on behalf of the financial services provider. I hold that, based on the representative mandate agreement, it has been properly joined in these proceedings.

In *Jaffit v Garlikcke &Bousefield* 2012 (2) SA 562 at 572 Madondo J, also observed and expatiated on this point as follows:

"Section 13(2)(a) of FAIS requires an authorised financial services provider to at all times satisfy himself or herselfthat the provider's representatives and key individuals of such representatives are, when rendering a financial service on

behalf of the provider, competent to act, and comply with the requirements contemplated in paras (a) and (b) of s 8(1) and ss (1)(b)(ii) of the section (s13), and to take reasonable steps to ensure that representatives comply with any applicable code of conduct as well as with other applicable laws on conduct of business."

[38] In conclusion, I have in this judgment held that in the light of the relief sought by the Applicant, the matter has to be determined on the basis of final interdicts. Flowing from the reasons for this judgment, it follows that the Applicant has satisfied the requirements of a final interdict. The First Respondent has not opposed this application, the relief sought by the applicant against him must be granted as prayed for. I also held the Third Respondent responsible for the acts of unlawful competition perpetrated by the First and Second respondent on the basis that as a financial services provider and in terms of the representative made, it had an obligation to ensure that the Second Respondent complied the business code of conduct as well applicable law. What remains to be considered is a question of costs of the postponement of the matter on 9 October 2014.

[39] This application initially served before Steyn J, on 9 October 2014. The Court declined to hear it on the basis that it was not sufficiently urgent to be heard in the urgent court. As a result, it was postponed to 29 October 2014 and costs were reserved for later determination. The Applicant indicated that it intended to file a supplementary affidavit, which it did, as outlined in this judgment. I see no reason why the costs of the postponement should not follow the result. The Applicant has achieved success in its application and it was not suggested that the postponement was due to some fault on its part.

[40] For all these reasons the following order is issued:

1. The Applicant's application for an interdict succeeds.

2. The First and Second Respondents and are interdicted and restrained from contacting any known client of the Applicant's, whether prescribed or otherwise, from 23 June 2014 to 23 June 2015.

3. The First Respondent is directed to deliver to the Applicant all of the Applicant's confidential information, including details of the Applicant's clients and prospective clients which was in his possession at the time of the termination of his employment with the Applicant and which is currently in his possession whether in electronic or hard copy, including all copies thereof.

4. The Second and Third respondents are ordered to pay the costs of this application, inclusive of the costs of the postponement on 9 October 2014, jointly and severally, the one paying the other to be absolved.

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T. NDITA

JUDGE: Western Cape High Court