Republic of South Africa

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

Case No. 18586/2021

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 16 March 2022
Date of judgment: 19 April 2022

In the matter between:

COYNE HEALTHCARE (PTY) LTD Applicant

and

KEVIN GEOFFREY COYNE First Respondent
NATROCEUTICS SA (PTY) LTD Second Respondent

JUDGMENT

BINNS-WARD J:

[1] The only substantive matters that require determination in this application are the applicant's prayers for interdictory relief in terms of paragraphs 6 and 7 in Part B of the notice of motion in the following terms:

> 6. The first respondent be interdicted and restrained until 28 January 2023 from, either on his behalf or for any other person, directly or indirectly approaching,

canvassing, soliciting or otherwise endeavouring to entice away from the applicant any of its existing customers and any person or Company who to the first respondent's knowledge, during the two years preceding 29 January 2021, had been a customer of the applicant.

7. The first respondent be interdicted and restrained from utilising, exploiting and/or directly or indirectly divulging and/or disclosing to any third party any of the applicant's confidential information, including but not limited to the terms of any contract the applicant has with any third party.

The applicant does not persist in seeking orders on the papers in respect of the other substantive relief sought in its notice of motion. Its application for interim relief in terms of Part A was struck from the roll with costs for lack of urgency in November 2021.

[2] The relief sought by the applicant on the papers would have final effect if granted, and accordingly, the evidence falls to be assessed consistently with the rule in *Plascon-Evans*.[1] That means that where a dispute of fact arises in the evidence adduced on affidavit, the application must be decided on respondents' version unless the respondents' evidence on the issue is so palpably far-fetched and untenable that it can be dismissed out of hand on the papers.

[3] The applicant company, to which I shall hereafter refer as 'Healthcare', carries on business in the complementary and alternative medicine sector. It is a wholly owned subsidiary of a Swiss registered company, Phytoceutics International AG ('PIAG'). Prior to its conversion into a company in 2016, Healthcare was a close corporation. The members of the close corporation were the first respondent's wife and mother-in-law. Healthcare, the

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

close corporation, was a family business conducted by the first respondent and his wife and mother-in-law.

[4] The first respondent, Mr Kevin Coyne, has been active in the industry in Cape Town since 2005. He developed and successfully launched his first 'nutrition product' in 2007. In 2011 he established a consultancy business in the sector, which he conducted through a close corporation, Coyne Consulting CC, which is still in existence. He registered Healthcare as a close corporation in 2013.

[5] Through his involvement in the industry, the first respondent became acquainted with Mr Gerhardus (Gert) Hoogland, who had his own business in the complementary and alternative healthcare sector, Pharma Plan. Hoogland sold Pharma Plan in 2013 and emigrated to Switzerland, but he and the first respondent remained in contact and continued to exchange business ideas.

[6] It was during the ongoing conversations between Hoogland and the first respondent that the idea was floated of Hoogland obtaining an interest in the close corporation's business. The proposition arose in the context of the interest shown by a third party at the time (2015) in acquiring Healthcare's business. The first respondent sought Hoogland's advice concerning the third party's approaches. Coyne was at that stage intending to emigrate to Portugal, and he and Hoogland then conceived the idea that the close corporation should be converted into a company to be held by an offshore entity in which the two of them would, either directly or indirectly, have an equal proprietary interest.

[7] After Healthcare's conversion to a company, PIAG, of which Hoogland appears to be the controlling mind, acquired the all the shares in it from the first respondent's wife and mother-in-law. The first respondent averred that he had an oral agreement with Hoogland that he would have the option of acquiring a 50 per cent shareholding in PIAG for the same consideration as that for which PIAG had acquired the shares in Healthcare from his wife and mother-in law. The taking up by the first respondent of his contemplated half share interest in PIAG was deferred pending implementation of his plan to put in place an offshore trust to hold it. Whether that plan was ever implemented is not apparent on the papers, but according to the first respondent, his relationship with Hoogland soured a few years after PIAG's acquisition of Healthcare when Hoogland declined to honour their understanding concerning first respondent's right to acquire a 50 percent holding in PIAG.

[8] After the conversion of Healthcare into a company, the first respondent took up an appointment as its chief executive officer. The terms of his appointment were negotiated with the directors of PIAG, Hoogland and Rosen. His wife and mother-in-law were appointed as directors of the company and also employed by it as consultants. The first respondent remained engaged as Healthcare's CEO until 28 January 2021, when his appointment terminated after he had served out a 6-month notice period after submitting his resignation in July 2020. Healthcare declined the first respondent's request to be released from the requirement to serve the full period of notice.

[9] The terms of the first respondent's appointment as Healthcare's CEO were entrenched in a letter of appointment dated 25 July 2016 signed by the first respondent and by his mother-in-law representing the applicant company.

[10] The non-solicitation interdict sought in paragraph 6 of the notice of motion, quoted above, is founded on clause 27 of the first respondent's forementioned contract of employment. It provided as follows:

> **NON-COMPETITION AND NON-SOLICITATION**
>
> During the term of the employment or if the employment relationship is terminated for any reason for up to two (2) years after such termination, you shall not:
>
> a) enter into any professional or financial agreement with or provide services to an existing customer or associate of the Company or expected customer or associate where negotiation and contact has already been made with such expected customer or associate at the time of termination;
> b) either on your behalf or for any other person, directly or indirectly approach, canvass, solicit or otherwise endeavour to entice away from the Company any of its existing customers; and
> c) directly or indirectly approach, canvass, solicit or otherwise endeavour to entice away from the Company or any of its customers any person or Company who to your knowledge has been during the two years preceding the termination of the employment contract a customer or employee of the Company or its customers.

[11] The relief sought in paragraph 7 of the notice of motion is founded on clause 17 of the first respondent's forementioned contract of employment and also in Healthcare's proprietary right to the Company's confidential information that is protectable in common law. Clause 17 provided:

CONFIDENTIALITY

- As a condition of your employment you hereby agree to treat as confidential any information and knowledge about the Company, its products, operations and any information which is said to be confidential, which is attained in the course or employment with the Company.
- The Confidential Information is of strategic importance to the business of the Company and the Company accordingly has a legitimate proprietary and commercial interest therein which the Company is entitled to protect;
- should any of the Confidential Information become available to a competitor of the Company, it could cause the Company considerable financial loss;
- the only effective and reasonable manner in which the Company's legitimate proprietary and commercial interests in the Confidential Information could be protected so as to avoid financial loss to the Company is by way of you furnishing the confidentiality undertakings provided for in the paragraph below.
- you shall not during your appointment/employment by the Company or at any time thereafter, either yourself utilise and/or directly or indirectly divulge and/or disclose to any third party (except as required by the terms and nature of your appointment/employment with the Company) any of the company's Confidential Information;
    1. you shall not derive any benefit, whether directly or indirectly, from the Confidential Information, Nor, without limiting the generality of the aforegoing, be engaged, involved, concerned or interested, whether directly or indirectly, in the economic exploitation, whether by marketing, promoting, advertising or selling in any manner whatsoever, the Confidential Information;
    2. you shall treat as confidential all confidential information which a third party has in terms of any contract made available to the Company and which has become known to you in the course of your duties under this agreement, and you shall not divulge to other third parties any information regarding such Confidential Information contrary to the terms of the aforesaid contract;
    3. any documents or records(including written instructions, drawings, notes or memoranda) relating to the Confidential Information of the Company which all created by you or which come into your possession during the existence of this agreement shall be deemed to be the property of the Company and shall be surrendered to the Company on demand, and in any event on the

termination of your ‘s (sic) appointment by the Company and the Company will not retain any copies thereof or extract thereof.

- Should you leave the Company at any time for any reason no Company information, documentation or property of any type or description may remain in your possession, even where these may have been of your own creation.
- All work in the Company is strictly private and confidential and must be treated as such even after the termination of your employment. Under no circumstances may details of any work including the names of clients be repeated to any persons outside the office. Whilst in the office, no clients may be given the name of other clients or any details relating to their affairs. Any breach of this confidentiality will result in the (sic) immediate disciplinary action which could result in the suspension or termination of your employment.
- Without prejudice to any other rights which the Company may have in law, you acknowledge that the Company can proceed to claim for breach of confidentiality in the form of a penalty/fine which will be an amount of not less than R50 000.00 (Fifty Thousand Rand), and that the Company shall be entitled to recover such amount, and any associated recovery costs, from the employee in respect of such breach.
- Additionally, legal procedures for a Civil Damages Claim will be instituted against you by the Company.

[12] During 2019, and with Hoogland’s consent, the first respondent commissioned a salary review of Healthcare’s employees, including himself. An independent consultant was engaged to undertake the review of the first respondent’s remuneration. The directors of PIAG were notified of the salary review and acquiesced in the resultant very substantial increase in the first respondent’s remuneration.

[13] The first respondent caused a new contract of employment to be drawn up to reflect his altered remuneration. The contract was approved and countersigned by his mother-in-law in her capacity as a director of the company. According to its terms, the new contract

replaced the letter of appointment agreement concluded in 2016 and its provisions superseded the terms of any previous agreement.

[14] The 2019 agreement did not contain a 'non-competition and non-solicitation' clause. It did contain (in clause 21) a differently worded confidentiality protection clause.

[15] The first respondent sought to meet the applicant's claim for relief in terms of paragraph 6 of the notice of motion on the basis that the non-solicitation clause in his 2016 contract of employment had been rendered redundant when he concluded the 2019 contract that did not include an equivalent provision. Healthcare contended, however, that the 2019 agreement was invalid by reason of not having been approved by the shareholders of Healthcare, as required in the circumstances by s 75 of the Companies Act 71 of 2008.

[16] The first respondent responded by contending that the applicant was estopped from asserting the invalidity of the 2019 agreement because it had implemented it in various respects, notably by paying him the remuneration stipulated therein, holding him to the altered leave provisions and requiring him to serve out the 6-month notice period that did not have an equivalent in the 2016 agreement. At the hearing, however, Mr *Miller*, who appeared for the first respondent together with Ms *Stansfield*, advisedly abandoned any reliance on estoppel after his attention had been drawn by counsel for the applicant, Mr *Manca* SC, assisted by Mr *Elliot* SC, to the judgment in *Philmatt (Pty) Ltd. v Mosselbank Developments CC* [1995] ZASCA 154 (29 November 1995); 1996 (2) SA 15 (SCA); [1996] 1 All SA 296 (A); [1996] 1 All SA 296 (A), in which FH Grosskopf JA stated, with reference

to Rabie *The Law of Estoppel in South Africa* 106, and the authorities there referred to, that '[g]enerally, where a statute requires that certain formalities have to be complied with in order to render a transaction valid, a failure to comply with such formalities cannot be remedied by estoppel'.

[17] Mr *Miller* did attempt, albeit without evident conviction, nonetheless to persuade me to declare the 2019 agreement to be valid in the exercise of the court's discretion in terms of s 75(8). I made it clear at the time that it would be inappropriate to do so in circumstances where the excision of the non-solicitation clause had been effected without informing the shareholder. The exchanges between the first respondent and Hoogland on the subject would have lulled PIAG's directors into understanding that the only material change being effected to Coyne's terms of employment was to his remuneration. It is apparent that the director of Healthcare who insisted on Coyne serving out the 6-month period of notice provided for in the 2019 agreement did so ignorant of the existence of the 2016 agreement and acting on the basis of the 2019 document which the first respondent had represented, and probably believed at the time, was the applicable agreement. It would defeat the object of the provision, which is directed at shareholder protection, to validate the replacement contract containing amendments to Coyne's originally negotiated engagement agreement to which the directors of the shareholder company, PIAG, would probably not have agreed had they been alerted to them.

[18] The question then is does the evidence prove that the first respondent has breached the non-solicitation clause or that the applicant has reasonable grounds to apprehend that he will do so if not interdicted. I am not persuaded that it does.

[19] After leaving the applicant's employ, the first respondent took up an appointment as the chief executive officer of the second respondent. The second respondent is a competitor of Healthcare. It was established at more or less the same time as the first respondent's resignation from Healthcare became effective. It makes a number of products that are equivalent to but different to those sold by the applicant. As in the case of Healthcare and other similar enterprises which manufacture products in the complementary and alternative medicine sector, the second respondent sells them to pharmaceutical outlet chains such as Clicks and Dis-Chem as well as to health shops who specialise in selling alternative medicine products and to medical practitioners who prescribe and supply such products for their patients. The identity of such medical practitioners is easily ascertainable on the internet.

[20] The first respondent has convincingly explained that there are any number of comparable product ranges manufactured by a number of producers locally and abroad. They compete by individualising the compound composition of commonly known remedies, resulting in the availability to the retail buyer of a choice made up of a variety of refinements of generic products. The principal method by which a manufacturer distinguishes its products from those of its competitors is by price and branding.

[21] The respondents illustrated by way of photographs of the competing products of Healthcare and the second respondent as they would appear to a shopper in a pharmaceutical store that there is no danger of the applicant's products being confused with those of the second respondent. The major pharmaceutical chains, which, as mentioned, are the main customers of businesses like those of the applicant and the first respondent, stock products from multiple producers to give shoppers a choice. Anyone who has ever shopped for toothpaste or deodorant in a supermarket or pharmaceutical store will have first-hand experience of the set-up described by the respondents. It is the high street shopper who is the ultimate customer.

[22] Accordingly, it does not follow that because Clicks and Dis-Chem now stock the second respondent's products, they will stop purchasing those of Healthcare. Indeed, as emphasised by the first respondent, it is telling in the circumstances that the applicant has not been able to identify a single customer lost to the second respondent in the seven months that intervened between Mr Coyne's engagement as the second respondent's CEO and the institution of these proceedings.

[23] The applicant has shown that BetterYou has terminated its distribution agreement with Healthcare. BetterYou is not properly described as a customer of Healthcare. It does not purchase Healthcare's products. It contracted with Healthcare to distribute BetterYou's products. To bring the non-solicitation clause in the first respondent's 2016 letter of

appointment to bear, one would have to characterise BetterYou as an 'associate' of Healthcare.

[24] During his conduct of the business of Coyne Consulting CC, the first respondent established commercial relationships with certain overseas product suppliers, namely BetterYou, Nelsons and Similasan. Coyne Consulting CC had been importing BetterYou products since 2012 for supply to Dis-Chem. His dealings with Nelsons and Similisan stretched back even further. He transferred the business he did with these suppliers to Healthcare when he assumed the position of chief executive officer of Healthcare after its conversion from a close corporation into a Company.

[25] The first respondent has testified that during May 2021 he was approached by the person with whom he used principally to deal at BetterYou. The person concerned had contacted him to enquire about the possibility of appointing the second respondent as a local distributor. The first respondent avers that, apparently mindful that any such appointment could give rise to problems with his previous employer and having taken legal advice, he informed his interlocutor that he should rather discuss the matter with other persons in the second respondent company. That was the course that was followed, and after a meeting between representatives of BetterYou and the second respondent, which the first respondent did not attend, and a following due diligence exercise conducted by BetterYou, a distribution agreement was concluded and BetterYou terminated its contract with Healthcare. The reason given for BetterYou's termination of its contract with Healthcare was a change in the

management of the applicant. That was a factor stipulated in BetterYou's contract with Healthcare that would entitle it to cancel the distribution agreement.

[26] The first respondent's evidence concerning the approach from BetterYou is not inherently improbable. On the contrary, it is evident that he had a long-standing personal connection with contacts at BetterYou, and therefore understandable that, when he left Heathcare and took up employment with another company carrying on business in the field, BetterYou might choose to follow him. No infringement of the non-solicitation part of clause 27 of the first respondent's letter of appointment was involved on the version set forth in the first respondent's answering affidavit. Applying the rule in *Plascon-Evans*, that is the version that must be accepted for the purpose of deciding the matter. It is not a version that can be rejected on the papers.

[27] Insofar as it might be arguable that sub-clause (a) of clause 27 pertained in the context of BetterYou's engagement of the second respondent as its distribution agent in circumstances in which Mr Coyne was Natroceutics' CEO, I would not be willing to grant an order enforcing the clause. To do so would, in my judgment, be a purely anti-competitive measure not justifiable by any demonstrated need for the reasonable protection of the applicant's proprietary rights.

[28] For these reasons, the application for relief in terms of paragraph 6 of the notice of motion will be refused.

[29] Turning now to address the claim for interdictory relief to protect the applicant's confidential information.

[30] The term 'confidential information' has a very wide but not very clearly defined import. What might be comprehended as 'confidential information' in the relevant context has been discussed in a number of reported judgments[2] and it would be a supererogation to retraverse that well-trodden ground here. Harms, *Amler's Precedents of Pleading* 9th ed. (LexisNexis 2018) offers the following succinct statement of the essential characteristics of 'confidential information' in the sense relevant in proceedings such as these: 'Information is considered confidential … if it is (i) useful – that is, if it involves and is capable of application in trade or industry; (ii) (objectively determined) not public knowledge or public property but known to a restricted number of persons; and (iii) objectively of economic value to the plaintiff'.[3]

[31] The essential elements that a litigant claiming interdictory relief to protect its confidential information has to allege and prove are set forth in *Amler* supra,[4] as follows (cited authorities omitted):

'(a) The plaintiff must have a proprietary, quasi-proprietary or other legal interest in the confidential information.

(b) The information must have had the necessary quality of confidentiality.

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[2] See, for example, *Van Castricum v Theunissen and Another* 1993 (2) SA 726 (T) at 730-736; *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) 409 (W) at 426-432 and *Telefund Raisers CC v Isaacs and Others* 1998 (1) SA 521 (C) at 528-531.

[3] At p.93.

[4] At pp.93-94.

(c) A relationship, usually contractual, between the parties, which imposes a duty (expressly, impliedly or tacitly) on the defendant to preserve the confidence of the information. An example of a contractual relationship is that between employer and employee or between partners and business associates. A plaintiff in a delictual claim may, for example, rely on the fact that the defendant is a trade rival who obtained information in an improper manner.

(d) The defendant must have had knowledge of the confidentiality of the information and its value. (Actual knowledge is probably not required.)

(e) Improper possession or use of the information, whether as a springboard or otherwise, by the defendant.

(f) Damages suffered, if any.'

The last-mentioned element does not apply in these proceedings, which are for only interdictory relief.

[32] The terms of the interdictory relief sought by the applicant do not specify the nature of the confidential information for which it seeks protection, but the evidence in the founding papers suggests that its concerns go to the knowledge by the first respondent of its trade and customer connections, its pricing structures and its trade secrets in relation to the composition of the products that it manufactures. The applicant pointed to certain factors that might support its suspicion that the second respondent was established as a vehicle through which the first respondent would be able to carry on business in competition with it. The first and second respondents have denied that there is any substance to the applicant's suspicions. The respondents' evidence cannot be rejected out of hand, but ex hypothesi even were I to accept that the applicant's suspicions were well-founded it would not affect the result of this part of the case. The applicant is in any event not seeking to bar the first respondent from continuing in the second respondent's employment.

[33] I related earlier in this judgment that the applicant and the second respondent deal essentially with the same customers. Those customers are the obvious ones for any enterprise manufacturing the type of product that the applicant and the second respondent do and in the nature of things they do not purchase and stock product exclusively from any single manufacturer but rather from a number of suppliers so as to be able to offer a range of choice to their retail customers or patients as the case might be. I am not persuaded that the identity of the applicant's customers is confidential information. On the contrary, it is something that anyone walking past the shelves in any of the many stockists of its products will be able to see for themselves.

[34] I also do not consider that the contacts or personal relationships that the first respondent might have had with buyers at any of the applicant's customers is likely to have had any cognisable economic significance. It seems to me that such connections are unlikely in the given context to cause any customer to stop purchasing Healthcare's products and buy those of the second respondent instead. I reiterate that the applicant has not been able to offer evidence proving the loss of even a single customer.

[35] I am also not persuaded that the identity of the suppliers of the raw materials used in the manufacture of the applicant's products is confidential information. The first respondent has testified, convincingly, that the suppliers of raw materials are well known internationally and that many of them advertise themselves regularly at various trade fairs and conventions to which producers such as the applicant and the second respondent are routinely invited.

[36] There is no evidence to support the notion that the first respondent has divulged or misused the knowledge that he had of the applicant's pricing structures. That is in any event the sort of information that changes with time to adapt to changing costs and market conditions. If it had a protectable value, the information could only be of use in a springboarding situation, and the time for that has passed now that the first respondent has already completed a full year in the second respondent's employ.

[37] The applicant has also failed to establish that the first respondent has misused any information concerning the make-up of its products during his employment with the second respondent. It is admitted that the second respondent manufactures certain products that are equivalent in material respects to some of the applicant's products, but it seems to me that those products are merely varieties of generic products made by any number of manufacturers of alternative medicines. The applicant has not shown that any of the second respondent's products are copies of the products that it makes. The components of the products made by alternative medicine manufacturers are required by law to be disclosed on the labelling of the products and accordingly the information is not confidential.

[38] For all these reasons I have not been satisfied that the applicant has made out a case for the relief sought in paragraph 7 of the notice of motion.

[39] The applicant had also sought, in para 8 of its notice of motion, an interdict restraining the first and second respondents from unlawfully interfering with the applicant's contracts with third parties, and in particular, the distribution agreements between the

applicant and BetterYou, Nelsons and Similasan. I have already discussed the circumstances concerning BetterYou's cancellation of its contract with Healthcare earlier in this judgment. According to the first respondent, Nelsons also showed some interest in concluding a distribution agreement with the second respondent, but it has failed to follow up its initial exploratory approaches. The respondents deny that they have had any dealings with Similisan. The applicant accepted that it could not obtain relief in terms of paragraph 8 of its notice of motion without a referral of the pertinent disputes of fact on the papers for determination after the hearing of oral evidence.

[40] The second respondent, represented by Mr *Miltz* SC and Mr *Smith*, opposed the reference of any issues to oral evidence. They argued that the disputes of fact were eminently foreseeable and that in any event the applicant had failed to define the issues it sought to have referred to oral evidence. It has ultimately become unnecessary to make any determination on those contentions because Mr *Manca* intimated that the applicant would not press its application to refer any matters to oral evidence if it proved unsuccessful in obtaining interdictory relief against the first respondent in terms of paragraphs 6 and 7 of the notice of motion.

[41] The same goes for the relief sought in paragraph 9 of the notice of motion for an order directing the first respondent to return the laptop issued to him by the applicant when he was in its employ. There was a dispute between the parties concerning ownership of the device.

The first respondent averred that he had had the information stored on the laptop professionally deleted after his departure from the applicant company.

[42] In the result an order will issue in the following terms:

> The application is dismissed with costs, including, in respect of each of the respondents, the fees of two counsel.

A.G. BINNS-WARD
Judge of the High Court