SOUTH AFRICA / JUDGMENT

BKB Ltd and Another v Collins and Another (1016/2011) [2011] ZAECGHC 16 (12 May 2011)

[2011] ZAECGHC 16

COURT
Eastern Cape High Court, Grahamstown

BEFORE
Pickering

CASE / FILE NUMBER
1016/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: 1016/2011

DATE HEARD: 5 May 2011

DATE DELIVERED: 12 May 2011

In the matter between

BKB LIMITED .....First Applicant

EAST CAPE AGRICULTURAL

CO-OPERATIVE LTD .....Second Applicant

Vs

CHRISTOPHER JOHN COLLINS .....First Respondent

CHARMAIN GOUWS INSURANCE

BROKERS CC .....Second Respondent

JUDGMENT

PICKERING J:

The two applicants, BKB Ltd and East Cape Agricultural Co-operative Ltd, have applied as a matter of urgency for an order, inter alia, in the following terms:

> *"2.1 Why the Respondents should not be interdicted and prevented, for a period of one year, from directly or indirectly soliciting any of the members of the customer base of the Applicants (as set out more fully in Annexure "A" hereto) in respect of any insurance and/or brokerage services, or performing any insurance and/or brokerage services for such persons or entities during such period.*

2.2 Why the Respondents should not be interdicted and prevented, for a period of one year, from directly or indirectly communicating

with any of the persons or entities set out in Annexure "A" hereto, with a view to creating an opportunity for the respondents to offer brokerage and/or insurance services to any such persons or entities.

2.3 Why the respondents should not be interdicted and prevented, from representing themselves, or any services they may offer, as

being connected or associated in any way with insurance services and business offered by and conducted by the applicant.

2.4 Why the respondents should not be interdicted and prevented from disseminating, in any manner whatsoever, any statements or allegations that the applicants have lost the majority or a substantial number or their staff, or that the applicants are unable

to perform the insurance services the respondents offer.

2.5 Why the respondents should not be ordered to return to the applicants all confidential records and information, in connection

with the persons set out in the Annenxure "A" hereto, whether in hard copy or electronic format.

2.6 Why the respondents should not pay the costs occasioned by this application, jointly and severally, the one paying the other to be absolved.

3. That paragraphs 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6 (sic) above act as an interim interdict pending the final determination of this

application."

The first respondent is Christopher John Collins, an adult male insurance broker of Queenstown. The second respondent is Charmain

Gouws Insurance Brokers CC, a close corporation carrying on the business of an insurance broker at Cathcart.

At the hearing of the matter it was agreed between counsel, Mr. Redding S.C. for applicants and Mr. Paterson S.C., who with Mr.

Dugmore appeared for respondents, that in view of the fact that the issues have now been fully ventilated on the papers no purpose would be served by approaching the matter as one for interim relief but that the application should be determined on the basis that it is an application for final relief.

First applicant, which conducts extensive business operations throughout South Africa, has a number of divisions which are intended

to provide supporting services to the South African farming community, more particularly in relation to wool, mohair, shearing,

auctioneering, properties and financial support services. The second applicant is a primary agricultural co-operative registered in terms of the Co-operative Act no 91 of 1981, carrying on business as a provider of agricultural support services. Second applicant is an authorised Financial Services Provider, duly registered in accordance with the provisions of the Financial Advisory and Intermediary

Services Act no 37 of 2002 ("FAIS").

Second applicant conducts the business of providing agricultural requisites and services to the farming and business communities in the Border and North Eastern Cape areas of the Eastern Cape Province. Included in this business operation is a brokerage and insurance business ("the insurance operation").

During 2010 second applicant's business was acquired as a going concern by first applicant. The insurance operation continued to be conducted by second applicant. This business entailed the rendering by second applicant of so-called intermediary services, as defined in FAIS, to its customers. These services, according to applicants, comprised the following:

> *"Establishing contact details from potential customers who contact the second applicant seeking insurance cover; passing these contact details to the brokers engaged by the second applicant to enable them to meet with the potential customer for the purpose of establishing the nature and extent of insurance services required; rendering insurance broking services in terms of which insurance products are marketed to both the existing customer bases and also prospective customers; the submission of quotations in respect of the insurance products offered; placing insurance business with an underwriter and attending to the issue of the policy in the name of the customer; receiving premium income from customers in respect of such policies; paying premiums as received for the insurer; retaining commission income; processing claims on behalf of customers; and performing general administrative functions associated with the delivery of an effective broking-insurance service."*

According to the general manager of first applicant, Mr. Goosen, the second applicant renders those services through administrative

personnel employed by it, as also through brokers who are engaged to write insurance business, and who are employed or mandated by second applicant to do so. According to Mr. Goosen the compilation of client information for use by second applicant is entirely the function of second applicant's personnel. All documents presented to clients in relation to the insurance business are issued in the name of the second applicant.

It is common cause that, as at the date of transfer of the business to first applicant, there were five persons rendering services in support of second applicant's insurance business. These five persons were the first respondent; Riana Bezuidenhout and Marian Roodt, both brokerage clerks; Chantel Harrison, a temporary administrative clerk; and Anthonie Roodt who, according to the

applicants, was engaged as an independent broker for the purpose of performing brokerage services and concluding insurance contracts on behalf of second applicant.

It is further common cause that first respondent has been involved with second applicant since 1987. What is not common cause is the nature of their relationship. According to the applicants, first respondent was employed by second applicant solely as its "insurance manager". First respondent, however, contends that his involvement with second applicant encompassed two distinct aspects. Whilst he administered the day to day business of the insurance division, for which he was paid a limited retainer by second applicant, he also performed intermediary services as a broker/consultant, servicing not only existing clients whom he had sourced and secured prior to his involvement with second applicant in 1987, and whom he had brought with him upon that involvement, without compensation from second applicant but also in the ensuing years sourcing, securing and servicing additional clients. His income in respect of his broking/ consulting activities was solely commission based. According to him second applicant has never previously laid claim to those clients. He attaches a list of these clients as annexure C2. Applicants, however, point to the fact that, out of first respondent's client base as of March 2011, no more than seven were sourced prior to first respondent commencing duties with

it. First respondent states further that by virtue of the nature of his work as a broker/consultant he was entitled upon the termination

of his relationship with applicants, to take with him all details relating to those clients whom he had sourced, secured and serviced

whilst involved with applicants.

It is common cause that during or about February 2011 first respondent, together with the four other persons engaged in the conduct of the insurance operation, tendered their resignations to second applicant. According to Goosen, upon receipt thereof he met with first respondent to discuss the matter and suggested that first respondent consider the withdrawal of his resignation. It was, Goosen

states, during the course of this discussion that first respondent, for the first time, raised the issue of what he referred to as being his "book". It is common cause that in the insurance industry a broker's client base and the insurance policies of such client in respect of which a

broker/consultant receives the benefit of commissions is referred to as that broker's "book". Goosen states that first respondent raised with him the issue as to what would happen to his "book" in the event of his death or resignation. He informed first respondent that he was unaware of any entitlement which first respondent might have to such a book, pointing out to him that first respondent was a full-time employee of second applicant, engaged for the express purpose of securing insurance business for second applicant. He told first respondent, however, that, if it was an issue which he wished to pursue, it would have to be investigated and legally determined and that he was not qualified to pronounce upon it.

Goosen states further that on 3 March 2011 he was in Queenstown and met with first respondent who raised the matter of his entitlement to his "book" again. Goosen again expressed his views on the matter and told him that if first respondent so wished he would make the appropriate enquiries and revert to him in that regard.

According to first respondent, however, he had as far back as June 2010 raised the issue of his entitlement to his "book" upon retirement or otherwise. This was important to him in the light of the take-over of second applicant by first applicant. He was concerned to ascertain whether his entitlement to his book, which had not been previously been disputed, might now become an issue. He states that he received no feedback whatsoever from Goosen or any other senior manager. Whilst he does not deny having met and spoken to Goosen on 3 March 2011 he denies that Goosen then, or on any other occasion, told him he had no right to his "book". Goosen, he said, merely told him that he was unaware of any such arrangement. He refers further to a letter (C6) dated 3 February 2011 and addressed by him to second applicant's compliance officer, Mr. Vosloo, in which he stated, inter alia, that he had "previously raised the issue pertaining to my Clientele Book at time of retirement. No feedback." It was, he says, only after the take-over of second applicant by first applicant and at the time of his leaving second applicant that his entitlement to his book became disputed.

It is common cause that on 7 March 2011 first respondent and the four other persons in the insurance business division again tendered their resignations with effect from the end of March 2011 and on that same day first respondent wrote a letter (C13) to Vosloo confirming an undertaking to handle the so-called "drag of 2/3 months in respect of insurance division administration premium turn overs, commissions, production figures etc".

Goosen states that on receipt of the resignation he arranged to meet first respondent in Queenstown on 17 March 2011 with a view to releasing him from further service during the balance of his notice period. He arranged also that first applicant's Human Resources Manager, one Engelbrecht and another colleague, Oberholster, be present at the meeting. Whilst he was on route to Queenstown he was advised telephonically by Oberholster that a certain Burnett, an employee of Flexilink Systems (Pty) Ltd, was in the process of downloading information from the system in second applicant's Queenstown offices. This company was the service provider responsible for the installation of the so-called Flexibroker Insurance Administration System utilised by second applicant for the purpose of conducting its insurance business. Goosen ordered that Burnett be stopped forthwith. Burnett tendered an explanation which is contained

in an affidavit filed in support of the application. I will return to this affidavit hereunder.

At the meeting on 17 March 2011 Goosen handed first respondent a letter dated 17 March 2011 (JLG9), stating that first respondent was released from his services with immediate effect and stating, inter alia:

> *"You are further reminded that you may not remove any intellectual property, or any files, records or documents. To the extent that you may have copied any files, records or documents, whether by electronic means or otherwise, you are required to return these to the Company immediately."*

According to Goosen first respondent did not contest the contents of this letter, nor, in fact, does first respondent refer thereto in his answering affidavit.

In his affidavit Burnett states that he received telephonic instructions from first respondent to visit second applicant's

branch in Queenstown on 17 March 2011 in order to remove from second applicant's administration systems all information relating to the customer base secured and serviced by first respondent and by one Anthonie Roodt on behalf of second applicant in the conduct of its insurance operation, as well as all details of the insurance work undertaken on behalf of that customer base. His further instructions were to download all this information to a storage device and thereafter to install it on the equivalent Flexibroker Insurance Administration System utilised by Charmaine Gouws Insurance Brokers CC, the second respondent herein.

Burnett states that this would have resulted in the complete elimination on applicant's system of all records pertaining to both the customer base and the insurance work undertaken in respect thereof. He assumed in the circumstances that applicants intended to discontinue their insurance operation and were transferring the business to second respondent.

Goosen states that this would have had disastrous consequences for applicants as the Flexibroker system was the only reliable record

which applicants had of the nature and extent of the insurance activities conducted on behalf of each of the members of the customer

base. It is not in dispute that the Flexibroker programme contains all relevant information pertaining to the persons or entities

insured, including all personal details of the insured: details of the underwriter from whom the insurance is secured; details of the policy or policies applicable and in terms of which the insurance cover is extended; as well as full details of all insurance cover provided to the insured in terms of such policy or policies, including the assets/risks insured; the sum insured; the premiums

payable; commission and fee income due to second applicant; debit order details and the claims history of the insured.

At the end of each month reports were compiled by second applicant utilising the information captured by the Flexibroker programme.

These reports were submitted to the underwriters responsible for providing the insurance cover in respect of each member of the

customer base, reflecting the amount of the premium, the commission and fee income due to second applicant and the balance of the premium due to the insurer. This enabled the underwriters to establish that the insured cover was to be retained in respect of each insured from whom a premium was received. The underwriters were entirely reliant upon these reports and second applicant was equally entirely reliant upon the system to establish and secure payment of the commission and fee income due to it. Had the information been removed this would have resulted in applicants being unable to generate the requisite reports or to secure payment of commission and fee income due to it, such commission and fee income being approximately R300 000,00 per month.

Burnett complied with the instructions to stop the download and restored immediately to second applicant's systems all information which had been removed. In the event no information was downloaded to second respondent's administration system.

Whilst first respondent admits having instructed Burnett to download the information he states that his instructions were designed to secure information to which he was entitled relating to his "book" and also to secure information relating to the book of Anthonie Roodt to which the latter was entitled. He denies that in so doing he was guilty of any improper, unethical or unlawful conduct as alleged by applicants. He states that Flexilink Systems (Pty) Ltd had been approached by second respondent about effecting a "split" of clients, thereby giving effect to his entitlement to his client book upon his leaving second applicant and joining second respondent as a broker/ consultant. In pursuance thereof he addressed a letter to Flexilink Systems (Pty) Ltd (C11) on 3 March 2011 on second applicant's letterhead and signed by him as "ECAC Insurance Manager", instructing it "to transfer client data base from ECAC to CGI Brokers CC, Queenstown, as arranged on 17 March 2011." He states that it was his understanding that, after the split had been effected, the client files at second applicant would be rendered inoperative and in due course made operative in the hands of second respondent. This, he states, is both necessary and standard practice. It was not his understanding that all data relating to clients would be removed from second applicant's

system but simply that second applicant would be prevented from accessing the data base of clients who had left for operative purposes.

Goosen, however, states that the insinuation by first respondent that the process of transfer of the information was initiated only on 3 March 2011 is dishonest, inasmuch as it is apparent from an email (JLG16) sent by Burnett to Charmaine Gouws on 18 January 2011, that Burnett had already, prior to 18 January 2011, been requested on behalf of the respondents to provide a formal written quote for the costs of the proposed data split. He refers also to an email (JLG18) sent on 1 February 2011 by Gouws to Marizaan Roodt, reading as follows:

"Hallo daar (tweede keer ha-ha)

Jammer man laat kry net vir my Chantel se mail ok, dan voel sy nie uitgesluit nie. Soos discussed met Anton en Chris gister, beplan ons die skuif selfde roete was wat myne verlede jaar (selfde tyd gits hey), maw julle moet op die makelaar sit al die flexi werk moet gedoen wees voor 15 Februarie en dit moet die Maart hernuwings insluit, daarna kan geen flexi werk gedoen word nie, tot na die maandeinde.

To do list (jul kan dit met Chris bevestig)

Print al die kliente se email adresse, noteer sover moontlik die wat nie mail het, se fax nommers, en dan die wat niks van die het se pos adres, want ons moet al die kliente in kennis stel van die skuif, sodat almal die nuwe kontak nommer het voor 1 Maart. Die is baie belangrik."

It is common cause that the "Chris" referred to therein is first respondent. Goosen contends that the letter of 3 March 2011 to which first respondent refers is clearly no more than a re-affirmation of a long pre-existing arrangement.

Certain allegations concerning issues relating to the resignation of the members of the insurance division which were made by one of the brokerage clerks in the insurance business, namely Marizaan Roodt, are denied by first respondent and it is not necessary to deal therewith. What is common cause, however, is that during December 2010 first respondent informed the staff members that he intended to start a business either on his own or in conjunction with second respondent or another brokerage in Queenstown. First respondent states that he prepared a draft letter of resignation which, at their request, the other resigning staff members also utilised. He told the other members that he would be meeting with Goosen to discuss their intended resignation. After that meeting first respondent informed the other members that there were undertakings to consider and that the resignations could still happen but were on hold for the time being. He admits that during February 2011 he took the members to view the premises from which second respondent intended to conduct its business in Queenstown.

At the beginning of March 2011 first respondent informed the other members of the division that he was now resigning. Marizaan Roodt prepared letters of resignation for all concerned. On 10 March 2011 Roodt received a further email from Gouws (MR2). In this email Gouws stated as follows:

> *"Hi daar. Hoe gaan dit met julle? Het weereens met Anthon en Chris bespreek, is uiters belangrik dat julle die kliente lys, wat die kontaknommers en adresse wys, print, dan moet julle ook op julle emails, direk op julle emails, gaan print die email adresse kontaklys, sal dit baie makliker maak, want dit kan sommer net so oorgelaai word op die nuwe stelsel.*

Dan maak seker dat julle alle korrespondensie wat enige iets bevat wat die skuif bespreek heeltemal delete.

Dan soek ek die volgende asseblief. Hoeveel kliente is daar (ek moet hanging files order vir kabinette)?????

Hoeveel hanging files is daar tans in die yster kabinette???????

Wil bestel?????

Neem kennis sodra die split gedoen is, sal julle glad nie meer op die stelsel kan werk nie, so as kliente inskakel, maak seker julle

doen al die notas van enige werk, eise, in examine pad en hou dit by julle.

Ek sal julle nuwe email adresse weergee sodra dit inkom."

Goosen avers that it is clear from the contents of MR2 that the respondents were taking all necessary measures to ensure that full

details of applicant's confidential information pertaining to the customer base were extracted for their purposes. He avers further that respondents had been astute to ensure that the steps taken by them were concealed from applicants and that first respondent, whilst in the full time employ of second applicant and acting in concert with second respondent, went about deliberately and unlawfully

attempting to extract applicant's confidential information pertaining to the insurance operation. He points out that he is the first respondent's direct superior in terms of reporting responsibilities and that first respondent at no stage disclosed to him his intention to remove the information, nor did he seek permission to do so.

In this regard Gouws, in an answering affidavit filed on behalf of second respondent, denies that anything sinister can be read into her instruction to delete all correspondence which in any way discussed the "skuif". She states that the correspondence to which she was referring is "that which relates to practical aspects of the move, relating to office furnishing, stationery, cutlery and the like."

She too denies that her conduct was improper or unlawful and reiterates first respondent's averments that he was entitled to his book of clients and that his instructions to Burnett were entirely proper and lawful.

Goosen states that during March 2011, following upon receipt of the resignations of first respondent and the other employees engaged in the insurance operation, the applicants concluded an agreement with Ambiton Financial Services (Pty) Ltd, an authorised Financial

Services Provider in terms of FAIS, in accordance with which Ambiton would continue to conduct the insurance operation in conjunction with the applicants. He arranged to meet with representatives of Ambiton on 17 March 2011 in Queenstown when first respondent would be relieved of his duties. Immediately upon becoming aware of the attempt by the respondents to remove the information from applicant's

administrative systems he instructed Ambiton to take over the system and to secure the customer base. It is not in dispute that Ambiton accordingly sent out SMS messages to the applicants' clients advising that second applicant was still conducting its insurance operation. Goosen states further, and this is common cause, that during the period 18 March to 25 March 2011 no less than 205 so-called "letter of appointment" notices, signed by individual members of the customer base, were received by certain of the underwriters with whom the insurance business of the customer base had been placed, in terms whereof each of the clients gave instructions for the transfer of their short term insurance policy/portfolio and file to second respondent with immediate effect. The underwriters also received further communications, on second respondent's letterhead, from each of those clients, setting out their policy numbers and appointing second respondent as their broker also with immediate effect. (See JLG13 and 14).

Goosen states with regard to the 194 forms dated 18 March 2011, that it is clear that they must have been prepared well in advance of 18 March, whilst first respondent was still in the employ of applicants, for the purpose of securing transfer of the respective insurance portfolios to second respondent immediately following upon the termination of first respondent's services with the applicants.

First respondent does not deny this. He avers, however, that the steps taken by him related to his clients in respect of whom he had received duly executed letters of appointment and mandated instructions and were effected in the interests of those clients. His interactions with his client base, so he states, were "pursuant to and in recognition of" his entitlement to his "book". He denies Goosen's further allegation that his actions were unlawful and improper.

As set out above, first respondent contends that, failing any specific agreement to the contrary, the book of an intermediary or

broker/consultant remains the book of that intermediary. He states, with reference to FAIS, that there are certain fundamental principles applicable to the short term insurance industry including the fact that the interests of clients and policy holders are paramount and that such clients and policy holders are entitled to absolute freedom of choice in respect of their broker and intermediary and may revoke their mandate to a broker/intermediary at any time. He states further that in the absence of an agreement to the contrary and in accordance with the norms of the insurance industry he, as a broker/consultant, retained the entitlement to his book of clients.

His averments in this latter regard are disputed by applicants who have filed an affidavit by one Fivaz, a Director of a Financial

Services Provider, with very extensive experience in the insurance industry. According to Fivaz no such norm as contended for by first respondent exists. On the contrary, and in the absence of an agreement between the broker and the Financial Service Provider

specifying otherwise, the accepted convention is that the Financial Service Provider retains a proprietary right to all information which it has collated in respect of clients who have appointed the Financial Service Provider as a broker or insurance agent to act on their behalf. The extent of a broker's rights to commission to insurance policy sold remains dependant upon the contractual

agreement concluded between the broker and the Financial Service Provider.

In attempting to rebut first respondent's averments concerning the nature of first respondent's relationship with second

applicant the applicants rely, inter alia, on certain allegations contained in affidavits attested to by Mr. May, Mr. Stevens and Mr. Shadiack respectively. In particular, second applicant avers that first respondent was employed on precisely the same basis as Mr. May and that the composition of his remuneration package was also precisely the same.

In his affidavit May states that he was previously employed by second applicant as a full time employee during the period 1995 to 2005. At this time first respondent was already in the employ of the second applicant as insurance manager. May was employed as an insurance broker, selling insurance to clients on behalf of second applicant and servicing the insurance needs of the second applicant's client base. No contract of employment was concluded with him. His appointment as insurance broker was confirmed by way of a letter setting out details of his salary and the commission which he would earn provided that he achieved sales beyond a certain threshold. There was no agreement whereby he acquired any right or entitlement to retain for himself, upon leaving the service of second applicant, any such business. He states that at the time of his retirement he was engaged in discussions about possible employment with another insurance broker. When second applicant became aware thereof it addressed a letter (JLG6.6) to him through its attorney, Mr. Shadiack, pointing out that May had not been engaged by second applicant as an independent broker and that as a full time employee of second applicant he had no right to any of the information pertaining to second applicant's client base.

Mr. Shadiack, who compiled this letter, states that it was prepared on instructions furnished to him by first respondent in his capacity as insurance manager of second applicant and that it reflects the view that was expressed to him by first respondent.

With regard to these averments first respondent states that his position was very different to that of May and that May was employed

solely as a salaried broker and only received by way of a performance bonus a percentage of commission above a certain threshold. He states further that May at no time "forcibly" asserted his rights to retain his client book on leaving second applicant's employ. First respondent states that he did not believe that second applicant could have sustained its position had May in fact pursued the matter. With regard to Mr. Shadiack's affidavit, first respondent states that whilst he had no specific recall of the matter he "may have asserted on behalf of second applicant a position most favourable to second applicant as a matter of legal posturing."

It is common cause that during 2001 second applicant issued new contracts of employment setting out the conditions of service between

it and its employees. A contract document was prepared for first respondent in his capacity as insurance manager by Mr. Stevens, a Human Resources officer in the employ of first applicant. In this document first respondent is described as an "employee" and second applicant as his "employer". According to Stevens no instructions were given to him by either the Chief Executive Officer at the time or by first respondent himself to the effect that the document should include a reference to first respondent's entitlement to his book. Stevens states that he was in fact instructed by the Chief Executive Officer to emphasise to all staff members that no alterations were to be introduced to the contract which was to remain standard in respect of all employees. Any amendments to the conditions of service had to be approved by the Chief Executive Officer, as indeed appears from the contract document itself. Stevens states that he had no recall of the contract having been returned to him but has, since the launching of the application, located it in first respondent's personal file. This document (PS2.1-20) has been signed only by first respondent.

According to Stevens, an examination of the document reveals that certain amendments thereto had been unilaterally effected by first respondent. The description on page one of first respondent's position as "Insurance Manager" has been supplemented by the words "broker/ consultant". On page four thereof the following has been added:

> *"Addendum 1: Consultant/brokers book of business is the property of the consultant/broker."*

Applicants aver that by means of these additions first respondent unilaterally endeavoured to accord to himself an independent status, whereas he was at all times in the full time employ of second applicant as its insurance manager receiving remuneration and benefits and being accorded the rights and obligations normally associated with an employment relationship, including annual leave, access to staff loan facilities, and being subject to the disciplinary code.

This is disputed by first respondent who states that a number of additions and amendments had to be made to what was in effect a pro-forma standard contract applicable to all employees, in order to deal with his own position. Apart from the above mentioned amendments he also added the words "commission/fees: 20% of nett of tax (35%) of gross" and "as per AA rate per km: adjusted annually 10%." Both these latter additions reflected the situation pertaining at the time and have been implemented ever since. Having made the above mentioned alterations he signed the contract and returned it to Stevens. At no stage did anyone query, comment or object to the

changes made by him. He contends therefore that, despite the fact that the contract as amended was not signed, and given the fact that the amended terms of the agreement have since been implemented in all other respects, it must be held to govern the relationship between himself and second applicant, inclusive of the provision that the client book was his property.

He relies further in this regard on the averments made by one Southey who was previously the General Manager of second applicant. According to Southey, first respondent was already employed by second applicant when he became General Manager. He could specifically recall that at that stage first respondent informed him that he had brought to second applicant a number of high value clients. At a later stage he and first respondent discussed the latter's entitlement to his client book were he to leave second applicant. Southey acknowledged to first respondent that were he to do so, second applicant "would have no hold over any of his clients who wished to keep their insurance business" with him or to the information relating to them. He reiterated that his understanding and agreement with first respondent was clear and to the effect that, in the event of first respondent leaving the employ of second applicant, he would be entitled to take with him all the clients on his book.

Southey states further that first respondent's job description would be better described as that of "broker/consultant" and that the title of "Insurance Manager" was not truly indicative of his position.

In response hereto applicant states that Southey was in fact dismissed from second applicant's employ in March 2005, having

been found guilty, inter alia, of certain dishonest and unlawful conduct. His averments against applicants should accordingly be treated with great caution. Applicants aver further that if it had indeed been the intention of Southey to accord to first respondent a status independent of his employment relationship as Insurance Manager, such as to provide him with proprietary rights to his book, it was inexplicable as to why he had not required that an agreement to this effect be prepared as he had done in relation to Charmaine Gouws, a matter to which I return hereunder. Applicants point out further that no approval for such an agreement had been sought or obtained from second applicant's board of directors.

First respondent refers further to the position of Charmaine Gouws and Anthonie Roodt who had both been in the employ of second

applicant and who, upon leaving, were permitted to retain their books and all information retaining thereto.

In her affidavit Gouws states that during her association with second applicant she operated as a broker/consultant and earned

commission/fees on all her clients. In exchange for the utilisation of second applicant's administrative facilities she paid second applicant 10% nett of VAT of her gross premium turnover. She states that second applicant never laid claim to her client base or book and agreed, when she left, that she was entitled thereto. Second applicant also agreed to the electronic transfer of policies utilising the so-called "Flexisplit."

In his affidavit Anthonie Roodt states that he too was employed by second applicant as a broker/ consultant. His agreement with second applicant was to the effect that all commission/fees earned in respect of clients sourced, secured and serviced by him were due to him save that second applicant was entitled to be paid by him 10% of premium turnover nett of VAT.

In reply hereto applicants deny that first respondent's position can in any way be equated to that which pertained in respect

of Gouws and Roodt. Goosen states that Gouws was not registered as a Financial Service Provider and that intermediary services could not be provided by her, except insofar as she performed under the aegis of a Financial Service Provider such as second applicant. It was therefore intended that she would operate under the aegis of the second applicant but that she would be entitled to manage her portfolio of clients and that, upon termination of her relationship

with second applicant, she would be entitled to all the relevant information concerning the clients. As such the clients and their

information pertaining to them did not form part of the business with second applicant and second applicant merely provided services to Gouws so that she could advance her business.

It appears from the affidavit of Mr. Shadiack that during August 2004 he was instructed on behalf of second applicant to draft a "commission agent contract" between second applicant and Gouws. He duly did so. A copy of the contract document prepared by him is attached to his affidavit as Annexure M1. It appears from that document which is headed "Commission Agent Contract", that the purpose of the agreement was to record in writing the terms of the "service agreement between the Co-operative and the intermediary", namely Gouws. The contract specifically provided that upon termination thereof "the Co-operative undertakes to provide the intermediary with a hard copy of the schedule of customers introduced to the Co-operative by the intermediary and the Co-operative are not been permitted to disclose any information pertaining to the portfolio of the intermediary to any other party during the period of the contract or thereafter."

There is no record as to whether or not the draft contract was signed. Goosen, however, states that this was the arrangement which

prevailed throughout the association of Gouws with the second applicant.

Applicants submit therefore that the position of first respondent was entirely different to that of Gouws and Roodt in that they were engaged independently, had no employment relationship, and made use of second applicant's registration and administration to advance their own business for which they paid second applicant a small percentage of the commission they received. First respondent,

however, was not engaged on this basis and was clearly an employee.

I turn then to consider the legal principles applicable to the Aquilian action of unlawful competition.

In Schultz v Butt 1986 (3) SA 667 (AD) the following was stated at 678F – G:

> *"As a general rule, every person is entitled freely to carry on his trade or business in competition with his rivals. But the competition must remain within lawful bounds. If it is carried on unlawfully, in the sense that it involves a wrongful interference with another's rights as a trader, that constitutes an injuria for which the Aquilian action lies if it has directly resulted in loss."*

At 678H – I it was stated that "the unlawfulness which is a requisite of Aquilian liability may fall into a category of clearly recognized illegality, as in the illustrations given by Corbett J in Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968

(1) SA 209 (C) at 216 F–H" but that it is not limited to unlawfulness of that kind. Reference was made to the dictum of Corbett J in the Dun and Bradstreet case supra at 218 where the learned Judge said the following:

> *"Fairness and honesty are themselves somewhat vague and elastic terms but, while they may not provide a scientific or indeed infallible guide in all cases to the limits of unlawful competition, there are relevant criteria which have been used in the past and which, in my view, may be used in the future in the development of the law relating to competition in trade."*

In Schultz v Butt supra Nicholas AJA stated at 679C – D that:

> *"In judging of fairness and honesty, regard is had to boni mores and to the general sense of justice of the community ... While fairness and honesty are relevant criteria in deciding whether*

competition is unfair, they are not the only criteria. As pointed out in the Lorimar Productions case ubi cit, questions of public policy may be important in a particular case, eg the importance of a free market and of competition in our economic system."

In Easyfind International (SA) Pty Ltd v Instaplan Holdings and Another 1983 (3) SA 917 (W) Schutz AJ (as he then was) stated as follows at 927 C:

> *"To my mind the simple practical guide in cases of appropriation of confidential documents ... is the command 'thou shalt not steal'... What is clearly established in our law is that it is unlawful for a servant to take his master's confidential information or documents and use them to compete with the master. For material to be confidential "it must not be something which is public property and public knowledge"; Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and Another 1977*

(1) SA 316 (T) at 321 in fine."

The Aquilian action in unlawful competition cases is available not only to the owner or proprietor of confidential information. In Prok Africa (Pty) Ltd and Another v NTH (Pty) Ltd and Others 1980 (3) SA 687 (W) Goldstone AJ (as he then was) stated as follows at 696F-697A:

> *"In principle I can see no reason for limiting the scope of this type of action by conferring it only upon the owner of confidential information. The wrong upon which the cause of action is founded and for which the remedy lies is not an invasion of rights of property: the Dun and Bradstreet (Pty) Ltd case supra at 215F - 216A. The wrong is the unlawful infringement of a competitor's right to be protected from unlawful competition... If A is in lawful possession of the confidential information of B and such possession was obtained by A to further his own business interests, it would be a wrong committed against A for C, a trade rival of A, to obtain that information by dishonest means from A for the purpose of using it to the detriment of the business of A. That it might also be a wrong committed against B is another matter. Once there is dishonest conduct of the type just posited and loss or damage suffered thereby to the person against whom the wrong has been committed, it seems to me that the requisites for Aquilian liability are present."*

In SA Historical Mint (Pty) Ltd v Sutcliffe and Another 1983

(2) SA 84 (C) Van Den Heever J (as she then was) stated as follows at 90H – 91A:

> *"There is not and cannot be a general duty burdening an employee, whether at humble or top management level, not to compete with the company that formerly employed him. But in the process of competing he may not 'steal' what is the company's property – its trade secrets or confidential internal business information; or 'steal' the energy expended in efforts, whether of research or negotiation, made to benefit it."*

It is apposite, in my view, to refer also to what was stated by Roos J in Van Castricum v Theunissen and Another 1993 (2) SA 726 (T) where at 731 F – H the learned Judge stated as follows:

> *"What is clear from the aforesaid, is that someone who saves himself the trouble of going through the process of compilation of the document, even where it is compiled from information which is available to anybody, such a person would be interdicted if that information had been obtained in confidence. The reason is simply that confidential information may not be used as a springboard for activities detrimental to the person who made the confidential information available. It would remain a springboard even when all the features have been published or can be ascertained by actual inspection by any member of the public. See Cranleigh Precision Engineering Ltd v Bryant*

[1965] 1 WLR 1293 (QB) at 1317-8 ([1964] 3 All ER 289), as quoted in the Harvey Tiling case supra at 324B-D."

In Meter Systems Holdings Ltd v Venter and Another 1993 (1) SA 409 (W) at 426E – I Stegmann J stated that:

"... our law recognises fiduciary relationships which, as a matter of law, give rise to an obligation to respect the confidentiality of information imparted or received in confidence, and to refrain from using or disclosing such information otherwise than as permitted by law or by contract."

At 428D – F the learned Judge, referred to customer lists drawn up by a trader and kept confidential for purposes of his own business and stated as follows:

"The legal protection afforded to this type of confidential information is limited by the fact that the law, whilst prohibiting an employee from taking his employer's customer list, or deliberately committing its contents to memory, nevertheless recognises that, on termination of an employee's employment, some knowledge of his former employer's customers will inevitably remain in the employee's memory; and it leaves the employee free to use and disclose such recollected knowledge, in his own interests, or in the interests of anyone else, including a new employer who competes with the old one..."

The learned Judge stated further at 429C that information, which although freely accessible to all members of the public, would nevertheless be protected as confidential "when skill and labour have been expended in gathering and compiling it in a useful form, and when the compiler has kept his useful compilation confidential, or has distributed it upon a confidential basis."

Finally, at the risk of piling Ossa on Pelion1 I would refer to Telefund Raisers CC v Isaacs and Others 1998

(1) SA 521 (C) in which Thring J referred to certain of the above authorities. In that matter the applicant described its business as "fundraising". For profit it sold presentation baskets of various kinds to individuals in businesses. It had build up a clientele of about four thousand regular customers. Certain of the respondents who had been employed as salespersons by the applicant left its service taking with them to the fourth respondent copies of so-called client lists which were allegedly the property of the applicant. The applicant applied, inter alia, for an order interdicting respondents from in any way using any of applicant's confidential information. It was argued on behalf of the respondents that the telephone numbers of applicant's customers could easily be ascertained from a telephone directory. In this regard Thring J stated at 532B – D:

"The identity of the applicant's existing actual customers and likely future customers is something known only to the applicant and its employees: that information is commercially valuable to the applicant, and would be equally commercially valuable to a competitor. Its disclosure to such a competitor could normally be expected to be deleterious of the applicant's interests and beneficial to those of the competitor. The competitor would be saved by such disclosure from having to spend time, money and effort searching for and finding potential customers: it would be furnished with what has been called a 'springboard' from which to launch and market its products. It would have a list of identified potential customers. It could canvass the applicant's customers knowing that they were the applicant's customers, and attempt to persuade them to deal with it rather than with the applicant. If it succeeded, it

would benefit thereby, and the applicant would suffer.

At 532 F – G the learned Judge pointed out that the information was not the kind of information which the employee would normally be entitled to carry away with him in his head to a new employer as being "some knowledge of his former employer's customers which would invariably remain in the employee's memory."

I bear the above principles in mind.

Leaving aside for the moment any specific contractual entitlement first respondent may have to his book I am entirely satisfied that no ordinary employee of the applicants would be entitled to the information contained on the Flexilink data base of the applicants

concerning its customers. The information was clearly, in my view, confidential internal business information, which, as appears from Goosen's affidavit, was compiled and administered by second applicant's personnel. The customer data base is neither public property nor does it fall within the public knowledge. It is commercially valuable to applicants and equally so to its competitors. Any competitor coming into possession of it would have a springboard from which to compete against applicants. It was

furthermore not information of the sort which would be carried away in the mind of the employee.

I turn then to consider the issue as to first respondent's relationship with the applicants. It is clear, in my view, despite first respondent's protestations to the contrary, that he was at all times an employee of second applicant.

His attempt to equate his relationship with second applicant to that of Gouws and Roodt is, in my view, devoid of any substance

whatsoever. On the contrary it is clear that their erstwhile relationship with second applicant is in no way comparable to that of the first respondent. In return for a percentage of their premium turn over they were afforded the use of second applicant's

administrative facilities. The contract drawn up for Gouws is headed "Commission Agent Agreement"; refers to Gouws as an "intermediary"; and specifically provides that upon termination thereof Gouws will be "entitled to a hard copy of the schedule of customers" introduced by her to second applicant.

By way of contrast there are, in first respondent's case, a number of material pointers to the fact that he was an employee of second applicant. He was second applicant's insurance manager; he was paid a salary; he had certain benefits associated with an employment relationship; he was subject to second applicant's disciplinary code; and, according to the unsigned contract upon which he relied, he was obliged to give second applicant thirty days written notice in the event of his resignation. It is also clear that he was, during the course of his relationship with second applicant, assessed and evalued as an employee and he himself signed the requisite evaluation form in 2006 as an employee. When he did eventually resign from service with the second applicant he himself gave notice as an employee, "as per conditions of service" (JLG8.1). The

unsigned contract upon which first respondent seeks to place reliance describes him as an employee and second applicant as his employer. Furthermore, the contractual relationship pertaining to him is virtually identical to that which pertained to May. First respondent brushes aside the averments which were made by Mr. Shadiack on his instructions in the letter to May as being mere "legal posturing". This riposte does not, in my view, withstand scrutiny and is nothing more than a transparent attempt to avoid having to lie in a bed which he himself had made.

I am satisfied in all the circumstances that first respondent was indeed an employee of second applicant. As such his employment responsibilities required him to behave as an employee must, namely, to advance his employer's interests and not to undermine his business in any way whilst still employed. Compare too: Phillips v Fieldstone Africa (Pty) Ltd and Another 2004 (3) SA 465 (SCA).

Accordingly, in the absence of any agreement to the contrary, it is clear in my view that first respondent would have had no proprietory

or other right to second applicant's information.

First respondent contends, however, that just such an agreement existed.

I interpose to mention that Mr. Paterson, correctly in my view, did not seek to rely upon the existence of any norm in the insurance

industry whereby an employee in the position of first respondent would be entitled to remove the information as was contended for by him and in terms whereof he was specifically entitled to take with him his book upon leaving second applicant.

Mr. Paterson submitted that there was nothing to gainsay first respondent's averments as to the nature of his relationship

with second applicant from the commencement of his services in 1987 up until 2001 when first respondent made the alterations to the contract and signed it. All that first respondent did in making those alterations, so it was submitted, was to commit to writing the pre-existing agreement in terms of which first respondent provided his services to second applicant as a broker/consultant who was entitled to his book of clients. It was submitted further that support for this proposition was to be found in the evidence of the former general manager, Southey.

The immediate problem with these submissions is that the contract with the alterations unilaterally made thereto by first respondent

was, for whatever reason, never signed on behalf of second applicant. Furthermore, the amendments fly in the face of the specific provision in the contract itself to the effect that any amendments thereto were subject to the approval of the Chief Executive Officer. It is clear that no such approval was ever obtained in writing.

The fact that the other additions to the contract made by first respondent in respect of "commission/fees" and "AA rate per km" have been implemented ever since is, in my view, neither here nor there in the light of first respondent's own averment that those additions reflected a situation which in any event pertained at the time.

I agree with the submission by Mr. Redding that whether or not Southey had an axe to grind with second applicant, in view of his

dismissal, his evidence in fact takes the matter no further. Southey does not state that he saw and approved of the amended contract at any time during his employment with second applicant. At best for first respondent his evidence establishes that he had understood that second applicant would have no hold over any clients who wished to follow first respondent should the latter leave second applicant. His evidence does not establish, in my view, that first respondent had been afforded a contractual right to take with him all information relating to every client sourced and secured by him during the course of his relationship with second applicant.

Even were I to be wrong in my assessment of the import of Southey's evidence, the fact remains that first respondent's conduct, once Southey had left second applicant's employee, belies his alleged belief in the existence of any definite contractual

entitlement to his book. According to first respondent he raised the issue of his book with Goosen during June 2010 because he was now concerned in the light of second applicant's take-over by first applicant, as to whether such entitlement might become an issue. When he received no feedback he raised the issue with Vosloo during February 2011 and again with Goosen on 3 March 2011. In my view the manner in which he raised the matter with them is hardly consistent with the conduct of a man secure in the knowledge of his contractual entitlement to his book. On his version he had signed his contract of employment, including the addendum recording his entitlement thereto. This contract, on his version, was the definitive answer to any dispute as to such entitlement yet, strangely, at no stage did he mention it to Goosen or to any other senior manager of second applicant. Nor did he mention his alleged agreement with Southey.

If he genuinely harboured the belief that he was contractually entitled to his book then his conduct thereafter becomes even more

inexplicable. One would have expected a senior responsible employee in a position such as his, having received no feedback to his queries about his rights to the book, to have taken the matter up formally with management and to have demanded a definitive answer from them. Instead, first respondent proceeded to act in what can only be described as an underhand manner, making surreptitious arrangements for the removal of the information from second applicant's system. It is clear from the emails of Gouws that already in January 2011 arrangements were being made with the knowledge of first respondent for the information to be removed. In particular, the email of 10 March 2011 (MR2) makes it abundantly clear, that as was contended by Goosen, the respondents were taking all necessary measures to ensure that full details of applicants' confidential information pertaining to the customer base were extracted for their purposes and that the steps taken by them to do so were to be concealed from the applicants. In

this regard the averment by Gouws that her statement that all correspondence which had anything to do with the “skuif” should be completely deleted was a reference to the practical aspects of the move is entirely disingenuous. It is quite clear from the context in which that statement was made that it referred to all correspondence which had anything to do with the “split”, such as her email to Marizaan Roodt of 1 February.

First respondent does not deny having met Goosen on 3 March 2011 and having again discussed the issue of his entitlement to his book. He does not deny that Goosen told him that if he wished to pursue the matter he would make the appropriate enquiries and revert to him in that regard. It transpires, however, that on that very day first respondent wrote to Flexilink, on second applicant’s letterhead and in his capacity as second applicant’s insurance manager, instructing Flexilink to transfer the client data base from second applicant to second respondent. This, regrettably, was not the conduct of an honest employee, acting fairly in the best interests of his employer.

Mr. Paterson, however, submitted that the subsequent letter (C13) of 7 March 2011 written by first respondent to Vosloo concerning the “drag” only made sense in the context of there having been some prior discussion between first respondent and Vosloo concerning the split and that it was therefore an indication that first respondent had acted overtly in that regard. In my view, however, Mr. Redding is correct in his submission that this letter in all probability related to first respondent’s personal issues

of commission. It makes no reference to his discussions with Goosen or to any intended split. In any event, in my view, the probabilities

are overwhelmingly against there having been any such prior discussion. It is inconceivable that, had such been the case, Vosloo,

in his capacity as compliance officer, would not have informed senior management thereof.

It is common cause that the 194 forms dated 18 March 2011 must have been prepared well in advance of 18 March whilst first respondent was still in the employ of applicants. In so doing he acted in breach of his fiduciary relationship with the applicants. In this regard first respondent’s reliance upon FAIS and its Code is, in my view, misplaced and an opportunistic attempt by first respondent to justify his actions. It is clear, as was submitted by Mr. Redding, that in terms of the Code it was in fact the applicants who were obliged to take the requisite steps to advise their clients of the change of representative. There is nothing contained in the Code which would authorise first respondent to remove applicants’ client data base.

I should mention for the sake of completeness that, in my view, those cases relating to restraint of trade referred to by Mr. Paterson are not relevant to a matter such as the present.

I am satisfied therefore that the applicants have established on a balance of probabilities that first respondent, by his improper

conduct, appropriated second applicant's information to which he was not entitled for the purpose of providing a springboard in order to compete with second applicant. In this regard he was assisted by second respondent. It is clear also that the information

was of great commercial value to both applicants and to first respondent. In my view therefore applicants are entitled to interdictory relief prohibiting the respondents from benefiting from their unlawful appropriation of applicants' confidential information.

During the course of the hearing Mr. Redding, no doubt appreciating the validity of the trenchant criticism directed by Mr. Paterson at the relief sought by the applicants, indicated that he now sought an interdict in more restricted terms. The amended relief recognises the right of Anthonie Roodt to his clients and removes them from the ambit of the interdict. It also correctly recognises that those clients of the applicants who wish to appoint the respondents as their brokers cannot be interdicted from doing so.

I have given considerable thought to the period of the interdict. In doing so I have had regard to what was stated in Roger Bullivant Ltd and Others v Ellis and Others [1987] Fleet Street Reports 172, namely, that the purpose of the interdict is not to punish the respondents but to protect the applicants and that, whilst the respondents should be denied any advantage from the unlawful springboard they have gained, the court should ensure that the applicants are not over-protected at the expense of legitimate competition.

In my view, in the circumstances of this case, a period of one year would meet the exigencies of the situation and would afford

applicants sufficient opportunity to remedy whatever prejudice they might have suffered in consequence of respondents' actions.

Accordingly the following order will issue:

1. First and second respondents are interdicted and restrained from:

1.1 for a period of one year, directly or indirectly approaching or soliciting any of the members of the applicants' customer base reflected in Annexure "JLG20.1" to "JLG20.7" in respect of any insurance and/or brokerage services.

1.2 in any manner submitting to insurers, or making use of, the change of appointment forms or instruction letters in respect of the applicant's clients compiled by first respondent or compiled at the instance of the respondents.

2. The first and second respondents are ordered:

2.1 to destroy any forms or letters as described in paragraph 1.2 above, in their possession;

2.2 to return to the applicants any information in their possession in connection with the persons reflected in Annexure "JLG20.1"

to "JLG20.7", whether in digital form or hard copy.

3. The first and second respondents are ordered to pay the applicants costs, jointly and severally, the one paying the other to be absolved.

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Applicants: Adv. Redding S.C.

Instructed by Netteltons Attorneys, Mr. Nettelton

Appearing on behalf of Respondents: Adv. Paterson S.C. and Adv. Dugmore

Instructed by Neville Borman & Botha Attorneys: Mr. Powers

1And not Pelion on Ossa as often and incorrectly quoted. See: Virgil: Georgics 1, 281

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