

SOUTH AFRICA / JUDGMENT

Odifin Life (Pty) Ltd v Jacobs and Another (J2015/2016) [2016] ZALCJHB 378 (22 September 2016) [2016] ZALCJHB 378

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamaje

CASE / FILE NUMBER

J2015/2016

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J2015/2016

In the matter between

ODINFIN LIFE (PTY) LTD

Applicant

Registration No: 2013/081137/07

And

MORNE JOHAN JACOBS

First Respondent

INSURCALL FINANCIAL SERVICES CC

Second Respondent

Registration No: 2004/017956/23

Heard: 22 September 2016

Delivered: 4 October 2016

TLHOTLHALEMAJE, J.

- [1] The applicant (Odinfin) seeks final interdictory relief on an urgent basis to enforce certain restraint and confidentiality undertakings given by the first respondent (Jacobs) pursuant to a contract of employment as entered into between the parties. Jacobs opposed the application. The second respondent, whose proper citation is 'Insurcall Financial Services CC t/a Execumed' (Execumed) has not opposed the application and Odinfin has since abandoned any relief against it. Execumed will nevertheless abide by the Court's decision.

Background:

- [2] Odinfin is an authorised financial services provider in terms of the Financial Advisory and Intermediary Services Act[1]. It carries on and conducts the business of selling insurance and other financial products to employees in the public service,

particularly in the education, public health services, and the SAPS. It specifically sells the products of Regent Insurance Company Limited and Regent Life Assurance Company Limited (Regent). It also has about 100 agents (reps/consultants) selling the product throughout the Republic. Odinfin contends that in order to sell its products, its consultants/reps will schedule workshops with government departments, where they would make presentations to civil servants, explaining and comparing different products and assisting them in making choices in acquiring products based on their specific needs.

- [3] Jacobs was employed as a leader of a team of consultants with effect from 4 February 2013. His terms and conditions of employment were recorded in his contract of employment including annexure C thereto (Confidentiality and Secrecy Agreement'), which contains a number of confidentiality and restraint of trade obligations in favour of Odinfin. He resigned from Odinfin on 5 August 2016 and has since joined Execumed, a known competitor of Odinfin.

- [4] Following the exchange of pleadings, at the time that the application was heard, the issues for determination had been narrowed down to the relief sought in prayer 4 of Odinfin's Notice of Motion which was;

'4 That the First Respondent be interdicted and restrained from, during or at any time prior to 05 February 2018 and anywhere in the Republic of South Africa, directly or indirectly, as an interested person or in any other capacity engage in, become financially interested in, be employed by or have any connection with any business or venture in any government sector in South Africa, including the teaching sector, SAPS, medical sector, military that-

4.1 is engaged in any activities competing with products or services offered by the applicant, provided that the first respondent may own securities of any corporation which is engaged in such business and is publicly owned and traded but in an amount not to exceed at any one time one percent of any class of shares or securities of such company, so long as the first respondent has no active role in the publicly owned and traded company as director, employee, consultant or otherwise;

4.2 or is within 18 months of 05 August 2016, a customer of the applicant whatsoever'

- [5] The parties are in agreement that the matter should be treated as urgent. Furthermore, in respect of prayers 2, 3 and 5 of the Notice of Motion, Jacobs has either by way of concessions or undertakings, agreed that for a period of 18 months and throughout South Africa he will not divulge to any outside party any of the secret and confidential information and proprietary interests of Odinfín and that he will not make any use thereof, and that he will not to solicit Odinfín's employees and customers. Execumed has underwritten these undertakings, including not do any business with Odinfín's clients if it would have the effect of the client switching policies.
- [6] Odinfín in return has abandoned the relief it sought under prayers 6, 7 and 8 of its Notice of Motion. These pertained to Jacobs being directly or indirectly as an interested person or in any capacity be engaged in or become financially interested in or be employed by or have any connection with any business or venture which employed or is in any way associated with any individual in whatever capacity who was at any time an employee of Odinfín, and the relief sought against Execumed.

The relevant restraint clause:

- [7] Clause 3 (Competition Restraint) of the Confidentiality and Secrecy Agreement between the parties is a replica of, and forms the basis of the relief that Odinfín seeks as contained in its prayer 4 of the Notice of Motion as already indicated above.
- [8] It is common cause that a restraint of trade existed between the parties, and that Jacobs had joined a competitor. Jacobs however seeks to be absolved from the agreement on the grounds that he had either not read or applied his mind to its provisions at the time that it was signed, or that he was not furnished with a copy thereof. This contention, half-hearted as it was made, is indeed unsustainable. This is so purely on the grounds of the principles of caveat subscriptor. In fact, I find it extraordinary and indeed improbable that a person like Jacobs, whose daily job entailed making clients sign documents would himself not have found the time to read his own contract of employment, let alone insisted on being furnished with a copy thereof.
- [9] A further contention raised by Jacobs in seeking to escape form the provisions of the contract, or in denying that his employment with Execumed is in breach of the restraint of trade agreement pertained to the wording of its clause 3. His contention was that upon a proper interpretation of contractual obligation as expressed in clause 3 of the Confidentiality and Secrecy Agreement, he is not in breach of the restraint obligation in that Execumed is not a business which falls under the government sector. He contends that Execumed was rather a privately owned company which sold financial products to those clients/customers employed in the government sector, and that the clause was unambiguous and did not admit of the interpretation sought by Odinfín.

[10] Ms. De Witt on behalf of Jacobs sought to argue that the plain language of the clause did not reflect the intention of the parties, and that to the extent that Odinfin had asserted that that the clause ought to read that Jacobs was not permitted to take up any employment with any business that is engaged in any activities competing with the products and services it offered in the government sector, it ought to apply for rectification to give effect to its own interpretation of the clause.

[11] It is trite that contractual obligations are determined by the intention of the parties, and further that contractual terms must be understood in context[2]. In *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd*[3], it was further held that;

‘Once a Court is called upon to determine whether an agreement is fatally vague or not, it must have regard to a number of factual and policy considerations. These include the parties' initial desire to have entered into a binding legal relationship; that many contracts (such as sale, lease or partnership) are governed by legally implied terms and do not require much by way of agreement to be binding (cf *Pezzutto v Dreyer and Others* [1992] ZASCA 46; 1992

(3) SA 379 (A); that many agreements contain tacit terms (such as those relating to reasonableness); that language is inherently flexible and should be approached sensibly and fairly; that contracts are not concluded on the supposition that there will be litigation; and that the Court should strive to uphold - and not destroy - bargains.’[4]

[12] In this case, the parties are in agreement that the clause in question is unambiguous, albeit for different reasons. It is however common cause that Odinfin's business of selling its insurance products is mainly concentrated in the public sector, and further that Execumed also operates in that market. To the extent that clause 3 of the Confidentiality and Secrecy Agreement makes reference to Jacobs being prohibited from ‘being employed by or having any connection with any business or venture in any government sector’, it follows that since Execumed operates its business or is involved in ventures being conducted in the government sector, that clause ought to be interpreted within the context of Odinfin's business and its operations as at the time it was entered into. I did not understand Jacobs' case to be that he did not understand the context under which the contract was entered into. There is therefore no merit in the contention that Odinfin's interpretation of that clause cannot be correct insofar as it seeks to prevent Jacobs from being employed by Execumed, as the latter clearly operates within, or has connection with business or ventures in the government sector.

The legal framework pertaining to restraint agreements and evaluation:

[13] In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[5], it was held that a restraint of trade agreement is enforceable unless, and to the extent that it is contrary to public policy

because it imposes an unreasonable restriction on the former employee's freedom to trade or to work. The enquiry into the reasonableness of a restraint is a value judgment that involves a consideration of two policy considerations as illustrated by the Labour Appeal Court in *Trevlyn Ball v Bambalela Bolts (Pty) Ltd and Another*[6] in the following terms:

"... The effect of the Magna Alloys' decision was to place an onus on the party, sought to be restrained, to prove, on a balance of probabilities, that the restraint was unreasonable (See Magna Alloys: Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA) at para 14 at 498E-499). However, because the right of a citizen to freely chose a trade, occupation, or profession, is protected in terms of section 22 of the Constitution and a restraint of trade constitutes a limitation of that right, the onus may well be on the party who seeks to enforce the restraint to prove that it is a reasonable, or justifiable limitation of that right of the party sought to be restrained. (See Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearman 2001 (2) SA 853 (SE) at 862; Canon KwaZulu-Natal (Pty) t/a Canon Office Automation v Booth 2005 (3) SA 205 (N)."

[14] Whether a restraint of trade provision is reasonable or not has to be assessed in accordance with the questions set out in *Basson v Chilwan & Others*[7] and *Reddy v Siemens Telecommunications (Pty) Ltd*[8], viz;

- a) Does the one party have an interest that deserves protection after termination of the agreement?
- b) If so, is that interest threatened by the other party?
- c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
- d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? (i.e., Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests)
- e) whether the restraint goes further than is necessary to protect the interest.

[15] Odinfin seeks a final order. It thus has to show a clear right; the absence of an alternative remedy; and that, if the interdict should not be granted, that it will suffer irreparable harm. In order to establish a clear right, the court has to consider whether there are interests deserving of protection. Once that has been established, the next enquiry would be whether the employee is in a position to threaten those interests. These interests, in line with the dicta in *Basson* must then be weighed up against the interest of the employee to be economically active and productive.

[16] To the extent that there may be disputes of facts as is typical with such cases, it is trite that such disputes should be resolved in accordance with the test enunciated in *Plascon Evans Ltd v Van Riebeeck Paints (Pty) Ltd*[9]. The test, as further explained in *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[10] is that;

“..... where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected”.[11]

Interests deserving of protection?

[17] A restraint of trade will be considered to be unreasonable if it does not protect some legally recognisable interest of the employer, but merely seeks to protect the employer against competition. It is accepted that the interest worthy of protection are of two kinds. The first relates to customer or trade connections, and the second category of protectable interests is in the form of confidential information or trade secrets which, if revealed to a

competitor, would give it a competitive advantage[12].

Customer connections:

[18] This entails an examination of the ex-employees' relationship with the ex-employer's customers, potential customers and others that make up what is compendiously referred to as 'trade connections' of the business, being an important part of its incorporeal property known as goodwill[13].

[19] The need to protect trade connections arises where the ex-employee has had, and/or will continue to have access to the ex-employer's

customers/clients; is in a position to build up a particular relationship with them when he leaves the service of the ex-employer;

and could easily induce them to follow him or her to the new business. Thus once that conclusion is reached and it is demonstrated that the prospective new employer is a competitor of the ex-employer, the risk of harm to the latter if its former employee would take up employment becomes apparent[14].

[20] Thus it is sufficient for the ex-employer to show that those trade connections did exist, and will continue to exist for the ex-employee

to exploit to its disadvantage[15]. It is however insufficient for the ex-employer to merely allege that the ex-employee had contact with customer or clients in the course of his/her employment. This in itself will not amount to a protectable interest. The relationship must be of such a nature that it would influence and induce the customer/client to follow the ex-employee to a new business[16].

[21] To establish whether there is a strong attachment between the customer/client and the ex-employee to such an extent that it can be said 'that when he/she quits and joins a rival he automatically carries the customer with him in his pocket'[17] needs an examination of a variety of factors including but not limited to the frequency and duration of interactions with the clients; the employee's personality; where the contact takes place; the knowledge that the employee gained with regard to the clients' needs and requirements; the general nature of the relationship; the extent to which the customers relied on the employee and how personal their association was; the type of products to be sold and whether there was evidence that the customers were lost after the employee left[18].

[22] Odinfin's contentions in regards to the issue of trade or customer connections are summarised as follows;

22.1 The nature of its business is distinguished from other insurance brokers as it is customer as opposed to product orientated. It sells its products and also resolved to giving its customers peace of mind when they acquire its products. Its business is dependent on the relationship that its consultants build with government departments where customers and potential customers are employed;

22.1 Jacobs had developed and built strong relationships with its customers and their relevant departments during his years of employment. As a consultant, he worked directly with clients, and was entrusted to match a product to the client's specific needs, and therefore stood in a position of trust towards those clients. Those customers and clients had faith in his advice and he could therefore exploit and influence them to switch products as a result of the trust relationship he had built. Accordingly, each customer and government department with whom Jacobs had forged a relationship constituted its proprietary and protectable interest.

[23] Jacobs starting point was that no discernible proprietary interest in either confidential information or in customer connections exists in the industry within which Odinfin and Execumed operated. In this regard, he submitted that;

23.1 The South African long-term insurance industry had essentially two distinct markets, viz, Mass Retail Market (MRM) and the 'affluent market'. The manner of conducting business in each was completely different. The 'affluent market' was serviced by brokers who developed relationships with clients by performing a comprehensive financial needs analysis for the client, and understanding their financial needs as they changed over time;

23.2 The MRM on the other hand focussed on lower income clients, particularly those in the government sector earning between R6 000.00 and R25 000.00, and was serviced by a few hundred independent brokers country wide, who in turn employed thousands of reps. Odinfin and Execumed operated in the MRM. Jacobs denied that brokerage selling in the MRM was client service and/or needs driven, and contended that it was instead sales and target driven;

23.3 Both Odinfin and Execumed had identical selling strategies. Together with other brokerages, they operated on the same basis that involved the appointment of reps who were remunerated on a commission basis. The reps travelled to various parts of the country targeting schools, police stations, clinics etc. to make presentations about their products. Reps from other brokerages who sold a variety of products would call on the presentation site to sell their own products, and he had encountered these reps on sites where such presentations were made.

23.4 In the light of how insurance business in this market was conducted, no financial needs analysis was done in respect of each prospective client, and reps did not get to know what other existing policies the client had, nor did the reps acquire an understanding of the client's financial needs at all.

23.5 Other than the same strategies being employed by all brokers, once clients have signed up for any product and all arrangements in terms of payments (usually by way of stop order facilities), reps rarely revisited the same clients. Thus upon a sale having been concluded, there was no interest in developing relationships with the same clients or employers, especially by Odinfin, which only sold one product/policy;

23.6 It was the exception for a client/employee to have multiple policies from the same brokerage as there was no loyalty to a brand of product or to a particular rep;

23.7 A further difference between Odinfin and Execumed was that the former primarily sold one Regent policy known as 'Cover for Life' whilst the latter sold numerous products/policies on behalf of numerous Life Insurance companies including Regent's, Old Mutual, Sanlam, Liberty, Bright, Discovery and others. Odinfin could therefore not claim to be consumer driven when it only had one product to sell in that once a deal was struck with a particular client, it had no further need for it;

23.8 Jacobs further denied that Odinfin's business was dependent on relationships with the officials in government departments, and contended that the business also entailed cold-calling, and thus there was no need to keep track of contacts in the departments or maintain lasting relationships. To this end, he denied that any customer connections were forged in the Mass Retail Market or that he was in a position to dissuade government officials from allowing other brokerages to have workshops on government sites. He did not maintain communications with government officials once a site had been visited and after a product had been sold;

23.9 He further contended that it was not in his best interest to encourage clients to cancel their policies with Odinfín in that if a client cancelled a policy at any time within 24 months of having acquired the policy, the commission paid by Regents to Odinfín would be 'clawed' back by Regent, and that he in turn would be liable to Odinfín for the upfront commission that he had received on that policy;

23.10 He submitted that it was impossible to switch policies without Odinfín being aware of that switch. Thus whenever a client cancelled a policy for another, a replacement policy advice record form was to be completed and forwarded to the relevant insurance company which would in turn notify the relevant brokerage. To this end, it would be impossible for him or Execumed to breach any undertakings not to switch policies without Odinfín being aware.

[24] Having had regard to pleadings and the submissions made by and on behalf of the parties, and further having had regard to the applicable legal principles as set out somewhere in this judgment including those pertinent to a resolution of factual disputes in such applications, it is my view that there is no basis for a conclusion to be reached that Odinfín has a protectable interest in regards to relationships forged by Jacobs with either government officials or public service employees. My conclusions are based on the following considerations;

24.1 It is accepted that Jacobs in the course of his duties as a rep had over time, developed or forged relationships with government

officials in order to access government employees. This is what in any event was required of the reps in order to achieve any sales in the government sector;

24.2 It is doubted however that the frequency and duration of interactions Jacobs had had with government officials would have had such an impact that he would persuade them to follow him to Execumed or prevent other brokerages from gaining access into government sites. This is so in that Execumed and other brokerages have in any event forged those relationships with government officials in order to access potential clients, and any rep from any of the brokerages can establish some form of relationship with any government official.

24.3 Odinfín's contention that Jacobs was a familiar face to the various government departments is clearly not supported by the facts. Even if this was the case, it is apparent that there are many reps from various brokerages that frequent government buildings and premises with a view of selling their own products. None of these reps representing different brokerages can claim a right to sole access to any government official or site. Jacobs is one of the many of these reps that are granted access to this market, and it is therefore not sufficient to claim proprietary interest to that market, which prima facie appears to be already flooded with different products from various brokerages including Execumed, and still open to further exploitation

by other brokerages. There is no basis for any conclusion to be reached that government officials can be attached to any particular

rep or brokerage or be influenced to the extent that other brokerages are excluded from gaining access to government sites;

24.4 In regards to relationships with clients/employees, I did not understand it to be seriously challenged that Jacobs did not rely on repeat business from the same sites or customers. Furthermore, there was no serious challenge to the contention that at the very least, and in a period of three years, he had only revisited 20% of the sites he had been to before, and even then, to find more clients who could have been recently employed by the state;

24.5 I accept that it is part and parcel of reps' functions to gain knowledge with regard to the clients' needs and requirements, otherwise they would not be in a position to give proper advice to prospective clients. Furthermore, it is indeed expected of the client to trust that the rep will give proper advice and guidance in regards to the products to be sold. If this was not the case, reps would not be able to sell their products. This however given the facts and environment in which the reps operate, did not necessarily make them attached to those clients in that once products have been sold, little purpose would be served in revisiting them in order to sell them further products. As I understand the modus operandi within the MRM, it is more like a one-stop and once off interaction, unless clients on their own call upon the reps after the sale of products for some or other reason related to the product that was sold;

24.6 The general nature of the relationship between the rep and the client despite the long term nature of products being sold is by all accounts brief and once -off. Once its objective has been achieved, not much contact between the parties is maintained, and there can be no talk of any meaningful attachment to a rep or a particular product;

24.7 The fact that Odinfin's business also entailed cold-calling makes any claim to a proprietary interest in respect of clients even more unsustainable. To the extent that such a business method involves solicitation of business from potential clients who have had no prior contact with the salesperson conducting the call, there can clearly be no substance to any contention that a sustained lasting relationships between the rep and the potential client is created. Cold-calling involves an interaction between a seller and prospective client who have had no dealings in the past. It can result in a client being secured or not.

24.8 In its replying affidavit, Odinfin denied that there were similarities between its business strategies and those of the Execumed, and further contended that there was no difference in selling products in the affluent market or the MRM. It insisted that contrary to Jacob's contentions, a needs analysis needed to be done and products were sold in accordance with each client's specific needs and requirements as contemplated in section 8 (1) and

(2) of the General Code of Conduct for Authorised Financial Services Providers and Representatives (as per section 15 of the Financial Advisory and Intermediary Services Act). I did not understand it to be Jacobs' case to contest that the industry operates within the said regulatory framework. It is however not sufficient for Odinfin to contend that its strategies are different to those of Execumed, when it refuses to disclose in what material respects those differences are. Besides, any of these strategies which might allegedly be unique are

dealt with and covered under the confidentiality provisions and undertakings as shall be dealt with shortly.

24.9 A further consideration in this case was that Odinfín had conceded that it only sold one policy, albeit that the policy incorporated different components that were typically sold under different policies by other insurance companies. To the extent that this is the case, and further in the light of a variety of other products which are sold by Execumed, to contend that one has a proprietary interest in such a market when that very same market is open to other products cannot in my view be sustainable. This contention in my view points to nothing but an attempt to stifle competition;

24.10 Certain concessions made by Odinfín further fortifies my conclusions that no basis had been laid for any contention that it has any proprietary interests that deserve protection insofar as any customer trade or connections are concerned. The first is that Jacobs still received commission statements from it with respect to the customers he had contracted whilst in its employ. Significantly though, it was also admitted that Jacobs would be liable for all 'claw-backs' on cancelled or lapsed policies, and that it was impossible to switch policies without it being made aware of the switch;

24.11 Odinfín however sought to downplay the significance of these concessions by alleging that as a salaried employee, Jacobs may not have the financial means to meet his liabilities. It further contended that both Jacobs and Execumed could easily manipulate this process by advising clients not to switch policies, but to simply cancel those acquired through it and take up new policies with Execumed, in which event, it would not be able to ascertain whether the Jacobs had breached his obligations;

24.12 Odinfín's contentions are at best based on mere conjecture and are not supported by any facts. Furthermore, as Jacobs had indicated, it would definitely not be in his financial interests to attempt to persuade clients to change their policies in the light of the financial consequences to him. In my view there is nothing before the court that suggests that the procedures for cancelling and switching policies are not water-tight as contended by Jacobs, and there is nothing to support Odinfín's

contentions that these procedures are easily open to manipulation.

[25] To conclude on this issue then, having had regard to the nature of Odinfín's operations and the environment within which it conducts its business, and further having had regard to nature of Jacobs's contact with government officials and employees who are the primary target of Odinfín's business, I am not satisfied that a case has been made out to establish that Jacobs had during the course of his employ with Odinfín, build up or forged a particular relationship with government employees and officials, to such an extent that it can be said that he had acquired such influence over them, as would enable him, if competition was allowed, to take advantage of those contacts and connections, to the disadvantage of Odinfín. There is no basis for a conclusion to be reached in the light of the facts of this case that Jacobs is in a position to carry government officials and employees with him to

Execumed. The nature of Jacob's relationship with his former clients as described elsewhere in this judgment cannot by all accounts pose a threat to Odinfín's interests.

Confidential information:

- [26] Odinfín's contention was that in carrying out his responsibilities as a consultant, Jacobs had access to confidential information pertaining to technical knowledge and experience, business know how, source codes, data diagrams, database, designs, processes, improvements, research and development, marketing plans, information, data, test results, inventions, trade secrets, techniques, actual and planned business and product strategies. He also had information regarding Odinfín's investments, investors, together with its business, banking and financial activities; information relating to customers, employees and relationships with other parties.
- [27] Odinfín further placed reliance on clause 1 of annexure C of the contract of employment, in terms of which Jacobs acknowledged that by virtue of his employment, he would come into possession of and have access to knowledge and information relating to the business, which were not readily available in the ordinary course of business of a competitor. It was further contended that the contractual terms constituted an unambiguous intimation by Odinfín to Jacobs that the former regarded such knowledge and information as 'confidential information'.
- [28] Odinfín further placed reliance on clause 1.2 of the agreement in terms of which Jacobs had acknowledged that he did not have any knowledge of or access to such information prior to his employment with it. It was further submitted that Jacobs was accordingly entrusted with and had access to such confidential information and knowledge as indicated above.
- [29] Jacobs' response to being in possession of confidential information which he could use for the benefit of Execumed was that he did not have access to any such confidential information, and could not imagine what confidential information Odinfín was referring to. He further submitted that in the three and half years that he was employed by Odinfín, he estimated that he could have sold policies to approximately 2500 – 3000 clients, and had not kept records of any of the clients' personal details
- [30] He further contended that over time, he had developed a stock of knowledge, skills and experience in the public domain, as a salesman of financial products, including in respect of Regent's products. He denied that Odinfín had provided him with skills, knowledge and information, and that the nature of the business was such that there was no need for specific skills and/or knowledge in respect of each different brokerage. He contended that the MRM was uniform across the country as the focus was on selling techniques rather than needs assessment and/or client relationships.
- [31] The training allegedly offered to new reps by Odinfín entailed no more than the new reps shadowing and observing other experienced reps for two weeks, and Odinfín did not at all offer formal training in respect of selling techniques. He further contended that having

come from Outsurance when he joined Odinfín, he was already trained in respect of techniques applicable to selling, and had brought those skills with him to Odinfín. To the extent that Odinfín may have insisted that it had trained him, his view was that such training was not protectable. To this end, he submitted that he could therefore not be prevented by means of enforcement a restraint, from using his own know how and skills as a salesman. He insisted that he was not privy to any confidential information which would be of objective use to Execumed.

- [32] Jacobs' defence however in this regard lost steam once he had acknowledged his contractual and common law obligations to honour all confidentiality undertakings. In the light of this acknowledgement and undertakings, no further purpose would be served in determining whether Odinfín has a protectable interests pertaining to its confidential information or not, and thus prayer 2 of Odinfín's Notice of Motion accordingly ought to be granted.

Conclusions:

- [33] It is accepted that in the light of the undertakings made by Jacobs, the restraint obligations are enforceable. However, insofar as the issue of any proprietary interest worthy of protection in regards to customer or trade connections, it is my conclusion that Odinfín has not been able to demonstrate a clear right in that regard. For the sake of completeness however, it needs to be stated that even if Odinfín had established interests worthy of protection in regards to customer connections, there is nothing before the court that suggests that Jacobs is in a position to prejudice or threaten those interests. In this regard, it is common cause that even though he would be entering the same market as Odinfín, by the very nature of the transactions concluded with the clients and the nature of the relationship between reps and clients as already indicated elsewhere in this judgment, it would not be in Jacobs' interest to persuade those clients to change policies in favour of Execumed.
- [34] I have further no reason to doubt that the undertakings were made by the respondents, (i.e. for a period of 18 months across the Republic, not to solicit the custom of the applicant's customers or to poach the applicant's employees; and confidentiality undertakings), were also made in good faith. Those undertakings in the light of the conclusions reached in this judgment go a long way in ensuring that Odinfín's interests are not prejudiced. I further have no doubt that despite Odinfín's scepticism in regards to these undertakings and other measures that will ensure that its interests are protected, which it might be added is not based on any discernible facts but mere conjecture, those undertakings and measures are and can be policeable.
- [35] Inasmuch as Odinfín is entitled to enforce the restraint of trade agreement, the dictates of public interest demand that Jacobs should equally be entitled to remain economically active. It has been concluded in this case that given the nature of the business that both Odinfín and Execumed operate in, and the different products they offer in that market, it cannot be fair to simply enforce the restraint for the sole purpose of stifling competition. To the extent that an undertaking has been made in regards to confidentiality information, and further in

the light of a variety of factors already alluded to in this judgment, the interests Odinfin seeks to protect are in my view, outweighed both qualitatively and quantitatively by those of Jacobs to be economically active and productive.

- [36] I have further had regard to considerations of law and fairness insofar as each party contended that it was entitled to costs. I remain persuaded by the principles enunciated in *Trevlyn Ball v Bambalela Bolts (Pty) Ltd*[19] to the effect that the enforcement of a restraint invariably involves a constitutional issue. In this regard, the LAC further held;

“Another important aspect which the court a quo clearly did not consider before making the costs order, is the fact that the enforcement of a restraint, technically, involves a constitutional issue. Restraints of the kind being considered, constitute a limitation on a citizen’s right, in terms of section 22 of the Constitution, which, arguably, requires justification (although the procedure employed in Reddy, 25 would suffice in most cases). In constitutional matters, the general rule that costs follow the result, does not apply. In such matters costs orders are generally eschewed out of concern that they may produce a ‘chilling effect’, in that litigants may be deterred from approaching a court to litigate concerning an alleged violation of their Constitutional rights for fear of being penalised with costs if they are unsuccessful. If constitutional matters are raised or defended in good faith and not vexatiously and the issues raised have merit or are important, like the violation of a right guaranteed in the Bill of Rights, and the proceedings that ensued, resolved those issues, the party complaining of the violation, even if unsuccessful, would, generally, not be ordered to pay the costs.

- [37] In this case, I have no reason to doubt that in the light of the undertakings made by the respondents, Odinfin was within its rights to enforce the restraint of trade agreement, and that the claim was raised in good faith and cannot by any measure be construed as vexatious. Inasmuch as costs orders should not be granted against ex-employees in the event that such claims were successful, considerations of law and fairness dictate that the applicant parties, where unsuccessful, should equally not be visited with a cost order.

Order:

- i. The first respondent is interdicted and restrained from divulging to any outside third party, including the second respondent, any of the secret and confidential information and proprietary interest of the applicant and from making any use thereof.
- ii. The first respondent is interdicted and restrained from, during or at any time prior to 5 February 2018 and anywhere in the Republic of South Africa, either himself or as an agent (for gain or otherwise), or as an employee of any other person or entity, persuade, entice, solicit, engage or procure any employee of the applicant to-
 - a) Become employed by or interested in any manner in any business directly or indirectly in competition with the business carried on by the applicant;

- b) Furnish any information or advice acquired by the employee as a result of the employment with the applicant to anyone else which results or is likely to result in any employee of the applicant being solicited or becoming employed by or directly or indirectly interested in any manner in any business entity; and
 - c) Solicit, interfere with or entice or endeavour to entice away from the applicant, any person or entity who is, or which during the period of any past or future employment of the employee was a customer or was accustomed to dealing with the applicant
- iii. The first respondent is interdicted and restrained from, during or at any time prior to 5 February 2018 and anywhere in the Republic of South Africa directly or indirectly, including personally or in any business in which he is interested person of sufficient stature to make hiring decisions, for any purpose or in any place, employ any person employed by the applicant or retained by the applicant as a consultant on 5 August 2016 or during the preceding 12 months
- iv. The first and second respondents will not for a period of 18 months until 5 February 2018, do any business with the applicant's clients which has the effect of switching policies written by or on behalf of the applicant in favour of the second respondent.
- v. Each party is to pay its own costs

Tlhotlhlalemaje J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv. EJJ Nel

Instructed by:

Barnard Inc

For the First Respondent: Adv. C de Witt

Instructed by:

Kirchmanns Inc

[1] Act 37 of 2002

[2] *Licinio Loureiro & others v Imvula Quality Protection (PTY) LTD* [2014] ZACC 4 at para [43] – [44]; See also *De Beer v Keyser and others* 2002 (1) SA 827 (SCA at para [13] where it was held that; ‘An agreement that is expressed in words that are capable of various meanings when they are viewed in isolation is not for that reason alone too vague to be enforced. The proper meaning of words that might at first sight appear to be ambiguous, or ill-defined, or otherwise vague, might often emerge when the words are seen in their context, or against

the background to the transaction, or when they are linked by admissible evidence to the circumstances in which they were intended to apply.'

- [2] Licinio Loureiro & others v Imvula Quality Protection (PTY) LTD [2014] ZACC 4 at para [43] – [44]; See also De Beer v Keyser and others 2002 (1) SA 827 (SCA at para [13] where it was held that;

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- [3] 1997 (2) SA 548 (A

- [4] At 561G-J.

- [5]

- [1984] ZASCA 116; [1984] (4) SA 874 (A) at 891 B-C. See also Sunshine Records (Pty) Ltd v Frohling and Others 1990(4) SA 782 (A) at 794 B-E, where the court in confirming the approach in Magna Alloys held that; "For present purposes the effect of this judgment may be summarised as follows (vide at 893 - 4). In determining whether a restriction on the freedom to trade or to practise a profession is enforceable, a court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations a court will obviously have regard to the circumstances of the case before it. In general, however, it will be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade."

- [5]

- [1984] ZASCA 116; [1984] (4) SA 874 (A) at 891 B-C. See also Sunshine Records (Pty) Ltd v Frohling and Others 1990(4) SA 782 (A) at 794 B-E, where the court in confirming the approach in Magna Alloys held that;

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[6]

[2013] (9) BLLR 843 (LAC) at para [13]

[7]

[1993] ZASCA 61; [1993] (3) SA 742 (A) at 767 G-H

[8]

[2007] (2) SA 486 SCA

[9]

[1984] ZASCA 51; [1984] (3) SA 623 (A) at 643H-635B

[10] 2 [2009]

(3) SA 187 (W) at para 19

[11] See also *Jonsson Workerwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC) at paras 9 – 10

[12] *Sibex Engineering Services (Pty) Ltd v Van Wyk & Another* 1991 (2) SA 482 (T)

[13] *Experian South Africa (Pty) Ltd v Haynes and Another* 013 (1) SA 135 (GSJ) at para [17]

[14] See *Experian* at para [18] and *New Justfun Group (Pty) Ltd v Turner and Others* (J786/14) [2014] ZALCJHB 177 (14 May 2014) at para [12] as referred to in *Vox Telecommunications (Pty) Ltd v Steyn and Another* (2016) 37 ILJ 1255 (LC) at para [33]

[15] *SPP Pumps SA (Pty) Ltd v Stoop & another* (2015) 36 ILJ 1134 (LC) at para

[30] and also *Dev Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D) at para [17]

[16] *Den Braven SA (Pty) Ltd v Pillay & Another* supra; See also *Branco and another t/a Mr Cool v Gale* 1996 (1) SA 163 (E):

[17] *David Crouch Marketing CC v Mark* (J2499/08) [2009] ZALC 63

[18] In reference to *Rawlins & another v Caravantruck (Pty) Ltd* [1992] ZASCA 204; 1993

(1) SA 537 (A) at 241 D -E

[19]

(2013) 34 ILJ 2821 (LAC) at [30]

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Prepared on 11 October 2026 · Esheria