IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D7091/2021

In the matter between:

BRUNIQUEL AND ASSOCIATES (PTY) LTD	Applicant
and	
MANJE GENERAL SUPPLIERS (PTY) LTD	First Respondent
MANJE COMPLIANCE AND CONSULTING (PTY) LTD	Second Respondent
MUVASHAN NAGURAN	Third Respondent

ORDER

(a) The application against the first respondent is dismissed.

(b) The second and third respondents are interdicted and restrained from making use in any way of training material and client lists obtained by the third respondent from the applicant or any of its employees;

(c) The second and third respondents are directed to deliver forthwith to the applicant all training material owned by the applicant, which is in their possession or under their control, as well as all written material (including copies) relating to the applicant's training, course notes, lectures and brochures relating to advertising material;

(d) The second and third respondents are directed to deliver forthwith to the applicant its database and client lists, which is in their possession or under their control, as well as all copies thereof, in hard and electronic format;

(e) The second and third respondents are directed to delete permanently from their computers or other devices any of the information or data referred to above which is thereon in electronic form;

(f) The second and third respondents are ordered to pay the costs of the application.

JUDGMENT

Delivered on: 17 February 2022

Ploos van Amstel J

[1] The applicant in this matter is Bruniquel and Associates (Pty) Ltd. Its business is training and consulting in what it describes as 'Diversity, Transformation, HR, Shop Steward, Leadership, Conflict Resolution and Labour Relations'. In the application before me it seeks orders interdicting the respondents from making use of its confidential information, soliciting business from its clients, making use of its training material and client lists, and so forth. As against the third respondent it also seeks an interdict restraining him from competing with it for a period of one year.

[2] The first and second respondents are Manje General Suppliers (Pty) Ltd and Manje Compliance and Consulting (Pty) Ltd respectively. The third respondent, Muvashan Naguran, is the sole shareholder and director of each of them. He was previously employed by the applicant, and it claims that he uses these companies to compete with it.

[3] The applicant relies on a restraint of trade clause in the employment contract which existed between it and the third respondent, and also on the law relating to unfair competition.

[4] The applicant's principal place of business and head office is in Roodepoort, Gauteng. It has a branch office in Durban, which is where the third respondent was employed.

[5] The applicant and the third respondent entered into a contract of employment on 24 April 2012, in terms of which he was appointed as a senior sales consultant. Clause 16.3 of the contract deals with the restraints of trade. The clause is extensive

and I will refer to its provisions in more detail when it becomes necessary to do so. Suffice it to say at this stage that the third respondent undertook not to use for his own benefit or the benefit of any other person any trade secrets or confidential information; and for a period of one year after ceasing to be employed, not to compete with the applicant, or to solicit or induce others to solicit any clients or customers of the applicant for the purpose of inducing them to cease doing business with the applicant.

[6] The applicant says that on or about 3 August 2021 it became aware that the third respondent, through the first and second respondents, was using its confidential information and client lists for his own personal benefit. The deponent says the third respondent had access to the applicant's training material and confidential information stored on its shared drive, as well as 'hard copy material' in the office. He says the first and second respondents advertised and held themselves out to be training specialists in the fields of sales training, project management, employment equity compliance, harassment GBV, bullying, chairing disciplinary (sic), POPI, diversity, transformation and BBBEE, competed with the applicant and actively sought the business of some of its clients.

[7] The deponent says the third respondent removed all data stored on the applicant's server 'and created under his name which appears to be an external hard drive'. Presumably the allegation is intended to be that he copied the data to an external hard drive. The deponent says this was the applicant's confidential and proprietary information, without any explanation as to what it was. I should add that the third respondent denies that he removed or copied any data for an unlawful purpose, and whatever he copied was to enable him to do his work.

[8] The third respondent was summoned to a disciplinary hearing which was scheduled to take place on 13 August 2021, but he resigned on 12 August and the hearing did not take place.

[9] The first issue relates to the enforceability of the restraint clause.

[10] In terms of clause 16.3.1 the third respondent undertook not to compete with the applicant or any of the companies in the group, while he was employed by it and for a period of one year thereafter, in any business which sells any goods which are

dealt with by the group or which renders any services which are rendered by the group, within the areas of restraint which were specified as 'the Republics of South Africa, Botswana, Namibia and the Kingdom of Swaziland including each magisterial district thereof…within which the employer or companies in the Group conducts business'.

[11] The area of the restraint is extremely wide. The order sought does not limit the area of its operation and merely seeks the third respondent, for a period of one year, to be interdicted and restrained from competing with the applicant in any business which sells any goods which are dealt with by the applicant in the ordinary course of business and/or which renders any services which are rendered by the applicant as at 12 August 2021.

[12] The papers do not make out a case for interdicting the third respondent from competing with the applicant in the whole of South Africa, Botswana, Namibia and the Kingdom of Swaziland. To enforce such an agreement in the circumstances of this case will be against public policy, and for this reason clause 16.3 of the agreement is unenforceable. [1] Counsel for the applicant did not contend otherwise.

[13] The rest of the relief sought concerns the use by the respondents of confidential information in relation to the applicant's business; soliciting the applicant's customers; and using the applicant's written training material and client lists.

[14] The third respondent does not deny in the papers that while he was employed by the applicant he used its client lists and training material in order to compete with it, through the second respondent. He says because of the circumstances pertaining to his employment he had no alternative but to conduct an alternative business to protect his position.[2]

[15] There was no dispute before me that the information contained in the applicant's data base and its client lists is confidential. If the third respondent is in possession of any such material he is obliged to return it to the applicant, and if it is

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[1] *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C) 82H-J

[2] The difficulties described by him relate to the impact of the Covid-19 pandemic on the applicant; its inability to pay its employees their full salaries; the downscaling of work; the inability of the applicant to pay travel and similar expenses; and the consequent inability of its employees to make ends meet and support their families.

in electronic form he must delete it from his computer or other devices. The confidentiality of the applicant's training material was challenged. It was created by the applicant and it stands to reason that it would not want its competitors to be able to use it. The fact that it deals with principles that are in the public domain does not mean that the training material itself is not confidential. The third respondent had no entitlement to the applicant's training material when he left its employ, and he was obliged to return it.

[16] Counsel for the third respondent submitted that the evidence does not show that the third respondent came into possession of the applicant's confidential material in a clandestine or dishonest way while he was employed there. That is beside the point. The question is what he did with it when he resigned. He does not say in his answering affidavit that he returned any of the material to the applicant or that he deleted it from his computer.

[17] Although the applicant's client lists are confidential, the same does not necessarily apply to the identity of its customers. In *Knox D'Arcy*[3] Stegmann J referred to an English case, with approval, in which it was said that there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer. The ex-employee can however lose that right if he had made or copied a list of the employer's customers or deliberately memorised it.[4]

[18] The point needs to be made that if the clause prohibiting competition by the third respondent had been valid, he would have been prohibited from competing with the applicant and soliciting its customers.

[19] Counsel for the third respondent informed me from the bar that the third respondent says he is no longer in possession of any of the applicant's confidential information. He did not say so in his answering affidavit and I am not prepared to accept his say-so from the bar.

[20] Although the third respondent admits that the second respondent carried on business as a training specialist in the areas highlighted by the applicant, he denies that the first respondent did so, and says it was cited incorrectly. In the light of the

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[3] *Knox D'Arcy Ltd and Others v Jamieson and Others* 1992 (3) SA 520 (W) 526
[4] Supra, 527H.

relationship between the three respondents there does not seem to me to be a need for a separate costs order.

[21] By way of summary: the clause in the agreement that prohibited the third respondent from competing with the applicant in the four countries mentioned is unenforceable; the second and third respondents are obliged to return the applicant's confidential information, including its data base, client lists and training material; and there will be no order against the first respondent.

[22] The order is as follows:

(a) The application against the first respondent is dismissed.

(b) The second and third respondents are interdicted and restrained from making use in any way of training material and client lists obtained by the third respondent from the applicant or any of its employees;

(c) The second and third respondents are directed to deliver forthwith to the applicant all training material owned by the applicant, which is in their possession or under their control, as well as all written material (including copies) relating to the applicant's training, course notes, lectures and brochures relating to advertising material;

(d) The second and third respondents are directed to deliver forthwith to the applicant its database and client lists, which is in their possession or under their control, as well as all copies thereof, in hard and electronic format;

(e) The second and third respondents are directed to delete permanently from their computers or other devices any of the information or data referred to above which is thereon in electronic form;

(f) The second and third respondents are ordered to pay the costs of the application.

Ploos van Amstel J

Appearances:

For the Applicant	:	L Dixon
Instructed by	:	Phosa Loots Inc. Attorneys
	:	c/o Macgregor Erasmus Attorneys Inc.
	:	Durban
For the Respondents	:	C Boden
Instructed by	:	Garlicke & Bousfield Inc.
	:	Durban
Date Judgment Reserved	:	15 February 2022
Date of Judgment	:	17 February 2022