Not reportable

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO.: 340/2021

In the matter between:

MONT BLANC FINANCIAL SERVICES (PTY) LTD **Plaintiff**

and

VERONIQUE CAROL REDDY **Defendant**

AND

CASE NO.: 763/2021

MONT BLANC FINANCIAL SERVICES (PTY) LTD **Plaintiff**

and

VERONIQUE CAROL REDDY **Defendant**

JUDGMENT

Goosen J:

[1] These are two cases in which the plaintiff seeks summary judgment against the defendant. The causes of action and the defences pleaded are identical. The plaintiff's claims against the defendant are founded upon a restraint of trade agreement operative between the parties. In case number 340/2021 an amount of R439 885.92 is claimed in respect of pre-estimated contractual damages. These damages relate to an alleged breach of an undertaking not to solicit certain clients of the plaintiff. In case four clients are identified. In the case number 763/2021 an amount of R370 169.28 is claimed. This is in respect of fourteen identified clients. The cases have not been consolidated. The applications of summary judgment were argued as one matter and I shall therefore deal with the applications in a single judgment.

[2] The plaintiff and the defendant entered into an employment agreement on 7 May 2019 in terms of which the defendant was employed as a senior short-term commercial insurance broker. The employment agreement incorporated a restraint of trade clause. Clause 8.1 contains certain definitions to which reference will be made, where relevant hereunder. Clause 8.2 contains the terms of the restraint as follows:

> "8.2 In terms of the broker's employment contract with the Company as an insurance broker, the Broker hereby agrees that he/she shall not: -
>
> 8.2.1 during the Broker's employment with the Company and during the restraint period be interested or engaged, directly or indirectly, in the capacity as an insurance broker, in any competitive activity in the territory.

8.2.2 at any time, whether during the period of the Broker's employment with the Company or at any time thereafter, disclose any confidential information and/or trade secrets other than to entities connected with the Company who are entitled to know such confidential information and trade secrets.

8.2.3 persuade, induce, encourage or procure any employee of the Company to become employed by or interested in any manner whatever within the territory on any competitive activity.

8.2.4 during the period of his/her employment with the Company or during the restraint period entice or solicit or canvas any client of the Company with respect to a competitive activity whether for his/her own business or otherwise.

[3] Clause 8.6 and 8.7 provide for payment of damages in the event of a breach as follows:

"8.6 The Broker acknowledges and accepts that in the event that the restraint of trade is transgressed, the broker will owe the Company a pre-estimation of damages in the amount calculated at 24 (twenty-four) months times the commission and fees earned by the Company in the month preceding the transgression. The broker further acknowledges that this shall apply to each and every transgression and is a fair and reasonable calculation of the harm that will be suffered by the Company.

8.7 The Broker acknowledges and understands that The Tier One Commission is an additional commission and is over and above Tier Two Commission.in the circumstances, the Tier One commission operates as a once-off restraint of trade payment in respect of each client the Broker writes up during his/her employment with the Company."

[4] In terms of the definitions clause "competitive activity" means the business of a short-term insurance broker; the "restraint period" is a period of 24 months from the date of termination of the agreement; and "territory" means the whole of Gauteng.

[5] It is common cause that the defendant terminated the agreement on 2 November 2020. It is also common cause that the defendant is resident in Port Elizabeth (Gqeberha) and is a short-term insurance broker. The plaintiff's cause of action is founded upon the following alleged breaches of the restraint clause:

"5.1 that the defendant was interested in or engaged as a short term insurance entity being Surenet Financial Services Group (Pty) Ltd; and

5.2 that the defendant enticed, solicited or canvassed the plaintiff's clients with respect to the business of a short term insurance broker.

[6] As a result of these alleged breaches plaintiff's clients have cancelled plaintiff's appointment as short-term insurance broker and appointed the defendant alternatively Surenet Financial Service Group (Pty) Ltd. The plaintiff accordingly claims the damages referred to hereinabove.

[7] The defendant initially noted an exception to the plaintiff's particulars of claim. The exception was to the effect that the particulars lacked averments to sustain a cause of action. As a result, the plaintiff amended its particulars in relation to the alleged breaches. In the amended particulars of claim the plaintiff alleged that the enticement of clients occurred during February 2021; that it related to an entity engaged in competitive activity, namely Surenet Financial Services Group (Pty) Ltd which carried on business in Port Elizabeth (Gqeberha); and that the restraint in clause 8.2.4 is not territorially limited. It is unnecessary to set out the further averments which relate to the calculation of the damages allegedly suffered.

[8] In her plea the defendant denies that the identified persons (14 in the one case and 4 in the other) were clients of the plaintiff at a time relevant to her employment with the plaintiff. One of the 14 named clients in case 763/2021 is the defendant. It was accepted by counsel for the plaintiff, during argument, that it could hardly be contended that the defendant breached an obligation not to use confidential information or enticed or solicited herself. She also denies that she solicited or enticed them to terminate their relationship with the plaintiff. In this regard she pleads that several of the identified persons approached her, that she indicated to them the existence of a restraint operative upon her and that they declared in writing that they had not been solicited or enticed. The defendant further pleads that the restraint in clause 8.2.4 is – since it is claimed not to be territorially restricted – over broad and accordingly unenforceable. Her plea contains a further averment, by way of alternative, that she did not solicit the said clients in Gauteng.

[9] In relation to the claimed damages the defendant relies, in her plea, upon the terms of s 3 of **Conventional Penalties Act** of 1968, suggesting that the damages were excessive and ought to be reduced.

[10] Based upon these pleaded defences, it was submitted on behalf of the defendant that a *bona fide* defence has been raised; that the disputes in relation to the facts – i.e. whether or not the defendant "solicited or enticed" persons who were clients of the plaintiff; and the proper interpretation of clause 8.2.4 are triable issues. As such, the application for summary judgment ought to be refused.

[11] The onus to prove a breach of the restraint agreement will rest upon the plaintiff at trial. In this case that will require proof of "solicitation" or "enticement" of each of the clients in respect of whom a breach is alleged. The pleaded defence, namely that the applicant was approached by certain clients and that she did not "solicit" or "entice" these persons, if established at trial, constitutes a sound defence in law.[1] The determination of this factual issue is, quintessentially, a triable issue.

[12] Base on this conclusion, it is unnecessary to consider the interpretation question or the reliance upon the Conventional Penalties Act in detail. The former issue may well require consideration of appropriate contextual or background evidence, notwithstanding that it concerns interpretation of an agreement.

[1] Cf Cargocare Freight Services (Pty) Ltd v Raath (2021/37630) [2021] ZAGPJHC 497 (28 September 2021) par [24] – [26]).

[13] It follows therefore that I am satisfied that the defendant has raised a *bona fide* defence. Accordingly, summary judgment must be refused in both matters.

[14] I make the following order:

1. The applications for summary judgment in Case No. 340/2021 and Case No. 763/2021 are dismissed.
2. The defendant is granted leave to defend in Case No. 340/2021 and 763/2021.
3. The costs of the application for summary judgment shall be costs in the cause in each matter.

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G.G. GOOSEN

JUDGE OF THE HIGH COURT

APPEARANCES:

Obo the Plaintiff:	:	*Adv J M Ramsay*
Instructed by	:	*Van Heerden Attorneys*
Obo the Defendant	:	*Adv Dwayi*
Instructed by	:	*Nicole Oosthuizen Attorneys*
Heard	:	*16 November 2021*
Delivered	:	*7 December 2021*