THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 14772/2015

In the matter between:

CREDIT MATTERS CC **Applicant**

And

THE DEBT EXPERTS **1st Respondent**

GREZELLE JANSEN **2nd Respondent**

ID No: [8…….]

SHANAAZ ABRAHAMS **3rd Respondent**

ID No: [7…….]

NAWAAL HENDRICKS **4th Respondent**

ID No: [8…….]

RUSHAAN ABRAHAMS **5th Respondent**

ID No: [9…….]

NASIPI SAM **6th Respondent**

ID No: [9……..]

SADIQUA SOLOMONS **7th Respondent**

ID No: [7……..]

ILHAAM WILLIAMS **8th Respondent**

ID No: [9…….]

ELISDA MOTOUN **9th Respondent**

ID No: [8…….]

NOMBULELO SAM **10th Respondent**

ID No: [8…….]

KHUMBULA SYLVIA MALGAS **11th Respondent**

ID No: [6……]

Coram: **KOEN AJ**

Heard: 17 March 2016

Delivered: 22 March 2016

JUDGMENT

KOEN AJ

[1] The applicant in this matter seeks to enforce restraint of trade agreements it has concluded with certain former employees. It cited The Debt Experts CC, the present employer of those employees, as the first respondent but seeks no relief against it. Initially, ten former employees were cited as respondents but by the time the matter came to be heard the applicant sought relief only against four of them. These are the third, fourth, fifth and ninth respondents.

[2] The restraint of trade clause in each of the relevant employment agreements reads as follows: *"You hereby undertake that, for a period of two (2) years after you leave the employer* (sic) *of the Company, and anywhere in the region of South Africa, you will not engage, directly or indirectly, in any activity or obtain employment with any firm that competes in any way with the activities pursued by the Company."* Although the agreement refers to the applicant as a company it was accepted by all parties that what was intended was a reference to a close corporation.

[3] In the founding affidavit deposed to on behalf of the applicant by one of its members the activities it pursued were described as the provision of debt counselling services in terms of the National Credit Act 34 of 2005 ("the NCA"). Its services, so the founding affidavit went on to allege, were marketed through a team of sales staff who actively contact and follow-up potential

clients. Its employees received trading and guidance in the sale of the debt counselling service it offered and its sales staff were paid a basic salary and received a commission for sales concluded.

[4] In the founding affidavit the applicant alleges that the first respondent, too, engages in debt counselling services in terms of the NCA and also charges debt counselling fees. Moreover, the founding affidavit describes the first respondent as *"a direct competitor of the Applicant in that it provides debt counselling services in terms of the National Credit Act 34 of 2005."*

[5] The first point taken by the respondents was that it was not lawful for the applicant to conduct business as a debt counsellor. The argument was based upon the provisions of section 44 of the NCA which provides that only natural persons may apply to be registered as a debt counsellor, and that *"a person must not offer or engage in the services of a debt counsellor in terms of this Act, or hold themselves out to the public as being authorised to offer any such service, unless that person is registered as such…"*. Moreover, in terms of section 47 of the NCA, juristic persons may not be registered as debt counsellors. It was not in dispute that the provisions of sections 44 and 47 of the NCA prohibited the applicant from carrying on business as a debt counsellor.

[6] In a marked change of stance, the applicant adopted a different approach in the replying affidavit filed on its behalf. It stated that the debt counselling services it provided are not the same services as those rendered by a debt counsellor. The replying affidavit went on to say that the applicant is engaged through its sales staff in the selling of the product of debt counselling as well as rendering all the services and assistance which goes with it. Later in the replying affidavit, and more coherently, the applicant explains that its function was to provide debt counsellors with administrative assistance in order successfully to place debtors under debt review and monitor payments received from those debtors.

[7] The two different descriptions of the business the applicant conducts are impossible to reconcile. There is no question, in my view, that in its founding affidavit the applicant contended that it was in the business of rendering debt counselling services. Its attempts, in the replying affidavit, to evade the inescapable conclusion that it is unlawful for it to conduct such business are unconvincing. Its own documentation, put up in reply, reinforces the conclusion that it is in the business of debt counselling. Thus, in a form it requires consumers to complete for debt review, under the heading "Debt Counselling Fee Structure" it states that it subscribes to the fee guidelines prescribed by the National Credit Regulator, and explains that it debits to consumers who make application through it an application fee of R50, a restructuring fee of an amount equivalent to the first instalment of a debt rearrangement plan to a maximum amount of R6000, and the monthly so-called "after care" fee. All of the fees exclude Value Added Tax. These are plainly not fees for the "sale" of debt counselling services.

[8] I should add that if I am wrong on this conclusion it helps the applicant not. If its business is not the provision of debt counselling services then the respondents, and their new employer, who do provide debt counselling services, do not compete with it. If this is the case the provisions of the restraint of trade clause do not come into play.

[9] In *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) it was held that the evaluation of the reasonableness of a restraint of trade agreement entails a value judgment. In making this value judgment *Reddy* requires that a Court weigh two contrasting considerations of public policy. These are, firstly, the public interest in holding persons to contracts they have solemnly concluded, and secondly, the public interest which is served by allowing persons to engage freely in competitive economic activity.

[10] *Reddy* explains that *"In applying these two principal considerations, the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a*

corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest."

[11] Can it be said that the applicant's interest in a business it conducts unlawfully is deserving of the protection of a restraint of trade agreement? The answer, in my view, is self-evident. The public interest is not served by the protection of unlawful business activity through the mechanism of restraint of trade agreements. The enforcement of a restraint of trade agreement with this as its object cannot be said to be reasonable. Indeed, the public interest would require that restraint of trade agreements which are intended to protect unlawful business activity should not be enforced. I would regard that proposition to be axiomatic.

[12] It follows, therefore, that on this ground alone the application cannot succeed. However, I propose for the sake of completeness, to deal very briefly with a number of other grounds which militate against granting the application.

[13] The applicant alleges that the respondents have breached the confidentiality clauses contained in their employment agreements and that they have sought to acquire confidential information from current staff members. There is nothing in the papers, which provides a factual basis for this allegation. The confidential information allegedly in issue is not described with any precision by the applicant. There are no affidavits from any staff member to corroborate the allegation that they have been approached by any of the respondents who have sought to acquire information which might be confidential. In *Hirt and Carter (Pty) Ltd v Mansfield and Another* 2008 (3) SA 512 (D) the point was made that information falling into this category should be *"something which is unique and peculiar to the employer and which is not public property or public knowledge, and is more than just trivial"* (at para [57]). The only information which might be considered to be confidential is the list of the applicants existing clients. This information is stored electronically on the applicant's computers to which none of the

respondents have access. If the respondents cannot access the lists they can do no harm. I did not understand this to be the subject of any serious dispute.

[14] An analysis of the positions occupied by the respondents during their employment by the applicant is also instructive. None of them held positions of seniority. The third, fourth, and ninth respondents were appointed as "debt counselling sales consultants". They earned a basic salary of R 2500 per month plus a small commission for every client they garnered. The papers do not indicate them to have any form of close attachment or personal relationship with the financially distressed consumers who approached the applicant for assistance. In fact the papers indicate that any contact between the applicant and a financially embattled consumer was often initiated by way of "cold calling". In my view it cannot be said that the relationships between clients and these respondents were personal to a degree which might militate in favour of the enforcement of a restraint agreement, as adverted to in *Hirt and Ca*rter. Nor is there any indication of *"customer contact"* of the personal kind referred to in *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D being present.

[15] The fifth respondent was employed by the applicant as a temporary data capturer earning R4000 per month. She had no special skills which were imparted to her by the applicant. She states affidavit that she did not build up her own client base within the applicant and that she was given no training by it to be a data capturer. She had acquired these skills herself, through her own labours.

[16] I cannot see that it is reasonable to enforce a restraint of trade agreement against former employees who performed relatively unsophisticated work requiring no special skills, who acquire through their employment no knowledge of the industry in which they are engaged which is not in the public domain, and who are not in a position to occasion any material degree of harm to the applicant. The enforcement of a restraint of trade in these circumstances is nothing other than a purely anti-competitive device of the kind frowned upon by our law.

[17] To turn, finally, to the question of costs. Counsel for the respondents sought to persuade me that an order for costs on the attorney and client scale should be made on account of the applicant's obdurate persistence in this matter, even after the answering papers had been filed. I am not inclined to accede to this request. I am not able to say from the papers why the applicant persisted in the matter, and I would regard it in any event to be unfair to expect of the applicant or its legal representatives to set themselves up as the judge of their own case. The applicant was entitled to make its case and the fact that I have found against it is not in itself a good reason for the award of costs on a punitive scale.

[18] One last matter requires attention. The matter was enrolled for hearing on 16 November 2015 when it was postponed. On that day an order was made that the costs of the postponement stand over for determination at the hearing. The matter did not proceed on that date because the applicant had not complied with the practice directions relating to an early allocation of the matter on account of the volume of the record. There is no reason that whatever costs were wasted on that occasion should not be borne by the applicant.

[19] In the circumstances I make the following order:

> The application is dismissed with costs including the wasted costs occasioned in connection with the aborted hearing on 16 November 2015.

KOEN AJ

APPEARANCES

For the Applicant	:	Mr K Munro
As Instructed by	:	R M Brown Attorneys

For the 3rd, 4th, 5th, 7th & 9th Respondents	:	Mr W Vos
As Instructed by	:	Brits Dreyer Inc