IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Reportable

Case no: J 2013/15

In the matter between:

MEDTRONIC (AFRICA) (PTY) LIMITED **APPLICANT**

and

HUGO HENDRICKS KLEYNHANS **FIRST RESPONDENT**

AMAYEZU ABANTU BIOMEDICAL **SECOND RESPONDENT**

Heard: 26 November 2015

Delivered: 15 December 2015

JUDGMENT

WHITCHER J

Introduction

[1] This is an application for final relief to enforce certain restraint of trade and confidentiality undertakings contained in a contract of employment concluded between the first respondent ("Kleynhans") and the applicant ("Medtronic").

[2] Medtronic seeks, however, to enforce the restraint of trade undertakings to a limited extent: whilst the restraint of trade undertakings prohibit Kleynhans from taking up employment with a direct competitor of Medtronic, Medtronic only seeks to interdict and restrain Kleynhans from, *inter alia*, selling, on behalf of the second respondent ("Amayeza") or any other competitor of Medtronic, any products which compete with Medtronic's Spinal Surgery products at certain hospitals or to certain surgeons. Medtronic also contends that Kleynhans possesses its confidential information.[1]

[3] Medtronic thus seeks to protect its alleged propriety interests in its customer connections and confidential information.

[4] The period of the restraint sought to be enforced is 12 months, calculated from 30 September 2015 [2] and enforcement of the restraint is sought in respect of the Pretoria, Witbank and the Middleburg Region.

[5] Kleynhans contends that the restraint of trade provisions are unreasonable and therefore unenforceable because Medtronic does not have any proprietary interests which are being infringed as a result of his employment with Amayeza and the enforcement will only limit his ability to be economically active and productive.

Background

[6] Medtronic sells medical devices. It has four business groups in South Africa, including the Restorative Therapies Business Group which comprises the Spine and Biologics, Surgical Technologies, Neuromodulation and Neurovascular Divisions.

[7] Kleynhans was employed as a sales representative within Medtronic's Spine and Biologics Division from 1 September 2010 until 30 September 2015, a period of over 5 years. Kleynhans took up employment in October 2015 with Amayeza, a direct competitor of Medtronic in respect of Spine and Biologics products.

[1] A complete list of products, hospitals and surgeons was provided. A confidential information affidavit was also provided.
[2] In October 2015, the parties agreed to an interim restraining order, pending the outcome of this application.

[8] Medtronic promotes and sells its products to surgeons resident at particular hospitals, through its sales representatives, such as Kleynhans. The sales representatives are assigned specific geographical areas. Kleynhans initially serviced hospitals and doctors in the Johannesburg, West Rand and Klerksdorp territory. In or around 2012 he moved territories and was assigned specific hospitals in Pretoria, Witbank and Middleburg.

[9] The medical devices which are sold are very complicated. The role of a Medtronic's sales representative is also to provide information and expertise on the safe and effective use and operation of the products, under the direction of the treating surgeons. Medtronic thus invests a significant amount of time and money in training their sales representatives.

[10] Equally, Medtronic spends significant time and money on educating and training the surgeons on the safe and effective use of the products and the benefits of the products.

[11] Medtronic contended that all this results in the sales representatives developing very strong relationships with the surgeons upon whom they call. These relationships readily result in the surgeons, where there are competing and interchangeable products available, electing (and responsibly so) to use the product promoted by the sales representatives whom they trust and with whom they have worked well in the past. Kleynhans, a successful sales representative, fell in this category.

[12] Kleynhans contended that because Medtronic spends a vast amount of time and money educating and training surgeons, it is Medtronic which has the relationship, (i.e. that it is therefore Medtronic which has the customer connection) and that his relationships with the surgeons he called upon while at Medtronic are secondary or of no consequence at all.

[13] Medtronic replied that this contention disregards the fact that Medtronic, being a juristic person, can only establish customer connections through the people it employs, in this case its sales representatives. While surgeons do attend training sessions organised by Medtronic, these sessions take place three to four times a year. It is however the continuous interface between Medtronic's sales representatives and surgeons which serve to strengthen Medtronic's

customer connections with the surgeons. Sales representatives are in contact with surgeons on a weekly, and sometimes, daily basis. The sales representatives attend the surgeons' training sessions which provides further opportunities for the sales representatives to bolster their relationship with the surgeons.

[14] Kleynhans contended that the primary basis for choosing what medical device to use is the patient's pathology, and that medical aid schemes also influence which products are purchased.

[15] Medtronic replied that in the spinal surgery field the medical schemes' preferred suppliers, of which there are but a few, are generally the hospitals (and not the product itself) and the choice of which product to use is very rarely overridden by the medical scheme particularly where the surgeon has requested a specific product. Moreover, what generally happens is that the medical aid will give the medical device company an opportunity to discount the price to bring it within the medical aid scheme's limit.

[16] Medtronic asserted that its products and those of Amayeza, particularly the spine products, are interchangeable and it does not specifically compete with its competitors on price on these products. Therefore, whether a surgeon uses Medtronic's product is based primarily on that surgeon's belief in the product and the relationship with the sales representative promoting the product.

[17] Kleynhans argued that Medtronic's submission does not take into account differences in product design. Medtronic however stated that changes in product design may only affect the manner in which a procedure is performed, but it is the function and purpose that a particular device fulfils that renders it interchangeable with another. Where two companies both offer a suitable premium product or both offer a suitable low end product, the relationship with the surgeon will be key.

[18] Finally, the issue of Kleynhans' replacement. Medtronic contended that it is difficult for a new sales representative to convince a surgeon to use a product sold by a competitor where that surgeon has an established relationship with another sales representative. Consequently the new sales representative

needs time, at least twelve months, to learn the products and build a relationship of professional trust with the surgeon. During this time it is necessary to restrain the previous sales representative. Kleynhans' challenge to this is that he introduced the new sales representative to the surgeons during August to September 2015 and that she is a highly competent salesperson. Medtronic, however, pointed out that this new sales representative was only employed by Medtronic in July 2015. Comparatively, Kleynhans has been established in the field for five years and three years with his present surgeons.

Analysis

[19] In determining the reasonableness or otherwise of the restraint of trade provision I apply the following test laid down in *Basson v Chilwan and Others.*[3]

[20] Is there an interest of the one party, which is deserving of protection at the termination of the agreement? Is such interest being prejudiced by the other party? If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive? Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

[21] An additional ground was enunciated in *Kwik Kopy (SA) (Pty) Ltd v van Haarlem & Another*,[4] namely whether, between the parties, the restraint goes further than is necessary to protect the interest. In my view, this is a reiteration of the third ground set out in *Basson v Chilwan*.

[22] Our law regards two kinds of proprietary interests worthy of protection by way of restraint of trade: trade secrets and trade connections. I shall consider them in turn.

Trade Secrets

[3] *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767C-H;
[4] 1999 (1) SA 472 (W) at 484E.

[23] Medtronic's argument in support of protecting its confidential information is weak. The secrets it suggests Kleynhans possesses are knowledge of Medtronic's business plan and strategy for the Spine and Biologics Division and knowledge of Medtronic's sales figures.

[24] Kleynhans' answer denies any knowledge of Medtronic's business plans and/or strategy or attending meetings where such was attended. He only had access to his own sales figures; and information contained in sales figures does not include other financial information such as profit margins.

[25] Kleynhans' denials are neither inherently implausible nor are they expressly contested in the pleadings.

[26] Consequently I find that Kleynhans likely possesses none of Medtronic's confidential information. There is thus no protectable interest to be served by a restraint of trade in this regard. In argument, counsel for Medtronic wisely conceded that their case for the enforcement of the restraint rests primarily on Kleynhans' ability to exploit customer connections rather than disclose trade secrets.

Trade Connections

[27] The need of an employer to protect its trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with a customer so that when he leaves the employer's service he could easily induce the customers to follow him to a new business. In *Morris (Herbert) Ltd v Saxelby* [5] it was said that the relationship must be such that the employee acquires such personal knowledge of and influence over the customers of his employer as will enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection.

[28] In *Rawlins & Another v Caravantruck (Pty) Ltd,* [6] Nestadt JA observed

> "Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of

[5] [1916] 1 AC 688 (HL) at 709
[6] *Rawlins & Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541C/D-I

the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left.*"*[7]

[29] In *Den Braven SA (Pty) Ltd v Pillay and Another*,[8] Wallis J remarked:

> "It is not in my view necessary for an applicant in this situation to winnow the wheat of trade connections and customer contact from the chaff of other factors that may influence purchasing decisions. It suffices for the applicant to show that trade connections through customer contact exist and can be exploited by the former employee if employed by a competitor."

[30] The onus is on the respondent to prove the unreasonableness of the restraint.[9] The respondent must establish that he did not acquire significant personal knowledge of or influence over the applicant's customers while in the applicant's employ.[10] It is enough if it is shown that contact with the customer has established a trade connection and that this connection can be exploited were the employee to move to a competitor.[11]

[31] But just how strong does the connection between employee and customer have to be before an employer develops a legitimate interest in protecting such a trade connection when the employee leaves?

[32] Mr Rossouw, for Kleynhans, argued that the connection needs to be irresistibly strong. He submitted that there would always be other factors that influence a surgeon's decision to buy medical equipment, besides a good relationship with a salesperson. These would include factors such as patient pathology and financial considerations. As a result, a salesperson's contact

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[7] at 541D-I
[8] 2008 (6) SA 229 (D) at 240H
[9] *Basson v Chilwan,* supra; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA).
[10] *Rawlins*, supra, at 542F-543A
[11] *Den Braven SA (Pty) Limited v Pillay and another* [2008] All SA 518 (D), at [17] - [18] at 240H-241A.

with a surgeon could never be said, on its own, to be strong enough to pull the surgeon away from a particular business.

[33] I will deal below with the conflicting evidence of how strong a factor pathology and price are in a surgeon's buying decision.

[34] As for testing whether a protectable customer connection has come into being, Mr Rossouw submitted that the *dicta* of Nestadt JA in *Rawlins and Another v Caravantruck (Pty) Ltd*[12] was apposite:

> *"The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business (*Joubert *General Principles of the Law of Contract at 149).* Heydon *The Restraint of Trade Doctrine (1971) at 108, quoting an American case, says that the 'customer contact' doctrine depends on the notion that*
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> > *'the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket'."*

[35] Mr Rossouw argued that Kleynhans' contact with surgeons over the years did not give him the kind of influence over them where he can automatically carry any of them with him *"in his pocket"* when he left Meditronic.

[36] The passage in *Rawlins* with the striking image of a customer being carried away in a departing employee's pocket does not end there, however. In surveying the law, including 'American' law, on the test for customer connection, Nestadt, JA, directly goes on to say:

> "In *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires 'such personal knowledge of and influence over the customers of his employer . . . as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection . . .' This statement has been

[12] 1993 (1) SA 537 (A) at 541D-F

applied in our Courts."

[37] It appears to me that the full passage contains two distinct standards for establishing the right to protect a trade connection. The first is that an employee has established a "particular relationship with the customers so that when he leaves the employer's service he could *easily induce* the customers to follow him to a new business" (emphasis added). The second standard references the 'American' doctrine of customer contact which depends on an employee being able to '*automatically [carry]* the customer with him in his pocket' (emphasis added). The phrases "easily induce" and "automatically carry" set two different standards of establishable influence over a customer; the latter of a greater magnitude than the former.

[38] I think it is safe to say that an employee's capacity to "automatically carry" a customer away from an employer is not part of our law on restraint of trade. This is clear from the full passage in *Rawlins* where Nestadt, JA rounds off the survey of the law on customer connection by referencing *Morris (Herbert) Ltd v Saxelby.* As set out above, this case provides that a customer connection is worthy of protection when an employee has "'such personal knowledge of and influence over the customers of his employer . . . as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection …". It is this that has been taken up into our law, the ability to take advantage and easily induce a customer, not the 'American' requirement that a customer is automatically carried away.

[39] In *casu*, the influence Kleynhans must show he lacks over the surgeons he served is not a total and hypnotic influence. He must show he cannot easily induce at least some of them to follow him to Amayeza, given the nature of the contact he has had over the past three years. In this regard, there may well be surgeons who do not follow him to Amayeza in respect of certain patients with particular pathologies, belonging to particular medical aids. It is enough that some may well be induced to switch to Amayeza, in

circumstances where products are interchangeable and price is similar, on the strength of their trust in and relationship with Kleynhans built up during his three years serving them while he was with Medtronic.

[40] I agree with Medtronic that the danger that Kleynhans will exploit customer connections for the benefit of his new employer is essentially "unpoliceable". Where Medtronic has tried to safeguard itself against the unpoliceable danger of a former employee utilising its customer connections on behalf of a rival concern by obtaining a restraint, the risk that the former employee will do so is one that Medtronic does not have to run. It is also not incumbent upon Medtronic to inquire into the *bona fides* of Kleynhans and demonstrate that he is *mala fides* before being allowed to enforce its contractually agreed right to restrain him.[13] In those circumstances, all that the Medtronic needs to do is to show that there is trade connection Kleynhans *could* exploit should he desire to do so. The very purpose of the restraint agreement is that Medtronic did not wish to have to rely on the *bona fides* or lack thereof on the part of Kleynhans when he left their employ.

[41] In this vein, in *New Justfun Group (Pty) Limited v Turner and Others*,[14] Van Niekerk J enforced the restraint of trade and held with reference to customer connections that "it is sufficient for the applicant to show that the customer contact exists and that they can be exploited by the former employee … It remains ultimately for the respondent to show that he or she … never acquired any significant personal knowledge of, or influence over, the applicant's customers."

[42] Looked at against the backdrop of the law set out above, Kleynhans' submission that Medtronic, a juristic person, is the entity that truly possesses the customer relations in its own right flies in the face of common sense.

[13] *IIR South Africa BV (Incorporated in the Netherlands) ta Institute for International Research v Tarita & Others* 2004 (4) SA 156 (W), at 166H0167C; *International Executive Communications Ltd ta Institute for International Research v Turnley & Another* 1996 (3) SA 1043 (W) at 1055E-1057B; *BHT Water Treatment (Pty) Ltd v Leslie & Another* 1993 (1) SA 47 (W) at 57H-58D; *Turner Morris (Pty) Ltd v Riddell* 1996 (4) SA 397 (ECD) at 409I-410C; *New Justfun Group (Pty) Limited v Turner and Others* (unreported judgment of Van Niekerk J, Labour Court, Johannesburg, case no. J786/14)

[14] Unreported judgment of Van Niekerk J, Labour Court, Johannesburg, case no. J786/14

Medtronic's connection with its customers flows from Kleynhans' continual interface with them. No other person in Medtronic, nor the corporation as an official entity, rivals Kleynhans insofar as the quantity and quality of interaction with surgeons is concerned. Colloquially speaking, Kleynhans was Medtronic's point man in dealing with surgeons in the Pretoria, Witbank, Middleburg corridor and he made out no case to the contrary.

[43] I accept Medtronic's assertions that its products are interchangeable with those of its competitors. It is common cause that Amayeza competes with Medtronic in spinal products. Such competition would, logically, not exist if their products were not substantially interchangeable.

[44] Medtronic, in my view, was correctly dismissive of Kleynhans' untenable attempt to elevate patentable differences to difference in the function of a product or the effective remedy it provides to a patient.

[45] Could price then be the determining factor in a sale? Medtronic says a medical aid seldom overrides a surgeon's recommendation while Kleynhans states that medical aid preference plays a significant role. I cannot see how it can plausibly be denied that the two companies' products are, broadly, similarly priced, albeit in bands ranging from low-end to premium products. Even if their advertised prices are different, Kleynhans specifically did not dispute Medtronic's claim that medical aids offered suppliers the opportunity to discount their wares to meet a rival's price in individual cases.

[46] I am satisfied that where products are interchangeable and price is negotiable, a patient's pathology would not necessarily play a determinative role in a surgeon's selection of spinal product. In these circumstances, a relationship between salesperson and surgeon could play a role in swinging the deal one way or the other. As stated above, a prior connection to a customer does not have to come into play in all buying decisions, only some, for a protectable interest to manifest.

[47] As Wallis, J remarked in *Den Braven,* it is not necessary for Medtronic to

'winnow the wheat of trade connections and customer contact from the chaff of other factors that may influence purchasing decisions'. It appears from Kleynhans' affidavit that he indeed concedes that customer connection could play a role in a choice of medical product, it is only, for him, not the primary consideration.

[48] In my view, it suffices for Medtronic to show that trade connections through Kleynhans' extensive contact with surgeons exists and that, given the interchangeability of spinal products and flexibility in price, these connections could easily be exploited by Kleynhans if employed by a competitor.[15]

[49] I therefore find that Medtronic possesses a protectable interest over its customer connections in this case.

[50] In addressing whether Kleynhans is prejudicing Medtronic's trade connections, Kleynhans bears the onus to show that his continued involvement in Amayeza will not infringe these. He has not done so.

[51] It is common cause that the products sold by Amayeza and Medtronic are competitive and thus interchangeable products. It is Kleynhans' intention to sell Amayeza's products in direct competition with Medtronic in the same area in which he was employed by Medtronic to the same surgeons at the same hospitals. Medtronic has simply to show that it has an objectively reasonable apprehension of harm, which I find that it does.

[52] The next question in terms of *Basson v Chilwan* is whether Medtronic's interest so weighs up qualitatively and quantitatively against the interest of Kleynhans that the latter should not be economically inactive and unproductive?

[53] Bearing the onus in this regard, Kleynhans adduced no evidence to show that enforcement of the restraint is disproportionate having regard to any of

[15] *Den Braven* (supra)

his countervailing interests. Kleynhans resigned from Medtronic of his own accord. Medtronic does not seek to prohibit Kleynhans from taking up employment with Amayeza or even selling spinal products to surgeons in the rest of South Africa, outside the Pretoria, Witbank and Middleburg area. In the circumstances, Kleynhans remains free to earn a living by using his skills and expertise in the industry. The restraint itself will not last forever. It is in place for 12 months, a period which does not appear excessive given the steps Medtronic needs to take to protect its legitimate interests: that is, permit a replacement salesperson establish the same relationships with surgeons upon which its sales strategy partly relies.

[54] Kleynhans has not shown why he must target and deal with Medtronic's customers rather than finding his own.

[55] There are no other public policy issues that militate against enforcing the restraint. Absent oppressive behaviour by Medtronic in obtaining Kleynhans' consent to the restraint of trade agreement, which was not shown, the importance of parties being held to their agreements favours the restraint being enforced.

[56] In conclusion, I find that the restraint sought is reasonable. Medtronic is, therefore, entitled to the final relief sought. Medtronic seeks costs, including the costs of two counsel. The issue of costs is difficult. On the one hand, Kleynhans is an individual, the applicant is a major corporation and there is no evidence to suggest Kleynhans defended these proceedings out of ill-will or malice. On the other hand, prior to litigation, Medtronic proposed a compromise similar to the relief sought in this application. Kleynhans rejected the proposal. Therefore in the circumstances, the applicant deserves costs, but not the costs of two counsel.

Order

1. The first respondent is interdicted and restrained from selling, on behalf of the second respondent or any other competitor of the applicant, any products which compete with the applicant's Spinal and Surgery products, that is the

products listed in the notice of motion, at the hospitals listed in the notice of motion or to the surgeons listed in the notice of motion. The period of restraint is twelve (12) months, calculated from 30 September 2015. The enforcement shall apply in respect of the Pretoria, Witbank and the Middelburg Region.

2. The first respondent is ordered to pay the costs, which includes the costs of one counsel.

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Benita Whitcher

Judge of the Labour Court

APPEARANCES:

For the applicant: C Whitcutt SC and Claire de Witt instructed by Fasken Martineau (incorporated in South Africa as Bell Dewar Inc)

For the first respondent: P Rossouw SC instructed by Pieter Ferreira Attorneys