REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1636/15

In the matter between:

ORTHOCRAFT (PTY) LTD **Applicant**

t/a Advanced Hair Studios

and

ANNE MUSINDO **First Respondent**

BREMAG TRADING INTERNATIONAL **Second Respondent**

T/A HAIR UNIVERSAL STUDIOS

Heard: 12 January 2016
Delivered: 14 January 2016
Summary: Orders for contempt of court. Respondents breaching restraint.

JUDGMENT

STEENKAMP J

Introduction

[1] The respondents have breached a restraint of trade order made by this Court (Brassey AJ) on 17 September 2015. The question before me is whether it was wilful; whether either or both of the respondents should be held in contempt of court; and if so, what the appropriate sanction should be.

Background facts

[2] The applicant (Orthocraft, trading as Advanced Hair Studios) and the second respondent (Bremag Trading International, trading as Hair Universal Studios) both operate in the hair extension business. The first respondent, Ms Anne Musindo, worked for the applicant as a hair stylist in its Sandton studio. She resigned in July 2015, ostensibly to look after her husband full time after he had been in a car accident. She was bound by an agreement in restraint of trade. So were two other employees, Richard Duffin and Tallulah Davies.

[3] The applicant brought an application in August 2015 to enforce the restraint against Duffin, Davies and Hair Universal Studios. Those respondents, represented by McLarens attorneys, initially opposed the application. On 27 August 2015 Hair Universal Studios withdrew its opposition and gave notice of its intention to abide the decision of the Court. On 26 August 2015 the applicant brought a further application to join Musindo to the proceedings. It was granted by Brassey AJ on 3 September 2015, together with an order enforcing the restraint against Davies and Duffin.

[4] On 4 September 2015 the applicant's attorneys, Fasken Martineau, sent a letter to Musindo and to Hair Universal Studios informing them about the first court order. They explained to Musindo that she had until 10 September to give an undertaking that she would cease her employment with the second respondent and be bound by the same terms of the restraint imposed by the first court order. Failing that, they would re-enrol the matter on 17 September 2015.

[5] On 7 September 2015 Mr Warren Sundstrom of McLarens attorneys sent an email to the applicant's attorneys in these terms:

> "We have been contacted by Anne Musindo and advised that you attempted serving documents at her house earlier today.
>
> Please send me a copy of the papers so that we can take instructions on the matter."

[6] The applicant's attorney, Ludwig Frahm-Arp, did so. Musindo did not provide any undertaking, nor did McLarens attorneys. The applicant's attorneys re-enrolled the matter for hearing on 17 September. On 10 September Frahm-Arp wrote to Sundstrom by email:

> "Have you been able to take instructions from Ms Musindo? Is she willing to give us the undertaking or is she opposing the application? I assume she is not opposing the application as we had asked her to deliver her opposing papers by 12h00 today and we have received nothing."

[7] Sundstrom did not respond. Musindo attended the hearing on 17 September. She told the Court (Brassey AJ) that she was willing to be restrained for three months while looking after her husband. She says that it was also at the hearing that a more restrictive radius of 50 km was proposed, although she cannot recall who proposed it. Brassey AJ stood the matter down for the parties to try and reach an agreement. Before they could do so, she left. The court reconvened. Brassey AJ handed down an order interdicting Musindo from remaining in the employ of the second respondent (or another competitor in a 50km radius) until 30 April 2016. The order was stamped by the Registrar on 23 September 2015.

[8] On 28 September the applicant's attorneys instructed a courier service to deliver a copy of the court order of 23 September (the second order) to Musindo at her place of residence and at her place of employment, i.e. the second respondent's premises. When an employee of the courier company, Musa Mutebi, tried to serve it at the second respondent's premises, he was told – he does not say by whom – that she no longer worked there. And when he went to her home, he was met by her sister, Chenai Cheremba, who told him that Musindo had gone to Zimbabwe.

Cheremba nevertheless accepted service on Musindo's behalf. It is common cause that Musindo received a copy of the order from her sister.

[9] During November some of the applicant's customers informed it that Musindo was still working for the second respondent. Andrew Rimmer, the applicant's financial controller, instructed one of its employees, Clayton Duval, to make an appointment with Musindo at Hair Universal Studios. When he phoned to make an appointment, the receptionist told him that Musindo did not work there.

[10] The applicant then asked a security company to ascertain whether Musindo was working at Universal Hair. An employee of the company, Doric Holmes, scheduled a haircut and laser hair therapy appointment with the second respondent on 18 December. He filmed Musindo working at the premises.

[11] The applicant brought this application on 22 December 2015. Molahlehi J granted a rule *nisi* on 24 December calling upon Musindo and a representative of the second respondent to appear on 5 January 2016 to show cause why they should not be held in contempt. On that day, Van Niekerk J postponed the return day to 12 January 2016 to enable the applicant to deliver a supplementary affidavit, as the respondents alleged that the applicant had not proved service of the court orders of 23 September and 24 November 2015.

[12] The applicant's attorneys delivered a supplementary affidavit showing that their candidate attorney, Magdalena Birkholtz, personally served the order of 24 December and the contempt application on Musindo at her place of residence on 28 December 2015. Her colleague, Farica de Bruyn, took a video recording of the events. Musinda signed receipt of the documents. She denied that she was working for second respondent.

[13] On 30 December 2015 the second respondent's manager, Macleod Burrill – who signed his email with the suffix "LL B – Bachelor of Laws, University of the Witwatersrand, Manager and Consultant at Universal Hair Studios – wrote to applicant's attorneys. He acknowledged that the contempt application had been served on it on 29 December. He stated:

> "Please note that Anne Musindo is not with us and as far as we are aware she is out of Johannesburg until the new year. Please also note that I as the Manager of Hair Universal Studios am currently recovering from medical issues which I experienced in December 2015 and have been advised by my doctor not to leave home and to just rest. We have also sought legal advice and counsel which is only available during the course of next week, 4th of January 2016, and as such we are unable to seek legal counsel and advice and properly respond to your application by the 5th January 2016.
>
> Under the circumstances please would you agree to the matter being postponed for two weeks to the 19th of January 2016 to allow us to properly respond to your application and to seek legal counsel."

[14] The applicant did not agree to a postponement. Nor did the respondents apply for one. Remarkably, though, the issue of service was raised by the respondents at the hearing of 5 January, and it remained for the applicant to disclose the acknowledgement by both respondents that the rule nisi had been served upon them on 28 and 29 December respectively.

[15] Musindo only delivered an explanatory affidavit on 8 January 2016. In that affidavit she admitted for the first time that she had breached the court order. She also admitted that she had received a copy of the 23 September court order from her sister after the applicant's attorneys had served it on her sister on 28 September.

[16] At the hearing of this application on 12 January 2016 both respondents were represented by a new attorney, Mr Dave Morgan.

Evaluation / Analysis

[17] The requirements for an order to be granted in civil contempt proceedings were eloquently summarised by Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd:*[1]

> "To sum up:
>
> (a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional

[1] 2006 (4) SA 326 (SCA) para 42.

scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

(d) But, once the applicant had proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof of a balance of probabilities."

The order and service

[18] It is common cause that Brassey AJ granted an order on 17 September 2015 (stamped on 23 September) and that the respondents have breached it. Despite their initial denial, it is clear that both that order and the rule nisi granted by Molahlehi J on 24 December were served on both respondents.

Wilfulness and mala fides

[19] In order to establish whether the applicant – on which the onus rests – has established wilfulness and *mala fides* beyond a reasonable doubt, it is convenient to deal first with the first respondent, Ms Musindo.

[20] The high water mark of her explanation is that, when she received a copy of the court order, from her sister, she "noted that the document was related to the restraint of trade but did not read the documents fully".

[21] She admits that she breached the order. She somewhat obliquely states that English is not her first language; what she does not say, is that she is

not fluent in English. Indeed, one only needs to read her letter of resignation to see that Ms Musindo – a Zimbabwean citizen – writes English fluently.

[22] Ms Musindo offers no reasonable explanation why she "did not read" the order fully. She was at court when the matter was argued on 17 September. She knew exactly what it was about, and when she received a copy of the order, she realised that it was "related to the restraint of trade". She had contacted her then attorney, Mr Sundstrom, on that day. She does not explain why she did not seek legal advice again, if necessary, when she received a copy of the order.

[23] It is clear beyond a reasonable doubt that Ms Musindo breached the order wilfully and with *mala fides* in the full knowledge that she was in breach, not only of the order, but also of the restraint to which the applicant's attorneys had alerted her before launching the application.

[24] The same applies to the second respondent. It did not deliver any opposing papers, although it was represented at the hearing by Mr *Morgan*. Its then attorney, Mr Sundstrom, was well aware of the terms of the court order. It was also aware of the first order granted on 7 September. Yet it continued, wilfully and *mala fide*, to employ Musindo (and continued to deny it despite Musindo's admission).

[25] The respondents have not discharged the evidential burden to cast reasonable doubt as to whether their non-compliance was wilful and *mala fide*. Musindo's explanation is woefully inadequate and unpersuasive. The second respondent has put up no explanation at all.

Conclusion

[26] It is clear beyond a reasonable doubt that both of the respondents have breached the court order of 23 September 2015. They did so wilfully and are in contempt of court. The question remains what sanction to impose.

[27] The primary aim of contempt proceedings is to ensure compliance and not to punish.[2] Ms Musindo has given an undertaking not to breach the order

[2] *Fakie NO v CCII (supra)* para 7.

again. But the fact that both respondents have already breached the order cannot be swept under the carpet. In my view, in order to make sure that they do not do so again, a suspended sentence will be appropriate.

[28] Ms *Jean-Pierre*, for the applicant, asked that Ms Musindo be directly imprisoned until 30 April 2016, the date that the restraint of trade enforced by the court order of Brassey AJ expires. That is too drastic a step. Firstly, I consider a period of imprisonment of 30 days a sufficient deterrent; and secondly, a suspended sentence operative until that date, i.e. 30 April 2016, should have the desired effect to ensure strict compliance.

[29] Similar considerations apply to the second respondent. Mr *Morgan* argued that no order should be made against it as the applicant did not allege that personal service of the court order was effected on a natural person responsible for its implementation. I disagree with that formalistic approach. It is common cause that the second respondent was aware of the order. Its then attorneys – who have not delivered a notice of withdrawal of representation – initially opposed the application to enforce the restraint of trade against two other employees, Richard Duffin and Talullah Davies. Ms Musindo was joined to that application. Mr Warren Sundstrom of McLarens attorneys contacted the applicant's attorney, Ludwig Frahm-Arp of Fasken Martineau, on 7 September 2015 on Ms Musindo's instructions. He knew that she had been joined to the application on 3 September 2015. And after the hearing on 17 September 2015 Mr Frahm-Arp informed Mr Sundstrom of the order granted against both respondents.

[30] Ms Musindo earned just over R10 000 per month according to her contract of employment attached to the founding affidavit. She appears to have worked for the second applicant over the period of November and December 2015, although the exact time period is not clear. I consider it appropriate for the second respondent to pay a fine of R20 000 – roughly equivalent to two months' remuneration for Ms Musindo, whose services it used in breach of the court order. But, as in her case, suspending it until 30 April 2016 should have the desired effect.

[31] With regard to costs, I am enjoined by s 162 of the Labour Relations Act[3] to take into account the requirements of law and fairness.

[32] As to the first requirement, costs should follow the result. Both respondents have blatantly disregarded an order of this Court. That necessitated the applicant to institute these contempt proceedings. The respondents must pay those costs.

[33] With regard to fairness, Mr *Morgan* submitted an argument *ad misericordiam* that Ms Musindo is a sole breadwinner who has to look after her husband who was involved in a motor vehicle accident. Indeed, that was the reason she offered when she resigned from the applicant in July 2015. She said:

> "Unfortunately due to unforeseen circumstance changing with my husband's condition, I have no choice but to commit full time to my husband's rehabilitation as he will be undergoing brain surgery in the next few weeks which will require me to be at the hospital on a daily basis."

[34] Far from committing full time to her husband's rehabilitation, Ms Musindo took up employment with the second respondent in breach of the court order. She also dishonestly denied breaching the court order, only to admit it subsequently in her explanatory affidavit. There is no reason in fairness why she should not be held liable for costs, together with the second respondent, although I will stop short of ordering the punitive costs for which Ms *Jean-Pierre* asked.

Order

[35] I therefore make the following order:

35.1 The respondents are in contempt of the order of this Court of 23 September 2015.

35.2 The first respondent, Anne Musindo, is incarcerated for a period of 30 days.

35.3 The second respondent is ordered to pay a fine of R30 000, 00.

[3] Act 66 of 1995.

35.4 The orders in 35.2 and 35.3 are suspended until 30 April 2016, provided the respondents are not found to be in contempt of court again.

35.5 The respondents are ordered to pay the costs of this application, including the costs of the appearance on 5 January 2016, jointly and severally, the one paying, the other to be absolved.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Lameeze Jeanne-Pierre of Fasken Martineau .
RESPONDENTS:	Dave Morgan (attorney).