THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other Judges

Case no: J967/16

In the matter between:

WESPOINT TRADING 91 CC t/a SkinPhd **Applicant**

and

ANNELIZE CAROLYNN SMIT **Respondent**

Heard: **01 June 2016**

Delivered: **09 June 2016**

Summary: An urgent application in terms of which the former employer seeks to interdict and restraint a former employee as provided for in the employment contract between the employer and the employee. Whether customer connection is a protectable interest? Whether the respondent breached the restraint or not? Held: (1) the matter is urgent. (2) The customer connection is a protectable interest. (3) The respondent has breached the restraint. The application granted with no order as to costs.

JUDGMENT

MOSHOANA, AJ

Introduction

[1] This is an urgent application in terms of which the applicants sought that the respondent be interdicted from working in conflict with and as contemplated in clause 9 of the Employment Contract. In essence, the applicants seek to enforce a restraint of trade clause. The application is opposed. Initially, the applicants sought a *rule nisi*. However, when the matter was heard, all the relevant papers had been filed. In the light of that, it would be a sheer waste of time and resources to issue a *rule nisi* as opposed to a final relief. In argument, I got a sense that given the opposition, the applicant was seeking a final relief as opposed to a *rule nisi*. Accordingly, the order to be issued herein would be of a final nature.

Background facts

[2] For a period of about seven years, the respondent was employed as a somatologist.[1] The respondent was so employed at Mall@Reds Shopping Centre, Shop 40A corner of Hendrik Verwoerd and Rooihuiskraal Drive Centurion. During the seven years of employment, there was no written contract of employment. On or about 4 March 2016, a written contract of employment was entered into. For the purposes of this judgment, the relevant clause is clause 9.[2] During her employment, the respondent like all other employees, had access to the employer's database, which contained detailed information about all the clients of the employer.

[1] Somatology is the physiological and anatomical study of the body. A somatologist does specialised massage such as reflexology, aromatherapy, manual lymph drainage and Swedish massage.

[2] 9.1 The employee undertakes that he/she shall not during this agreement and for a period of 6 (six) months after the termination of the agreement within *a five km radius from any Outlet where he/she has rendered services to the employer* in the preceding 12 months where the employer is trading in, solely or jointly, or as employer, employee, manager, or agent for any person, firm or body corporate directly or indirectly carry on, or assist financially, or otherwise be engaged or engaged or concerned or have interest in the following:

9.1.1 Use, operates or allow to operate a similar machine to the machine used by the employer.

9.1.2 Use the same business concept as the employer.

9.1.3 Contact*, approach or recruit the clients of the employer directly or indirectly, for any kind of health or skincare treatments whatsoever*.

[3] On or about 31 March 2016, the respondent tendered her resignation.[3] She was asked to take a paid leave from 6 April 2016 until 30 April 2016. During her leave, an interview, recorded in Afrikaans was held with her. Therein, she undertook as agreed in the employment contract to not approach the employer's customers for her own business purposes as it was made known when she resigned that she is going to open her own salon. It is apparent that the respondent opened a business named Danne Skin and Beauty Clinic at 90 Willem Botha Avenue, Wierda Park.[4] The respondent's facebook account was accessed. It revealed that she had formed ties with almost 50 of the employer's regular customers. The respondent testified that those were her personal friends. The applicants provided facebook communication wherein one Lindi Edwards, a customer of the employer, enquired where the respondent's salon is situated.

[4] The respondent posted on her facebook wall that she is now working on her own.[5] Various customers of the employer commented on the posting. Others were asking information about the location and the price list. The employer, after observing all of these, formed a view that the respondent was in breach of clause 9. As a result, on 4 April 2016, a letter was dispatched from the employer's attorneys. In the said letter, it was mentioned that the respondent is in breach of clause 9.1.3 of the agreement. She was advised that should she continue, a court shall be approached for a relief. On 25 April 2016, an email communication was sent to the respondent, where she was informed that she is using the employer's name to market her business. The respondent admitted this and actually apologised for the inconvenience caused.[6] In May 2016, there was communication between the respondent and one Yolandi Maritz, a customer of the employer. Amongst other things, the

[3] The resignation letter written in Afrikaans simply tendered a resignation as a somatologist at Mall@Reds where she served for a period of 8 years.
[4] In one of the pamphlets CMM8 it is stated 'beauty *is not in the face, beauty is a light in the heart'.*
[5] Annexure CMM11 and the comments by the friends.
[6] Annexure CMM13 'Jammer vir enige ongerief wat di nou veroorsaak'

respondent provided Yolandi with a pricelist and address where her business was located.

[5] On 26 May 2016, the applicants launched the present application. Lagrange, J postponed the matter and directed the parties to exchange affidavits within a specified time period. When the matter came before me, all the relevant and additional affidavits were filed.

It is common cause that the business of the respondent is located within the five kilometers radius. In terms of clause 9.1, the respondent undertook not to operate within the five kilometers radius. In the light thereof, the applicants launched this application.

Evaluation

The issue of urgency

[6] One of the defences raised by the respondent was that the matter lacks urgency. In its founding papers, the applicants' deponent alleged that she became aware of the possible breach of the restraint when she saw a posting on the facebook wall. Few days after the observation, a letter of demand was issued seeking an undertaking not to breach the restraint. At that time, the respondent was still in the employ of the applicants. Her last day of service was the 30 April 2016. Clearly, until after 30 April 2016, there was no serious risk that would have necessitated the applicants to approach this court. During the second week of May 2016, the applicants realised the impact of the respondent's conduct to the viability of the business. Steps were taken to seek legal advice. The chosen legal advisor was unavailable to assist the applicants. Subsequently, court papers were drafted. On 26 May 2016, the parties were in court. The matter was postponed and a timetable was agreed upon to have the matter fully ventilated in court. The respondent accepts that the applicants were entitled to approach this court once they became aware of her contravention on 31 March 2016. Her only objection is that

the applicants waited for two months before launching the application.[7] On the facts of this case, the applicant did not sit back and only caught a wakeup call two months later as suggested by the respondent. They wisely considered other options that could have averted litigation and saved costs.

[7] I must state that hearing a matter on an urgent basis is a matter of discretion. Practice has shown that applications of this nature are ordinarily brought on an urgent basis for a simple reason that the restraints do not live longer. *In casu*, the restraint is only valid for six months. If a normal application was brought by the time the matter is heard, the restraint would have expired and mootness may be raised as a point. Besides, Whittington addressed the issue of urgency at the end when the entire merits were argued. I would have expected him to raise it before I hear any argument on the merits. Accordingly, I rule that the matter is urgent and shall be dealt with by way of an order that shall follow below.

Is the second applicant within the five kilometres radius?

[6] The respondent in her affidavit took issue with the *locus standi* of the first applicant. She contended that the employment contract was between herself and the second applicant. An attempt was made to have the contract rectified in order to reflect the first respondent as a party to the contract sought to be enforced. During argument, Geldenhuys, for the applicants, rightly conceded that the agreement is between the respondent and the second applicant; therefore, the second applicant has a right to enforce the agreement. That concession rendered the rectification relief nugatory. In turn, Whittington for the respondent sought to argue that since the second applicant is the one enforcing the contract, the five kilometer clause does not apply because in the founding papers, it cited its address as being in Cape Town.[8] I must say that I found this argument to be opportunistic at the very least.

[7] Page 224-225 paragraph 6.31.
[8] Business Centre, No 1 Bridgeway Road, Bridgeway Precinct, Cape Town, Western Cape.

[7] By the respondent's own admission, she worked for the second applicant at Mall@Reds[9]. In any event the five kilometers is reckoned from any outlet where she rendered services. She rendered services at Mall@Reds. Mall@Reds is within the five kilometers radius. To my mind, the fact that the address mentioned in the papers is in Cape Town is of no consequence. Of consequence is the fact that the second applicant had an outlet at Mall@Reds where the respondent plied her trade as a somatologist. Having plied her trade there, arising from an employment relationship, she opened a salon at Wierda Park. Also it is clear that there is a relationship between the first and second applicant, which relationship, the respondent knew well. Accordingly, I am of a view that the business of the respondent was within the five kilometers radius within the contemplation of clause 9.1 of the employment contract.

Does the second applicant have proprietary rights worthy of protection?

[8] Nowhere in the answering papers does the respondent question the applicants' proprietary rights. In argument, Whittington submitted that nowhere in the founding papers do the applicants set out proprietary rights. In *Marion White Ltd v Francis*,[10] the Court of Appeal had the following to say:

> 'It is accepted by the plaintiff company that the burden rests on them to establish that this covenant is one which is reasonable in the interest of the parties and reasonable in the public interest, and that it is for the protection of some interest of the plaintiff company's in respect of which the plaintiff company is entitled to protection. It is obvious that in an establishment such as ladies' hairdresser's establishment the assistants who actually deal with the customers, who dress their hair, wash their hair, and do whatever else they do for the customers, provide an important part of personal contact between those engaged in the business and the customers of the business. That constitutes an

[9] Page 215 paragraph 6.13 she testified that at the time of opening the salon I was not aware of the fact that I was within 5 kilometre radius stipulated in the restraint undertakings. At page 205 paragraph 3.2 she testified that I resigned from the employ of the first applicant. When regard is had to her letter of resignation, it is addressed to SkinPhd Mall@Reds. She was resigning from a position of a Somatologist of SkinPhd Mall@Reds.

[10] [1972] 3 All ER 857.

important element of the goodwill of the business: and that is an interest which the employer is entitled to have protected…And, just as the milk roundsman may endear himself to the housewives on his round, so an assistant in a ladies' hairdressing establishment may very well endear herself, either by her personality or by her skill, to the customers of the establishment who come there for services; and that constitutes part of the good will of the employer's business which the employer is fully entitled to protect.'

[9] In *Experian South Africa (Pty) Ltd v Haynes and Another,*[11] Mbha, J had the following to say:

'It is well established that the proprietary interests that can be protected by a restraint agreement, are essentially of two kinds, namely:

"The first kind consists of the relationship with customers, potential customers and others that go to make up what is compendiously referred to as the "trade connection" of the business, being an important aspect of its incorporeal property known as goodwill.

The second kind consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "trade secrets".'

[8] In *Rawlings and Another v Caravan Truck (Pty) Ltd*,[12] Nestadt, JA, dealing with the issue of a party's relationship with customers, stated that 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. The Leaned Judge referred to *Heydon*.[13]

[11] (2013) 34 *ILJ* 529 (GSJ) at para 17. See also *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502D-F.
[12] 1993 (1) SA 537 (A) at 541C-D.
[13] *The Restraint of Trade Doctrine* (1971) at 108 where is stated that 'customer contact doctrine depended on the notion that 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

[9] Steenkamp, J in *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronje and Another I,*[14] stated that, therefore, a restraint would be enforceable restriction on the activities of an employee who for example had access to the company's customers and could use his/her relations with the company's customers to the advantage of a competitor and to the detriment of the company.[15] Customer goodwill and trade connections are regarded as proprietary interest worthy of protection.[16]

[10] In *casu,* the applicants testified that the respondent has formed ties or relationships with as many as 50 of the employer's regular customers.[17] Further, the applicants attached a Facebook page and alleged that the respondent has in fact commenced recruiting some of the employer's established customers for her own business.[18] In full realisation of the fact that she was encroaching into her previous employer's trade connections, the respondent referred those listed as her personal friends.

[11] She does not deny that they are regular customers of the applicant.[19] To my mind, the applicants have set out a case of proprietary interest in the founding affidavit. I, therefore, cannot agree with the submission that a proprietary interest has not been set out. There is clear and unambiguous case of existence of a trade connection between the 50 customers listed and the applicants. An attempt to suggest that they are the clients of the first applicant and not the second applicant-party to the contract is feeble and, accordingly, rejected.

Is the restraint enforceable?

[12] A restraint of trade is enforceable only if found reasonable.[20] The enquiry into the reasonableness of a restraint is a value judgment that involves a

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the customer with him in his pocket... the relationship must be such that the employee acquires such personal knowledge of and influence over the customer of his employer as would enable him, if competition were allowed, to take advantage of his employer's trade connection'.

[14] (2011) 32 *ILJ* 601 (LC).

[15] *Ibid* at para 27.

[16] *Hirt and Carter (Pty) Ltd v Mansfield and Another* (2008) 29 *ILJ* 1075 (D) at para 37.

[17] Para 7.15. A list of those customers is provided.

[18] Para 7.16.

[19] Bundle of documents at page 217, para 6.19 of the AA.

[20] *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

consideration of two policy considerations namely, the public interest, which requires that parties to a contract must comply with their contractual obligations (*pacta servanda sunt*) and the principle that a citizen should be free to engage or follow a trade, occupation or profession of her choice.[21] A restraint will be regarded as unreasonable and unenforceable if there is no interest deserving of protection. There must be a legitimate protectable interest. A restraint, which is purposed merely to prevent competition, is not reasonable.[22] There are four questions to be investigated and those are:

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

[13] I have already found that the applicants have a trade connection as an interest worthy of protection. Later in this judgment, I would give a little more attention to the question whether the interest is being prejudiced. Suffice to mention that there is clear evidence of the interest being prejudiced. The trade connection interest weigh qualitatively and quantitavely more as against the interest of the respondent to ply her trade. The respondent could still ply her trade outside the five kilometers radius. After six months, she could ply her trade within the five kilometers

[21] *Ball v Bambalela Bolts (Pty) Ltd* [2013] 9 BLLR 843 (LAC) at para 15. Section 22 of the Constitution provides that every citizen has the right to choose their trade, occupation or profession freely. See *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 15.
[22] *Basson v Chilwan and Others* 1993 (3) SA 742 (A) 771D.

radius. Accordingly, I conclude that the restraint is reasonable and enforceable.

The Defences of the respondent

[14] The only relevant defences worthy of consideration are those directed to the trade connection interest since I find that such is worthy of protection. A technical defence raised is one that seeks to suggest that the trade connection is that of the first respondent with whom she did not enter into a contract. Earlier in this judgment, I have dealt with this defence. I have found that there is a relationship between the two applicants. An attempt to conveniently separate them seem disingenuous to me given the respondent's own version. She concedes to have worked for the first applicant and also having served the second applicant. Accordingly, this defence cannot be upheld.

[15] She denies breach of the restraint in that she has not contacted any of the applicant's clients for the purposes of recruiting them for her business.[23] It is clear from her evidence that she does not dispute contacting them. She disputes the purpose of soliciting and recruiting them to her business. I have serious difficulties with this denial. Firstly, the only way that the respondent got to be in contact with these customers is by her being of service to them at work. Put it differently, the respondent did not and could not have known these customers from a bar of soap. I do not accept her version that they were personal friends.

[16] Even if I were to accept that indeed they were her personal friends, when she posted on her wall, she knew or ought to have known that her friends who happen to be the customers of the applicants will have access to the posting and would certainly comment. Indeed, Lindi Edwards asked where the salon is to which she responded with an address and asked to be sent a whatsapp.[24]

[23] Bundle at page 216 para 6.17 of the AA.
[24] See CMM11 page 161 second comment.

[17] Lo and behold the whatsapp communication happened as directed.[25] A price list was even made available on whatsapp. Her answer to the whatsapp allegation speaks volume. She testified that she is not restrained from advertising her business and that the restraint only applies within five kilometers of the second applicant's business.[26] By necessary implications, she admits having advertised her business to Lindi. Of importance is that Lindi was invited to send a whatsapp and thereafter a price list was given to her. I have no doubt in my mind that what was happening during the whatsapp communication was a clear solicitation. Clause 9.1.3 is clear. Direct or indirect recruiting is in breach.

[18] Accordingly, I am unable to uphold the defence that there was no contact for the purpose of recruiting. On the balance of probabilities, the respondent posted on the wall for that purpose alone. Hence she importuned Lindi on a separate whatsapp communication. On her own version, after receiving a letter of demand, she undertook not to contact the customers.[27] If the contact was innocent as she now seeks to suggest, why did she give an undertaking? Clearly, she gave an undertaking with full appreciation of the fact that there is a trade connection between the applicants and the clients.

[19] The defence that there is no protectable interest was only foreshadowed in argument. Reliance was placed on the judgment of the Supreme Court of Appeal in the matter of *Digicore Fleet Management (Pty) Ltd v Steyn and Another*.[28] Upon perusal of the judgment, I observed that the restraint in that matter did not have the provisions similar to 9.1.3. Lewis, JA writing for the majority had the following to say:

> 'Digicore does have a proprietary interest in its client base, and information about it, that deserves protection. However, Steyn presents

[25] See CMM14 pages 171-172.
[26] Page 221 paragraph 6.25 of AA.
[27] Page 220 paragraph 6.22
[28] (722/2007) [2008] ZASCA 105; [2009] 1 All SA 442 (SCA) (22 September 2008).

> no threat to that interest: she is using only her own contacts and information, acquired before joining Digicore.'[29]

[20] That case is distinguishable from the one before me. The clients or customers so contacted were never contacts or customers of the respondent before joining the applicants. If that was the case, such a case is not foreshadowed on the papers before me. The other authorities relied on by the respondent deal with the issue of confidentiality of information or trade secrets. The applicants' case is not pegged on trade secrets but on trade connection. Therefore, such authorities are of no assistance to the respondent.

[21] Accordingly, I am of a firm view that the respondent bore no defence to the applicants' case. That much, I supposed she was so advised probably by Roode hence the undertaking to move outside the five kilometers radius.

The issue of cost

[22] In this regard, I am guided by the provisions of section 162 of the LRA. Further, I took into account what the LAC said in *Ball*, *supra*. It specifically said:

> 'Another important aspect which the court a quo clearly did not consider before making the costs orders is the fact that the enforcement of a restraint technically, involves a constitutional issue. Restraints of the kind being considered constitute a limitation on a citizen's right, in terms of section 22, of the Constitution, which, arguably, requires justification .In constitutional matters, the general rule that costs follow the result, do not apply. In such matters costs orders are generally eschewed out of concern that they may produce a "chilling effect", in that litigants may be deterred from approaching a court to litigate concerning an alleged violation of their constitutional rights for fear of being penalized with costs if they are unsuccessful. If constitutional matters are raised or defended in good faith and not vexatious and the issues raised have merit or are important, like the violation of a right guaranteed in the Bill

[29] *Ibid* at para 15.

of Rights, and the proceedings that ensued, resolved those issues, the party complaining of the violation, even if unsuccessful, would, generally, not be ordered to pay the costs.'[30]

Conclusion

[23] In summary, I am persuaded that the applicants have a protectable interest worthy of protection. There is clear and unequivocal evidence of the interest being prejudiced and or breached. Qualitatively and quantitatively, the interest outweighs the interest of the respondent to ply her trade. The duration and area seem very reasonable. The respondent can even ply her trade in the face of the restraint outside the five kilometers radius. Accordingly, the applicants have met the requirements of an interdict.[31]

Order

[24] In the results, I make the following order:

1. The respondent is interdicted from working in conflict with and as contemplated in clause 9 of the employment contract.

2. There is no order as to costs.

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Moshoana, AJ,

Acting Judge of the Labour Court of South Africa

[30] Ball, above n 22 at para 30. See also *Motsepe v CIR* 1997 (2) SA 898 (CC) at para 30.
[31] *Setlogelo v Setlogelo* 1914 AD 221 at 227. The requisites for the right to claim an interdict are clear right, an injury actually committed or reasonably apprehended, absence of satisfactory remedy.

APPEARANCES

For the Applicant:	C J Geldenhuys of CJ Geldenhuys at Law Inc, Pretoria
For the Respondents:	Advocate Dean Whittington
Instructed by:	Fluxmans Inc, Rosebank