



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

CASE NO.: 440/2020

Heard on: 7 May 2020

Delivered on: 09 June 2020

In the matter between:

DEIDRE STEYN PHYSIOTHERAPY INC

APPLICANT

and

MARLENE STANDER

RESPONDENT

JUDGMENT

GQAMANA, J:

Introduction

[1] To the applicant, this case is about protecting its business interests and to the respondent, it's about putting bread on the table and her ability to earn a living without restrictions. With such competing interests at stake, one has to determine a

case like this by striking a balance between the applicant's right to its unique business interests and the respondent's right to work and to sell her skills in a competitive market. Undoubtedly, these conflicting interests must be balanced in the light of public interest.

[2] In this application, the applicant seeks an order to enforce a restraint of trade covenant against the respondent.¹ The applicant is a personal liability company, duly incorporated in terms of the laws of the Republic of South Africa, which carries on business as a physiotherapy practice at various locations in Port Elizabeth *inter alia*, at St George's Hospital ('the hospital'). Initially the applicant traded under the name and style of Leonora Ferreira Physiotherapists Incorporated ('LFPI') until that name was changed on 1 June 2019 to its current name. The business was purchased by the deponent in the founding affidavit on 1 March 2017.

[3] The respondent was an employee of LFPI at the time that the business was acquired and remained an employee of the applicant until she resigned with effect from the end of September 2019. The employment relationship between the applicant and the respondent was governed by a written employment contract ('the contract') which the respondent concluded with LFPI dated 28 November 2010². The said contract contained a restraint clause, in terms of which the respondent undertook not to conduct or to be employed by any physiotherapy practice or any business or practice which renders physiotherapy services within a radius of 10 km from the applicant's practice premises for a period of nine months after termination of her employment with the applicant³.

[4] The contract also recorded *inter alia*, an undertaking by the respondent not to approach any of the applicant's suppliers or associates with a view of persuading

¹ Index pp 1-3; prayers 2 and 3 of the Notice of Motion.

² Index pp 27-32.

³ Index p30; clause 19.4, the exception thereto are the Technikons, Universities or local provincial or central government institutions or hospitals.

them to cease doing business with the applicant and to commence doing business with anyone else.⁴

[5] As indicated in paragraph 3 above, the respondent resigned from her employment with the applicant with effect from the end of September 2019. Shortly thereafter, on or about 28 October 2019, the applicant's attorneys penned a letter to the respondent reminding her of the terms of the restraint agreement and in particular sought an undertaking from her to restrain from handing out personal business cards to the medical professionals ('the referring doctors') at the hospital in an attempt to solicit business⁵. That letter was met with a response dated 29 October 2019 from the respondent's erstwhile attorneys refuting any breach of the restraint agreement. Thereafter there were numerous exchange of correspondence between the applicant's attorneys and the respondent's erstwhile attorneys. However no undertaking was made by the respondent that she will honour the terms of the restraint agreement.

[6] The applicant became aware in January 2020, that the respondent accepted an appointment and worked as a locum at the hospital over the December holidays in breach of the restraint agreement. That then necessitated the applicant to launch the present application with truncated time period for the service of the notice of set down and the enrolment of the matter. Due to Covid-19 lockdown Regulations the matter could not be heard on the initial date of the hearing.

Factual *matrix*

[7] An understanding of the nature of the applicant's business and how it operates is fundamental for the determination of the issues herein. As indicated in paragraph 2 above, the applicant carries on business as a physiotherapy practice at various locations. Its human resources consist of 19 employees and 11 of them are qualified physiotherapists. Much of the applicant's revenue is generated through

⁴ Index p30; clause 19.3.

⁵ Index pp37-38.

services rendered by the physiotherapists. The majority of the physiotherapy services rendered by the applicant are from the referring doctors practising from their rooms at the hospital. For some years, the applicant developed a close working relationship with these doctors and without their support, its practice would not be sustainable at the hospital. Consequently that would have a devastating impact upon the applicant's business. Such relationships were maintained by the physiotherapists in the manner in which they carried out their duties. The respondent, while still in the employment of the applicant, was amongst those physiotherapists who had to maintain such relationships with the referring doctors.

[8] It follows that the physiotherapists who worked for the applicant were introduced to the referring doctors. Because of their association with the applicant the doctors also got to know and trust them. Those relationships were also nurtured by the quality of service rendered by the physiotherapists and other forms of business networking⁶. The applicant has established special relationship of trust with the referring doctors and those doctors constitute a significant part of its goodwill and trade connections. The respondent was also well known amongst the doctors in the hospital through her employment with the applicant and at times she was required to work with these doctors without supervision.

Issues to be decided

[9] The applicant seeks to interdict the respondent and enforce its restraint agreement. It is the applicant's case that the respondent has acted in breach of clause 19.3 by soliciting business from the doctors by handing the business cards to them or leaving same in their practices and also in breach of clause 19.4 by conducting a business which renders physiotherapy services at the hospital. Its case is that, it has a protectable interests in the form of a goodwill of practice which is worthy of protection.

⁶ For example, spending time interacting with doctors on their rounds and at their practices, regular meet and greet sessions with the doctors and contacts with the doctors on their birthdays and buying of birthday gifts for them.

[10] The respondent contends that the applicant has no protectable interests and as such the restraint agreement entered into between her and the applicant is unenforceable for the following reasons:

10.1 The applicant has not set out sufficient facts to show that it has interests deserving of protection. To the contrary, its pleaded case shows only that, the applicant has built up and solidified considerable goodwill and market share.

10.2 The applicant's case falls short of showing that the relationship between the respondent and its main customers was one in course of which the respondent acquired personal knowledge or influence over any of the customers, such as to enable her to take advantage of any trade connections of the applicant, or that any such customer can be classified as 'in the pocket of the respondent'.

10.3 Even if it is found that the applicant has a proprietary interest in the form of goodwill, there is no evidence of threat that the respondent will take advantage of and is able to induce the doctors to walk away with her.

10.4 The restraint agreement is unreasonable and against public policy.

[11] The respondent further argued that the expertise and the relationship that she has developed with some of the doctors are her own attributes based on her experience that she has accumulated over the years as a physiotherapists.

Legal principles applicable to agreements in restraint of trade

[12] Individuals are free to sign and conclude legally binding contracts, such as a restraint of trade and once one has done so, she is expected to keep her promises. In **Magna Alloys and Research (SA) (Pty) Ltd v Ellis**⁷, the court said that:

⁷ 1984 (4) SA 874 (A).

“In South African Law, an agreement in restraint of trade is, on the face of it, valid-and hence enforceable –and will only be invalid and unenforceable if it is contrary to public policy on account of it unreasonably restricting a person’s right to trade or to work.”

[13] Also in **Reddy v Siemens Telecommunications (Pty) Ltd**⁸, it was held that, the substantive law as laid down in **Magna Alloys** is that a restraint is enforceable unless it is shown to be unreasonable, which necessarily casts an onus on the person who seeks to escape it. All that an applicant has to prove is that it has a proprietary interest to protect in the restraint agreement and such interest may be in a form of trade connections.

[14] It suffices for the applicant to show an existence of trade connections and that there is a potential risk of such customer contacts to be exploited or used by the erstwhile employee in competition against it⁹.

[15] In determining the reasonableness or otherwise of the restraint of trade provision, the test is as set out in **Basson v Chilwan & Others**¹⁰ which is the following:

1. Is there an interest of the one party, which is deserving of protection at the termination of the agreement?
2. Is such interest being prejudiced by the other party?
3. 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?
4. 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?

⁸ 2007 (2) SA 486 (SCA).

⁹ Rawlins & Another v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) at 541G-I and also Dev Braven v Pillay & Another 2008 (6) SA 229 (D), para [6].

¹⁰ 1993 (3) SA 472 (A) pg 743G-I

[16] A further consideration which was added in **Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another**¹¹, was whether the restraint goes further than is necessary to protect the interests.

Application of the legal principles to the facts hereto

[17] The applicant has the onus to show that it has an interest worthy of protection.

[18] In **Rawlins & Another (supra)**, Nestadt JA at 541C-H said the following:

“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

‘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.’

In *Morris (Herbert) Ltd v Saxell [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 employeras would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer’s trade connections

This statement has been applied in our Courts (for example, by Eksteen J in **Recycling Industries (Pty) Ltd v Mohammed & Another 1981 (3) SA 250 (E)** at 256C-F. Whether the criteria referred to are satisfied is essential a

¹¹ 1999 (1) SA 472 (W) at 484E

question of fact in each case, and in many, one of degree. Much will depend on the duties of the employees; his personality; the frequency and the duration of the 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 into 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 employees left

[19] From the onset, let me state that insofar as there are factual disputes, those would be resolved by applying the Plascon-Evans rule¹². This being motion proceedings, the applicant would only succeed in obtaining the relief sought if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justifies such an order.

[20] It was ardently argued by Mr Le Roux that, the case pleaded by the applicant shows only that, it has built up and solidified considerable goodwill and market share. However, the applicant's case as pleaded does not show that the respondent has established relationships with the doctors that enable her 'to carry off a doctor in her pocket'. Much reliance was placed on the judgments in **Laser Junction (Pty) Ltd v Karl Leeson Fick**¹³ and **Smart Office Connexion EC (Pty) Ltd v Van der Merwe and Another**¹⁴.

[21] In **Laser Junction** (*supra*) Pillay J said the following:

"[37].....an employer would have protectable proprietary interests in its confidential information, trade secrets, customer and trade connections if it

¹² Plascon-Evan Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A) at 634-5.

¹³ unreported judgment, Kwazulu Natal Local division, Case Number 6970/2017 and

¹⁴ unreported judgment, Eastern Cape Local Division, Case No.: 847/2019

proves having such interests. Whether proprietary interests worthy of protection under a restraint agreement exist, depends on whether confidential matter exists, whether the employee has access to it, whether it would be useful to the employer for carrying on business, whether it is private or known to a few people and not in the public domain and whether if disclosed, it would give a competitor an advantage. Whether information is confidential or amounts to a trade secret is a factual enquiry.

[38] An employer would also have a proprietary interest in its relationship with customers, potential customers, suppliers and others, that is, its trade connection or goodwill. To establish a trade connection an employee would have to have had access to her employer's customers, be able to build relationships with them and induce them to follow her to her new employment. She would have to acquire such personal knowledge and influence over the customers that if she were allowed to compete she would be able to take advantage of the employer's trade connection."

[22] In developing the submissions, Mr Le Roux argued that not only the employer must show trade connections or customer connections but, it must also show that such trade connections are vital to the employer to carry on business and that the respondent is in a position to carry the customers in her pocket.

[23] Mr Belyveld SC for the applicant, argued that the applicant's goodwill and its relationship with its customers is a proprietary interests worth a protection. In **Rawlins**¹⁵ (*supra*), it was held that, customer goodwill that was created or enhanced by performance by an employee of his duties in terms of his contract of employment was at least in part an asset of the employer¹⁶ and as such it becomes a trade connections of the employer which is capable of protection by means of a restraint of trade clause.

¹⁵ At p 542H.

¹⁶ See also *Omni Technologies v Nathan Phillips & Others* (unreported judgment of Kroon J, Case No.: 142/11 at para 33).

[24] Also in **Hawkwind CC v Salome Goddard**¹⁷, Eksteen J held that, customer goodwill is an asset of an employer and becomes a trade connection of the employer which is capable of protection by the restraint of trade.

[25] To establish a trade connection an erstwhile employee would have to have had access to her employer's customers and was able to build with them and is in a position to induce them to follow her to her new employment.

[26] In the instant matter it is not disputed that the relationship which the respondent had with the doctors was critical in maintaining a relationship between the applicant and its customers. More so, in maintaining that relationship the respondent was responsible for promoting the applicant's image to its customers and maintaining and fostering its goodwill.

[27] The respondent argued that the relationship with the doctors was on account of her own skills and attributes, which could suitably place her in a position to receive referrals from them and, not as a result of any advantage gained as a consequence of her past association with the applicant. And because she has developed a relationship based on her skills and attributes, she should not be precluded from making use of them. I agree that, her skills and attributes are part of herself¹⁸. But the evidence presented herein was that the respondent during her employment with the applicant developed relationships with applicant's customers, and that relationship was critical in maintaining a relationship between the applicant and its customer and in fostering its goodwill. Further the respondent was introduced to the doctors through her employment with the applicant. No contradictory evidence that she knew any of the doctors before her employment with the applicant. Much energy was devoted to the extent of such relationship. The respondent saying that with most doctors she merely greeted them in passing and as such she has not gained personal knowledge to be in a position to induce them to walk away with her. I

¹⁷ [2010] ZAECPHC 73 (7 December 2010).

¹⁸ *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* [2007] 4 ALL SA 1073 (SCA) and also *Aranda Textile Mills (Pty) Ltd v Hurn* [2000] 4 ALL SA 183 at para [33].

disagree. On her own version, the respondent received some referrals from some of the doctors subsequent to her resignation from the applicant's employment. Further the respondent was central to maintaining the relationship between the applicant and the doctors through her services to the patients of the doctors. Effectively, the respondent was strategically deployed to promote the good image of the applicant to the doctors. She developed trust relationships with the doctors and she is in a position to take advantage of such relationship and to induce the doctors to do business with her. The respondent has worked for the applicant for a period of approximately nine years.

[28] On the facts on this particular case, I am satisfied that the applicant has proprietary interests worthy of protection.

[29] The further argument raised by the respondent is that, there is no harm caused to the applicant's business. The argument was that, if it is accepted that the goodwill of practice is a protectable interest, the applicant has not shown that such interest is vital to its business and that the latter is vulnerable should such interest not protected by way of the restraint. I am unable to share Mr Le Roux's argument on this point for various reasons. Any trade connection is capable of protection if it is threatened by the possibility of an erstwhile employee taking an advantage of it and using it for the competition. In **Rawlins** (*supra*) it was said the need for an employer to protect its trade connections arises where an employee had access to the customers and is in a position to build up a particular relationship with the customers so that when she leaves the employer's services she could induce the customers to follow her¹⁹. It is not part of our law that the protectable interest should be vital to the applicant's business.

[30] In my view, the risk to the applicant's customer connection is sufficient enough to justify the enforcement of the restraint agreement against the respondent. I am alive to Mr Le Roux's argument that the respondent is a 'sole practitioner' and it

¹⁹ Rawlins *supra* 541 C-D.

is inconceivable that she would be able to compete with the applicant which has employed no less than nine physiotherapists' practitioners. This argument lost focus. In matters of this nature context is everything. By context, I mean, one has to understand the underlying trust relationship between the respondent and the applicant's customers and how the respondent is strategically deployed for purposes of maintaining and fostering such relationship. Size matters not. The fact that the applicant is on a larger scale able to service more doctors is immaterial.

[31] In the instant matter, it is not a matter of a threat to the applicant's customer connections, but it is common cause that the respondent has already received referrals from some of the doctors. Therefore, having regard to all the evidence of this particular case, I am satisfied that the risk to the applicant is enough to justify enforcement of the restraint agreement.

[32] That takes me to the issue as to whether the restraint is reasonable or otherwise. The onus is on the respondent to prove the unreasonableness of the restraint agreement²⁰.

[33] Not much argument was advanced on behalf of the respondent on this point. Mr Le Roux's argument was that, if the court comes to the conclusion that the applicant has shown proprietary interest worthy of protection and that there is a risk that the respondent is in a position to induce the customers to move away with her, it follows that, I am likely to find that the restraint is reasonable. That is not so. Despite my findings that the applicant has a protectable interests, I still need to apply a value judgment and consider those factors enunciated in **Basson's** judgment.

[34] A person's right to choose her own profession without restrictions as enshrined in the constitution has to be guarded jealously, but not at all costs. The first two factors set out in **Basson** have already been dealt with above. The third leg of the

²⁰ BHT Water Treatment (Pty) Ltd v Leslie and Another 1993 (1) SA 47 (W).

enquiry is whether such interests so weighed up qualitatively and quantitatively against the interests of respondent, the latter should not be economically inactive and unproductive. The relief now sought by the applicant is restricted despite the wording of the restraint. The applicant has no qualms with the respondent taking up employment elsewhere or in any of the other hospitals in Port Elizabeth except for St George's Hospital. Therefore the relief sought is much narrower, but that is not a concession that the restraint agreement was unreasonable.

[35] Mr Le Roux on this point, argued that the much of the business arises from St George's Hospital and if the respondent is restrained from rendering physiotherapists services at the said hospital, she would virtually be economically inactive and unproductive. No evidence presented to support the contention that much business opportunities for physiotherapists are at St George's hospital. It can be accepted that there are number of other hospitals in Port Elizabeth and nothing prevents the respondent from practising her profession in such hospitals.

[36] As I have indicated above, the fact that the applicant is in a larger scale as compared to the respondent is of no assistance to her. Weighing up the parties' interests, the respondent would not be economically inactive and unproductive if the restraint agreement is enforced. Further there is no other facet of public policy, having nothing to do with the relationship between the parties that requires the restraint to be rejected.

[37] Not much argument was advanced on the fifth consideration, that is, whether the restraint provision goes further than is necessary to protect the particular interest. In any event, I am well pleased on evidence before me that the restraint provision does not go further than is necessary to protect the applicant's interests.

[38] With regard to the alleged breach of clause 19.3 of the contract, the applicant's case hinges on the fact that the respondent dispersed business cards to

some of the doctors' practices. There is no evidence that the respondent approached any of the doctors with the view of persuading them to cease doing business with the applicant and to commence doing business with anyone else. Therefore the applicant in my view, has not proved breach of clause 19.3 and is accordingly not entitled to the relief sought in prayer 2 of the notice of motion.

[39] Lastly, this being an interdict application for a final relief, I am satisfied that the applicant has proved all the requirements necessary for a final interdict²¹ for the relief sought in prayer 3 of the notice of motion.

[40] Insofar as the issue of costs are concerned, both parties were in agreement that this is a matter wherein costs should follow the results. I also find no reason why I should depart from that general rule and the applicant is substantially successful.

Order

[41] In the circumstances, I make the following order:

1. The respondent is hereby interdicted and restrained for a period of 9 months from 01 October 2019 to 30 June 2020, from conducting or being employed by any physiotherapy practice or any business or practice which renders physiotherapy services within St George's Hospital in Port Elizabeth.
2. The respondent is ordered to pay the costs of this application, such costs to include the costs of two counsel.

N. GQAMANA

JUDGE OF THE HIGH COURT

²¹ Setlogelo v Setlogelo 1914 AD 221, Masuku v Minister van Justisie 1990 (1) SA 832 (A) at pp 840-841 and also John Saner Agreements in Restraint of Trade in South Africa at 15-82.

APPEARANCES

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