THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J 2948/16

In the matter between:

PB HARIDRESSING ORGANISATION (PTY) LTD

t/a CARLTON HAIR INTERNATIONAL **Applicant**

and

JOSEPH VINCIGUERRA **First Respondent**

SIRENE HAIR SALON (PTY) LTD **Second Respondent**

Heard: **10 January 2017**

Delivered: **16 January 2017**

JUDGMENT

RABKIN-NAICKER J

[1] This matter came before me on an urgent basis. The applicant seeks the following relief:

1.1 Directing First Respondent to cease his employment with Second Respondent with immediate effect.

1.2 Interdicting and restraining First Respondent, until 18 November 2017 from, either directly or indirectly, within a radius of ten kilometres (as the crow flies) calculated from the front door of Applicant's Hyde Park salon situated in the Hyde Park Shopping Centre on the corner of William Nicol drive and Jan Smuts Avenue , Sandton ("the Restraint Area"): -

1.2.1 taking up employment with, contracting to or consulting to, being associated or concerned with or interested or engaged in any hair styling, hairdressing or related activities in any capacity whatsoever; and

1.2.2 in any manner assisting in the activities of, or taking part in, any undertaking in the Restraint Area which carries on any business activities which are directly competitive with those of Applicant;

1.3 in any manner assisting in the activities of, or taking part in, any undertaking in the Restraint Area which carries on any business activities which are directly competitive with those of Applicant;

1.4 Directing First Respondent to pay the costs of this application.

1.5 In the event of Second Respondent opposing the application, directing it to pay the costs of the application, jointly and severally with First respondent, the one paying the other to be absolved.

[2] At the commencement of proceedings before Court the first respondent brought a successful application to have certain annexures and paragraphs related thereto struck out of the replying papers on the basis that they were hearsay evidence. The said material was unsupported by confirmatory affidavits or a statement by the deponent that he believed the hearsay evidence to be true and correct.

[3] The applicant (Carlton) is a group of companies established in 1968, and currently operating 23 branches nationwide. It has four hairdressing academies, which it operates throughout the country, training learners as well as already qualified hairstylists. Carlton's Hyde Park salon commenced trading in 1990. Carlton's stylists are trained to establish niche personal relationships with particular clients, in order to incentivise the client to return to the salon because of the relationship established with the stylist.

[4] The deponent to the founding affidavit avers that it is a common feature of Carlton's business model (and that of the hairdressing industry at large) that customers return every 6 to 8 weeks to the hairdressing salon at which they will be serviced by the particular stylist with whom they have established a personal relationship of trust and who knows and understands their unique needs and desired results. This means according to Carlton that the goodwill and relationships established between its employees and clients is a valuable proprietary asset deserving of legal protection. This is the rationale behind Carlton requiring its stylists to enter into a restraint of trade in terms of their employment contract. The restraint is somewhat lengthy but bears recording as follows:

"15. Restraint of trade

15.1 In this clause, the following words and expressions shall carry the following meaning-

15.1.1. **"Client"** means any client/customer of the Company or Group Company who visited on at least 2 (two) occasions within a 6 (six) month period prior to the Termination date, the salon at which the Employee rendered services as at the Termination Date;

15.1.2. **"Restraint Area**" means a radius of 10 (ten) kilometres (as the crow flies) calculated from the front door of the solon at which the Employee rendered services as at termination date and any other salon at which the Employee may have rendered services in a 6 (six) month period to the Termination Date;

15.1.3. **"Restraint Period"** means a period of 1 (one) year immediately following the Termination Date;

15.1.4. **"Restricted Business"** means that business and those activities conducted by the Company (and any Group Company) including hairstyling, hairdressing and related activities;

15.1.5. **"Termination Date"** means the date upon which the Employee's employment with the Company is terminated for any reason whatsoever;

15.2 It is recorded and agreed that-

15.2.1 The Restricted Business is highly competitive;

15.2.2 the Employee shall, in the course of her employment with the Company-

15.2.2.1 at the expense of the Company, receive extensive and on-going training enabling the Employee to initially qualify and thereafter earn living as a stylist;

15.2.2.2 repeatedly and on an on-going basis be exposed to clients of the Company on a personal level, enabling the Employee to forge and maintain a personal relationship with each client that she services; and

15.2.2.3 have access to the Company's client database.

15.3 The Employee acknowledges that-

15.3.1 the client relationship(s) referred to in clause 15.2.2.2 above constitutes a proprietary and protectable interest of the Company;

15.3.2 the Company's client database referred to in clause 15.2.2.3 above constitutes a proprietary and protectable interest of the Company;

15.3.3 should the Employee leave the employ of the Company and continue to render services as a hair stylist within the Restraint Area, there exist a reasonable apprehension on part of the Company that the Company's clients shall follow the Employee to her new place of business, to the clear detriment and prejudice of the Company;

15.3.4 it is accordingly necessary for the Parties to conclude an agreement in order to protect the Company's legitimate protectable interest for the duration of the Restraint Period and within the Restraint Area;

15.4 In light of the foregoing, the Employee warrants and undertakes that she shall not at any time during the Restraint Period-

15.4.1 In any capacity whatsoever (including that of principal, proprietor, agent, broker, partner, representative, assistant, trustee, or beneficiary of trust, manager, member of close corporation, member of a voluntary association, shareholder, director, employee, consultant, contractor, advisor, financier, demonstrator), directly or indirectly, take up employment with, contract or consult to, be associated or concerned with or interested or engaged in any Restricted Business or entity carrying on any Restricted Business in Restricted Area;

15.4.2 solicit, interfere with or entice or endeavour to entice away from Company or any Group Company any client(s);

15.4.3 employ, offer employment to or cause employment to be offered to any employee of the Company or any Group Company;

15.4.4 communicate with or furnish any information or advice to any employee of the Company or Group Company or to any prospective employer as such employee for the direct or indirect purpose of inducing or causing the said employee to leave the employ of the Company or any group Company and/ or become employed by or in any way directly or indirectly interested in or associated with any Restricted Business;

15.5 The Employee, after due consideration, agrees and acknowledges that-

15.5.1 having regard to the damages that will result from a breach of any of the restraint undertaking given herein, the restraint and undertakings imposed upon the Employee in terms of this Agreement are fair and reasonable and are necessary as to subject matter, area and duration and are reasonably necessary in order to preserve and to protect the proprietary interests of the Company and/ or Group;

15.5.2 she has entered into this Agreement freely and voluntarily and that no circumstances exist for her alleging either now or at any future time that she was at a disadvantage in agreeing to the restraint undertakings contained herein or was in anything other than an equal bargaining position with the Company in agreeing to such restraint undertakings;

15.2.3 notwithstanding the manner in which the restraint in this clause 15 and the area comprising the Restraint Area have been grouped together or described geographically, each of them constitutes a separate and independent restraint, divisible and severable from each of the other restraints and separately enforceable, in regard to all aspect thereof including-

15.5.3.1 each month of the Restraint Period;

15.5.3.2 each state, province, division or council area, municipal area, magisterial district, town, locality falling within the Restraint Area;

15.5.4 no restraint or combination of restraints shall be limited by reference to or inference from any other restraint or combination of restraints, provided however that the invalidity or unenforceability of any one or combination of the restraints contained in this Agreement shall not affect the validity and enforceability of the other restraints contained in this Agreement or any combination of such restraints.

15.6 The Employee has given the restraint undertaking herein contained notwithstanding that the Employee acknowledges that those restraints may limit the employment opportunities available to him, thereby potentially limiting her income earning capacity.

15.7 The Employee agrees that should she at any time dispute the reasonableness of the restraint undertakings herein contained, then the onus of proving such unreasonableness will be on her.

15.8 The undertakings given by the Employee in clause 9 and in clause 15 shall also be the benefit of and may be enforced by any Successors-in-title and/ or any Group Company. The undertakings shall be deemed to have been imposed as *stipulation alteri* for the benefit of any Successor-in-title and/ or any Group Company at any time.

15.9 The Employee agrees that irreparable damage would occur if any of the restraint undertakings recorded herein were not fully complied with in accordance with its specific terms or were otherwise breached. The Employee accordingly agrees that the Company and/ or Group Company will be entitled to apply for and be granted an interdict or an order for specific performance, in addition to any other remedy to which it may be entitled in law. The provisions of this clause 15.9 shall be without prejudice to the right of the Company or Group of Company to claim whatever additional damage may be sustained by it in consequence of such breach.

15.10 Should any provisions of this clause 15 be breached by the Employee, then the Restraint Period will be deemed, at the instance and in the discretion of the Company and/ or Group of Company, to be extended by a period equal to the period from the date when such breach was first committed until the earlier of the date on which the Employee ceases to be in breach of this clause 15. If the Company or Group of Company exercises its right to extend such period as aforesaid, the provisions of this clause 15 will apply *mutatis mutandis* in respect of such extended period. "

[5] The first respondent studied at the Carlton academy in Greenside. After completing a year of study, he was required to complete a practical year in one of Carlton's salons as part of his tuition. He entered into an agreement with Carlton, which included the restraint quoted above, on 14 January 2015 and he worked initially as a student hairdresser (with effect from 14 January 2015) and thereafter as an unqualified Junior Stylist (with effect from 22 March 2015). On 13 May 2016 he became a qualified junior stylist and remained at this level until he resigned from Carlton's employ on 18 November 2016.

[6] First respondent, a 21 year old who suffers from dyslexia and who avers, as a result, did not obtain a matric certificate, states in answer that when he graduated from student hairdresser to 'junior stylist' he received a basic salary of R3000.00 per month and was able to receive limited commission. At Carlton a client is offered the services of either a junior, senior, executive or master stylist.

[7] It is first respondent's case that as a junior stylist one has a limited customer base and one generally provides less elaborate services. When he qualified as a junior stylist (six months before resigning) he earned R5320, 72 a month and was able to perform the same functions as other more senior stylists but remained the lowest status classification. He avers that he accrued some 20 to 30 regular clients during

his time with Carlton and that a more senior stylist can service between 12 and 20 regular clients a day. He states that there is no guarantee that what he refers to as his 'negligible customer base' will follow him to his new place of employment. He has furthermore made a written undertaking to not make contact with any of the clients he served at Carlton.

[8] It is submitted by first respondent in the answering papers that the goodwill of a company is traditionally represented by *inter alia* good customer relations which enhance the company's brand and reputation. However, in the hairstyling industry, where clients are loyal to their specific stylists, not the companies at which the stylists work, the good will is established between the particular stylist and client rather the particular company at which the stylist works. In other words, the interest sought to be protected is not one that resides in the company in this industry. Carlton for its part submits that it is precisely because of the need for close customer relationships between its stylists and customers that a restraint of this kind is necessary in the industry.

<u>The applicable legal principles</u>

[9] The law as it applies to restraints of trade was most usefully summarised by Mbha J (as he then was) in *Experian South Africa (Pty) Ltd v Haynes and Another*[1] as follows:

> "Legal principles applicable to agreements in restraint of trade
>
> [12] The locus classicus on this subject is *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 897F – 898E, where Rabie CJ summarised the legal position, inter alia, as follows:
>
> [12.1] There is nothing in our common law which states that a restraint of trade agreement is invalid or unenforceable.
>
> [12.2] It is a principle of our law that agreements which are contrary to the public interest are unenforceable. Accordingly, an agreement in restraint of trade is unenforceable if the circumstances of the particular case are such, in

[1] 2013 (1) SA 135 (GSJ)

the court's view, as to render enforcement of the restraint prejudicial to the public interest.

[12.3] It is in the public interest that agreements entered into freely should be honoured and that everyone should, as far as possible, be able to operate freely in the commercial and professional world.

[12.4] In our law the enforceability of a restraint should be determined by asking whether enforcement will prejudice the public interest.

[12.5] When someone alleges that he is not bound by a restraint to which he had assented in a contract, he bears the onus of proving that enforcement of the restraint is contrary to the public interest….

[14] The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint bears the onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.

[15] The test set out in *Basson v Chilwan and Others* supra at 767G – H for determining the reasonableness or otherwise of the restraint of trade provision, is the following:

[15.1] Is there an interest of the one party which is deserving of protection at the termination of the agreement?

[15.2] Is such interest being prejudiced by the other party?

[15.3] 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?

[15.4] 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?

[16] In *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* A 1999 (1) SA 472 (W) ([1998] 2 All SA 362) at 484E Wunsh J added a further enquiry,

> namely whether the restraint goes further than is necessary to protect the interest."

[10] The question for this Court to determine is whether on the facts of this matter, the applicant has an interest which is sufficiently deserving of protection and if so, whether any of the other enquiries laid down in *Basson* v *Chilwa*n would lead the court to find the restraint unreasonable.

[11] It is well established that the proprietary interests that can be protected by a restraint agreement are of two kinds. The first consists of the relationships with customers, potential customers, suppliers and others that go to make up what is referred to as the 'trade connections' 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 referred to as 'trade secrets'. [2]

[12] In *Rawlins and Another v Caravantruck (Pty) Ltd* [3] Nestadt JA stated that —

> '(t)he 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'.

[13] In *Aranda Textile Mills v Hurn & Another*[4] the court emphasised that proprietary interests sought to be protected must be properly described as belonging to the employer. As explained by Kroon J:

> "A man's skills and abilities are a part of himself and he cannot ordinarily be precluded from

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[2] *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502D – F.

[3] 1993 (1) SA 537 (A) at 541C – D

[4] *Aranda Textile Mills (Pty) Ltd v Hurn and Another* [2000] 4 All SA 183 (E)

> making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workmen. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workmen, his know-how or skills. Such know-how and skills in the public domain become attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy."

[14] It was stated in *Rawlins v Caravantruck*[5] that establishing customer connections 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".

<u>Evaluation</u>

[15] Taking the above legal principles into account, I note the following:

15.1 In this matter, the applicant has proved the existence of the restraint and the breach thereof. I am unconvinced by the argument by first respondent that customer connections and goodwill of a brand such as Carlton do not amount to a proprietary interest. Part of the skills for which such a

[5] At 541C – D

company employs stylists is their ability to foster customer connections for the employer.

15.2 There is no evidence on the papers that any of Carlton's clients have followed the first respondent to his new place of employ, although there is a risk of same. Taking into account the Plascon Evans rule, I accept the evidence contained in the answering papers that first respondent's client base is in the region of 20 30 persons and that same is negligible in relation to the entire client base of the Hyde Park salon of Carlton.

15.3 The fact that the restraint in question appears to be a 'one size fits all' covenant is problematic. The ambit of its terms cannot be considered proportional in relation to all of Carlton's stylists. It was contained in the first respondent's contract in the same form even when he was an apprentice. There appears to be no differentiation made in the wording of the restraint in respect of different levels of stylists.

15.4 The Court is of the view that the first respondent has established that it is unreasonable and against public policy, for such a restraint to be upheld in respect of a junior employee, qualified for only 6 months and who is a mere 21 year old.

<u>Order</u>

[16] I therefore make the following order:

1. The application is dismissed with costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: L Stansfield

Instructed by: *Cliffe Dekker Hofmeyr*

For the First Respondent: R Blumenthal

Instructed by: *Bobat Inc Attorneys*

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