LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1239/18

In the matter between:

P B HAIRDRESSING ORGANIZATION (PTY) LTD	**Applicant**
and	
RUDOLPH KRUGER	**First Respondent**
JINGLES HAIR EMPORIUM	**Second Respondent**

Heard: **11 May 2018**

Delivered: **6 June 2018**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The applicant seeks an order on an urgent basis, to enforce certain restraint of trade and confidentiality undertakings against its erstwhile employee, the first respondent Mr Rudolph Kruger (Kruger). The order sought is in the following terms:

"…

2. Directing the First Respondent to resign from his employment with the Second Respondent with immediate effect.

3. Interdicting and restraining the First Respondent until 13 March 2019 from-

3.1. either directly or indirectly, within a radius of five kilometres from the Applicant's hairdressing salon at which he had rendered services, being employed by any firm, business, undertaking, person, corporation or company or by any agent, associate, representative or advisor of any such organisation which performs the services in the territory that are directly competitive with those performed by the Applicant;

3.2. in any manner assisting in the activities of any undertaking in the territory which carries on any activities which are directly competitive with those of the Applicant;

3.3. taking part in any undertaking carrying on business of a type, class or kind competitive with the type, class, kind of business carried on by the Applicant in the territory; and

3.4. directly or indirectly soliciting the customers of the Applicant or seeking to take the business of any person and/or corporate entity who is a client of the Applicant…"

[2] Only Kruger opposed this application. His main contentions are that the application is not urgent, and/or that the urgency claimed is self-created. To the extent that it may be found that the matter is urgent, that the applicant failed to demonstrate that there are protectable interests worthy of protection in terms of the restraint of trade agreement, that agreement ought to be declared *contra bonos mores* and therefore unenforceable as its duration and geographical area was illogical and unenforceable. He further contended that the entire agreement, considered as a whole, was of general application and not proportional to what the applicant seeks to protect.

<u>Background:</u>

[3] The applicant operates 23 stores (Hairdressing Salons) throughout the Republic. One of them is Carlton Hair, situated at the Nelson Mandela Square in Sandton, Johannesburg, where Kruger was employed prior to his resignation. In seeking the order, the applicant averred that it has invested a large amount of time, resources and energy in developing its business over the years and has acquired experience and expertise in the operation of hairdressing salons. It further contended that its customers are regular clients who represents some considerable investment in time, money and energy, and that over time, a relationship of goodwill was developed with clients, whom it considered its valuable assets.

[4] According to the applicant, a stylist like Kruger had the responsibility of forging and maintaining personal relations with clients. As such, a "regular client" would almost without fail report to a specific stylist each time he/she visited the salon for a hair treatment or styling, and that stylist would then be responsible for the hairdressing needs of that client.

[5] Kruger commenced his employment with the applicant with effect from 28 June 2000 as a Learner Stylist. He progressed and was eventually promoted to the position of Master Stylist. On 7 July 2017, Kruger signed an amended contract of employment which also included restraint and confidentiality undertakings in favour of the applicant. The pertinent clause(s) of the employment contract record the following:

> "…
>
> **15. Restraint of Trade**
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> …
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> 15.1.1. "Client" means any client/customer of the Company or Group of Company who visited on at least 2 (two) occasions within 6 (six) month period to the Termination date, the salon at which the Employee rendered services as at the Termination Date;
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> 15.1.2. "Restraint area" means a radius of 5 (FIVE) kilometres (as the crow files) calculated from the front door of the salon at which the Employees rendered services as at termination date and

any other salon at which the Employee may rendered services in a six (six) month period prior to the Termination Date;

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

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

…

15.2 It is recorded and agreed that:

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 he/she services; and

…

15.3 The Employee acknowledges that-

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

…

15.4 in light of the foregoing, the employee warrants and undertakes that he/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 a trust, manager, member of a 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 Restrained Business in a Restraint Area;

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

…"

Urgency:

[6] On 28 February 2018, Kruger advised the applicant in writing of his intention to resign from its employ. The contract of employment was set to terminate on 13 March 2018. Having served his notice of resignation, Kruger thereafter on the same date informed the applicant's store manager and deponent to the founding affidavit, Ms Lesly Kahn that he intended taking up employment with the second respondent, Jingles Hair Emporium (Jingles).

[7] Jingles is the applicant's competitor operating in Benmore Gardens, Sandton, and is located some 1.7 km from Mandela Sandton Square. Subsequent to his resignation, Kruger had indeed commenced employment with Jingles. On 22 March 2018, the applicant addressed a letter to Kruger advising him that his continued employment with Jingles was in direct contravention and in breach of his restraint undertakings. Kruger was requested to give an undertaking on or before 26 March 2016, that he would immediately resign from the employ of Jingles and to also hand back any confidential information that he may still have had in his possession.

[8] On 5 April 2018, Kruger wrote an email to the applicant's attorneys of record wherein he denied that he had solicited any client(s). He further denied that he had received any training from the applicant except for product knowledge. He refused to make any undertaking as requested by the applicant.

[9] The applicant averred that since Kruger's resignation, approximately 10 of the 1 587 repeat clients or regulars have returned to the branch, meaning that a vast majority of Kruger's clients have not returned to the applicant's salon.

[10] The applicant launched this application on 18 April 2018. It is accepted that applications to enforce restraint of trade undertakings are inherently urgent[1]. The inherent urgent nature of such applications obviously derives from the fact that restraint of trade agreements are normally of a limited duration, and further that any proprietary interests, if they exists, need urgent protection. Be

[1] *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) at 88J

that as it may, I have consistently held the view that the inherent urgent nature of these applications does not absolve a party from satisfying the requirements of urgency, particularly those set out in Rule 8 of the Rules of this Court[2]. These provisions[3] were explained in *Jiba v Minister: Department of Justice and Constitutional Development and others*[4] as follows;

> "Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules".

[11] Thus, where the applicant has not advanced sufficient reasons for the matter to be treated as one of urgency, and where on the facts there is no discernable evidence that the applicant had acted with the necessary haste in approaching the Court, the application ought to be struck off from the roll[5].

[12] The applicant avers that the matter is urgent on the basis that it cannot be afforded substantial redress at a hearing in due cause. In this regard, it was submitted that the nature of the relief sought and Kruger's non-compliance with his undertakings was such that it may be denied redress in a hearing in due cause, because the imminent or perceived harm that it seeks to be protected against may have potentially occurred.

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[2] See *Ecolab (Proprietary) Limited v Thoabala and Others* (2017) 38 ILJ 2741 (LC) at paras 16 – 20; *Moyo & Others v Administrator of the Transvaal & Another* (1988) 9 ILJ 372 (W) at 387I, where it was held that:

> "An applicant who seeks relief by way of notice of motion should put all the facts, in as much detail as possible, before the Court. The mere fact that an application is urgent and urgent relief is sought does not relieve an application of this duty."

[3] Rule 8 of the Rules of this Court reads;

(1) "A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).

(2) The affidavit in support of the application must also contain-

(a) the reasons for urgency and why urgent relief is necessary;

(b) the reasons why the requirements of the rules were not complied with, if that is the case; AND

(c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted".

[4] (2010) 31 ILJ 112 (LC) at para 18

[5] See *National Police Services Union & Others v National Negotiating Forum & Others* (1999) 20 ILJ 1081 (LC) at para 13

[13] The applicant had conceded that upon Kruger's resignation on 28 February 2018, it became aware of his intentions to start employment with Jingles. It nonetheless contended that upon the realisation that Kruger was to join Jingles in breach of his restraint provisions, its attorneys of record were approached, and attempts were made to either persuade him not to leave or at most, correspondence was sent to him requesting that he made certain undertakings in respect of his restraint obligations. After Kruger's response on 5 April 2018, the founding affidavit was then deposed to on 13 April 2018.

[14] Kruger contends that no grounds were laid by the applicant to demonstrate urgency, particularly in the light of lack of haste in approaching the Court, and I am inclined to agree with him for the following reasons;

14.1 Kruger resigned from the applicant's employ on 28 February 2018, and his last day at the applicant's employ was on 13 March 2018. In the founding affidavit, the applicant merely states that subsequent to Kruger's resignation, it came to its attention that Kruger had commenced employment with Jingles. It is not stated when and how such information came to its knowledge.

14.2 Only on 22 March 2018, and some three weeks since Kruger had left and taken up employment with Jingles, was he reminded of his restraint of trade undertakings through correspondence from the applicant's attorneys of record. This was in circumstances where it was known as at 28 February 2018, (and not on 14 March 2018 as alleged) that he intended to take up employment with Jingles. That correspondence was only hand delivered to Kruger on 29 March 2018. Still, nothing was heard from Kruger until 5 April 2018 when he sent correspondence effectively stating his intentions not to be bound by the restraint provisions. Even then, it took the applicant a further six days before deposing the founding affidavit, and not much is explained in regards to what happened between that period.

14.3 Ultimately, since it was not in dispute that when Kruger handed in his resignation on 28 February 2018, he had also on the same day, advised the applicant's Kahn that he intended to join Jingles, I agree with his contentions that effectively, the *proverbial horse bolted* on 28 February 2018. There is nothing in the applicant's averments that anything was done immediately to remind Kruger of his restraint of trade undertakings and the consequences should he not abide by those undertakings.

14.4 Kruger had further submitted that the six weeks' delay in bringing these proceedings coincided with the interval in which a client would be expected to return to the applicant and be deemed a regular client. (It being his contention that repeat customers return to the applicant every six to eight weeks). On the applicant's own version, since Kruger's resignation, approximately 10 of the 1 587 repeat clients or regulars have returned to its store, meaning that a vast majority of his clients have not returned. This in my view adds credence to Kruger's contentions that indeed the application is belated, and any imminent or perceived harm sought to be protected by the enforcement of the restraint of trade undertakings would in any event have occurred and as such, any urgency would be self-created[6].

14.5 Thus, to the extent that the applicant seeks interdictory relief, it has long been stated that such a remedy is not meant for past invasion of

[6] See *Macneil Jhb (Pty) Ltd v Cocolaras and Another* (J1722/17) [2018] ZALCJHB 2 (11 January 2018) at para 19 where it was held;

> " In essence, urgency must not be self-created as a consequence of the applicant's failure to launch the application at the first available opportunity. It stands to reason that a litigant seeking an indulgence to be heard on urgent basis must act swiftly in instituting the litigation. Urgency dwindles with time, hence the applicant must come to Court immediately, or risk failing on urgency. In *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another* the Court held:
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> > '[9] It is clear from the above that the Courts do not easily grant urgent relief. This caution is justified given the exceptional and drastic nature of such relief. The Labour Court Rules set out the proper procedure through which applications to the Court should be pursued and these rules exist to ensure that due process is allowed to run its course. They have not been arrived at arbitrarily but after careful consideration as developed over years of practice. Thus, deviation from the usual rules should not be taken lightly, it is only in exceptional circumstances that the Court will deal with applications on an urgent basis. In order to succeed in an urgent application, the applicant must satisfy the Court that on balance the interests of justice outweighs the right of the parties to have a considered opportunity to place their case before this Court. Although the Courts recognise that financial consideration may be taken into account, the onus is on the applicant to show the prejudicial effect that will give rise to the injustice and plus the urgency of the situation. In particular, the applicant must show that he has launched the application at the first available opportunity; that special circumstances exist justifying the granting of the order; and there is no alternative remedy available to it.'

rights, but is concerned with present or future infringements[7]. Thus where as in this case the applicant had not acted with the necessary haste to approach the court, and had only done so some one month after Kruger's resignation, with the full knowledge that he had joined Jingles, and where the harm sought to be prevented had already taken place, the invariable conclusion to be reached in the absence of a reasonable explanation for the delay is that indeed the urgency claimed is self-created, and the harm complained of, if it has already occurred is as a direct result of the applicant's dilatoriness.

14.6 It does not in my view, assist the applicant's case to merely allege that litigants should resolve their differences prior to approaching the court. There is no such legal obligation imposed on litigants, especially if the alleged harm is imminent. Attempts at resolution of disputes between the parties is merely a courtesy between them, which has no bearing on whether the requirements of urgency have been met or not. This is particularly so in this case, where any alleged attempt to resolve the dispute essentially involved a mere demand rather than serious engagements with Kruger in resolving the matter. To that end, it is concluded that the applicant has not satisfied the requirements of urgency, and in effect, the urgency claimed in this case is self-created. Ordinarily, the matter ought to be struck off the roll in the light of these findings. For reasons that will appear clearer below however, I propose to deal with the merits of the matter.

<u>The merits:</u>

[15] To the extent that I may be incorrect in my conclusions in regard to urgency, it is further my view even if this matter was to find its way back on the court's ordinary roll, the applicant nonetheless faces insurmountable hurdles on the merits, which I propose to dispense with. Since the nature of the relief sought is in the form of a final order, it is trite that the applicant has to *inter alia* show a clear right; the absence of an alternative remedy; and that, if the interdict

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[7] See *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) at para 20

should not be granted, it will suffer irreparable harm. In order to establish a clear right, the court has to consider whether there is an interest deserving of protection, and to thereafter look at the other factors proposed in *Basson v Chilwan and others*[8] as shall be illustrated below.

[16] The applicant wishes to enforce the restraint of trade agreement against Kruger, and it is common cause that indeed such an agreement exists. By taking up employment with Jingles which is some 1.7 km from the applicant's store, Kruger has indeed breached his restraint of trade undertakings. Having discharged the onus in respect of the existence of the agreement and the breach, the onus is upon Kruger to demonstrate that the enforcement of the agreement is unenforceable, unreasonable and/or contrary to public policy[9].

[17] The enquiry into the reasonableness of the restraint is essentially a value judgment that encompasses a consideration of two policies, namely the duty on parties to comply with their contractual obligations and the right to freely choose and practice a trade, occupation or profession[10]. Central to an enquiry into the reasonableness of the restraint are four interrelated questions as identified in *Basson v Chilwan and others*[11], viz;

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[8][1993] (3) SA 742 (A) at 767 G-H

[9] See *Experian South Africa (Pty) Ltd v Heyns and Another* [2013] (1) SA 135 (GSJ) at para 14, where it was held that;

> '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'

See also *Massmart Holdings Ltd and Others v Vieira and Others* (J1945/15) [2015] ZALCJHB 451 (3 November 2015) at para 4 where it was held that;

> "…Restraint agreements are enforceable unless they are unreasonable (see Magna Alloys and Research (SA) (Pty) Ltd v Ellis [1984] ZASCA 116; 1984 (4) SA 874 (A)). In general terms, a restraint will be unreasonable if it does not protect some proprietary interest of the party seeking to enforce a restraint. In other words, a restraint cannot operate only to eliminate competition. The party seeking to enforce a restraint need only invoke the restraint agreement and prove a breach of the agreement, nothing more. The party seeking to avoid the restraint bears the onus to establish, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable (see 2013 (1) SA 135; Magna Alloys and Research (SA) (Pty) Ltd supra; Den Braven SA (Pty) Ltd v Pillay and another 2008 (6) SA 229 (D)).

[10] See *Labournet (Pty) Ltd v Jankielsohn and Another* [2017] 5 BLLR 466 (LAC) at para 41; *Sunshine Records (Pty) Ltd v Frohling and others* 1990 (4) SA 782 (A) at 794C-E

[11][1993] (3) SA 742 (A) at 767 G-H

(a) Does the one party have an interest that deserves protection at the termination of the employment?

(b) If so, is that interest threatened/prejudiced by the other party?

(c) Does such interest weight qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

(d) Is there an aspect of public policy having nothing to do with the relationship between the parties, which requires that the restraint be maintained or rejected?.

[18] The interests sought to be protected are generally in two categories. The first is confidential information which is useful for the carrying on of the business and which could be used by a competitor, if it were to be disclosed to that competitor, to gain a relative competitive advantage ('trade secrets'). The second is relationships built with customers, potential customers, suppliers and others ('trade connection' of the business, this being an important aspect of its incorporeal property known as goodwill)[12].

[19] The existence of these interests require a factual enquiry, as it is not sufficient to lay claim to them based on the mere existence of a restraint of trade agreement or alleged breach. Furthermore, it is also not sufficient for the applicant to merely rely on the so-called '*acknowledgement*' or '*freely and voluntarily*' or '*equal bargaining position'* clauses in the restraint of trade agreement in an attempt to enforce it. A case needs to be made out that there indeed exists proprietary interests worthy of protection, and the respondent must equally demonstrate that the agreement is unenforceable for some or other reason.

[20] The interests that the applicant seeks to protect in this case relate mainly to the goodwill and relationships established between Kruger, in the course of his employment, and the customers serviced by him during his period of employment. In this regard, it was submitted that;

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[12] *Massmart Holdings Ltd and Others v Vieira and Others* at para 6

20.1 The applicant's commercial interests are threatened directly by the possibility of its existing customers previously served by Kruger, who will be diverted to Jingles along with him. This was particularly so since Kruger had conceded that some of these customers have been serviced by him at Jingles.

20.2 The applicant's protectable interests were prejudiced as Kruger was utilising his unfair advantage of having established strong client relations developed during his employment for the benefit of Jingles, which conduct amounted to 'spring boarding', and was unfair and unlawful.

20.3 The goodwill and client connections were a clear and vital proprietary interest of the applicant and formed the basis of it requiring that all its stylists enter into restraint of trade agreements, which terms were reasonable and fair in terms of geographical area and duration.

[21] Kruger in opposing the application raised a number of other preliminary points related to the position of the deponent to the founding affidavit, Kahn, and the averments made, which were considered to be inadmissible hearsay as it is alleged that she was not a manager at the applicant's salon where Kruger was based. He also took issue with the reliance by the applicant on annexure 'LK2' which purports to be a summary of customers serviced by Kruger between March 2017 and 4 April 2018, and the fact that it is not indicated in the founding affidavit as to who had compiled the report, who was responsible for confirming the accuracy of that document, when or at what point the applicant's computer was updated or reconciled. Kruger also questioned the authenticity of that document and further pointed out it related to a period when he was no longer in the applicant's employ. Kruger further pointed out that even though it was alleged that only 10 of the regular customers had returned to the salon, it is not clear as to who had advised Kahn of those figures and the details in that regard. He nonetheless submitted that there was no evidence to support the allegation that his regular customers did not return after 13 March 2018.

[22] Kruger also submitted that in the light of the relief that the applicant seeks, the determinative question is whether his skills, expertise and know-how as a hairdresser is an interest which accrues to him as an employee, or one which accrues to the employer. He appreciated that in the event that such an interest accrued to the employer, then it was protectable by way of enforcement of restraint. If however it did not, then the employer had no proprietary interest and could not seek to enforce the restraint of trade provisions.

[23] The applicant's view however in the light of Kruger's contentions is that the purpose of the restraint is not to restrict him from utilising his skills and qualities that he had acquired over the years, but to restrict him from relying upon the relationship he had established with its clients whilst still in its employ, and from taking advantage of those client relationship and utilising his skills, knowledge and experience for the benefit of Jingles. It was submitted that Kruger's allegations that the applicant retained no protectable interest in respect of its clients were misleading, generalised and speculative, and further that attributes such as personal know-how and skills played no role in the determination of the issues.

[24] It is now trite that the fact that the ex-employee has taken up employment with a competitor does not necessarily in itself entitle the applicant to any relief, if all that the ex-employee would be doing is to apply his/her skills and knowledge acquired while in the employ of the applicant. Effectively, it is only if the restriction on the ex-employee's activities serves to protect a *recognisable proprietary interest* relied on by the applicant, that it can be said that there is a breach of contractual obligations[13].

[25] Kruger submitted that because of the nature of the hairdressing and styling industry, the product serviced to customers is the skill and qualities of the stylist developed over the years, and not the product of the employer or its proprietary interest, which therefore rendered the restraint provisions contrary to public policy and unenforceable.

[13] *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007 (2) SA 271 (SCA) at 279

[26] The need to protect customer goodwill or trade connections at a general level 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[14]. The ability of an ex-employee to enable him or her to induce customers to follow him or her arises from the connection (attachment or influence) built between the ex-employee and those customers[15]. I further accept that customer connections entails a relationship a business has with customers or potential customers, which is indeed an important aspect of a business goodwill[16].

[27] In the same token however, one is mindful of the principle emphasised in *Den Braven* that a protectable interest in the form of customer connections does not necessarily come about simply because the former employee had contact with the employer's customers in the course of his or her duties. An element of ability to induce customers to follow an ex-employee to the new employer remains a critical factor[17].

[28] It is accepted in the hairdressing industry that despite some form of training, mentoring and investment into a stylist, the latter, in any event ultimately will apply his or her own skills, knowledge, experience and personality in attending to the individual and personal needs of clients. Any claim by a salon owner that there is a specific formula applied by stylists in attending to the needs of each customers would be fallacious, in that each individual client invariably has specific if not unique needs, even if he or she is a repeat client.

[29] As to whether a relationship developed between a hairstylists and a client constitutes an important element of the goodwill of the business, and whether that is an interest which the employer is entitled to have protected has been a subject of divergent views by the Courts over the years.

[14] *Rawlings and Another v Caravan Truck (Pty) Ltd* 1993 (1) SA 537 (A) at 541C-D
[15] *Longfield Trading CC v Bradfield* [2011] JOL 28113 (KZD) at para 15
[16] *Den Braven SA (Pty) Limited v Pillay & Another* 2008 (6) SA 229 (D)
[17] At para 236D

[30] The facts of this case are not dissimilar to those in *Nachtsheim v Overath*[18], where the applicant sought to enforce a restraint of trade agreement ('a bar clause') against a hairdresser. The court (per Corbett J) held that;

> "...having regard to all of these facts, the circumstances of the case generally, more particularly the two year period of the employment contract, it seems to me that the applicant was entitled, at the time when this contract was entered into, to take steps for the protection of his business, more particularly for the retention of his customers, in the event of the respondent terminating his contract of employment and seeking employment elsewhere. It seems to me that, under the circumstances, the applicant had a real interest in the retention of such customers who might well be induced to patronise a rival business should the respondent become employed by such a business because of the personal relationship which arises between an employee in the position of the respondent and the clientele of the business."[19]

[31] Kruger however as already indicated maintains that his skills and knowledge as a hairdresser is an interest that accrues to him. A number of authorities support his contentions. In *Aranda Textile Mills v Hurn & Another*[20]**,** the court emphasised that proprietary interests sought to be protected must be properly described as belonging to the employer. In this regard, Kroon J held that;

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

[18] 1968 (2) SA 270 (C).
[19] At para 272 G-H
[20] *Aranda Textile Mills (Pty) Ltd v Hurn and Another* [2000] 4 All SA 183 (E); See also *PB Hairdressing Organisation (Pty) Ltd t/a Carlton Hair International v Vinciguerra and Another* (J2948/16) [2017] ZALCJHB 8 (16 January 2017) at para 13

> 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."

[32] A similar approach as above was followed in *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others*[21], where the court held that the facts of that case established that the know-how acquired by the respondents was no more than a specialist skill in manufacturing machines. Those skills did not belong to the ex-employer, but to the respondents as part of their general stock of skill and knowledge, which they could not be prevented from exploiting. In the circumstances, the ex-employer had no proprietary interest worthy of protection, and the restraint sought was inimical to public policy and unenforceable[22].

[33] Similarly in *Basson v Chilwan,* the court accepted that a restraint would be against public policy if it prevented the employee, at the termination of employment, from freely participating in the profession or industry, provided the protectable interests of the employer were not violated. The court further accepted that a person is entitled to take his skills with him, even if those skills were acquired through his former employer's training, and that he is free to earn his living in his chosen occupation[23]. The Labour Appeal Court in *Labournet (Pty) Ltd v Jankielsohn and Another*[24] in reference to *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* accepted that even if

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[21] At para 8

[22] At 277G-278A and C; 282E-F and 282G. See also *Kopano Copier Company (Pty) Ltd* t/a *Nashua Kopano v Gibson* 2013 JDR 1994 (GSJ); (13340/2013) [2013] ZAGPJHC 233 (31 July 2013) at para 19 where the Court (Per Madima AJ) held that;

> "I agree further that the fact that the first respondent has taken up employment with Smart Office does not in itself entitle the applicant to any relief if all he will be doing is applying his skills and knowledge acquired while in the employ of the applicant. It is only if the restriction on his activities serves to protect a <u>recognisable proprietary interest</u> relied on by the applicant that the first respondent would be in breach of his contractual obligations. *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007 (2) SA 271 *(SCA) at 279.* This also does not appear to be the applicant's case in its founding papers."

[23] See also *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 507A, where the copurt held that;

> 'In seeking to protect his 'investment' in training the workmen, the employer is pursuing an objective which is unreasonable and contrary to public policy. For public policy requires that workmen should be free to compete fairly in the market place to sell their skills and know-how to their own best advantage; and the enforcement of a restraint which has no objective other than to stifle such free and fair competition is unreasonable and contrary to public policy.'

[24] At para 61

an employer spent time and effort and money to train or "*skill*" an employee in a particular area of work the employer had no proprietary hold on the employee, or his, or her, knowledge, skills and experience, even if those were acquired at that employer.

[34] Applying the above principles to the facts of this case, the starting point is to accept that the very nature of establishments such as hairdressing is that the hairstylists invariably develops personal contacts or attachment with regular clients that they attend to. This is so in that clients ordinarily have individual specific needs and tastes, and seek to be attended to by specific stylists of their choice. A rapport is built between the stylist and the client as a result of the personal nature of the service provided, and invariably, clients want stylists they are comfortable with, know and trust, and who understand and appreciates their own personal (styling) needs. That relationship can for all intents and purposes be described as unique.

[35] It can also be accepted that stylists through their own personalities or skills, endear themselves to those clients, hence the latter's need to be attended to by them. In effect, it cannot be said in such an industry that there is a one size fits all formula in the procurement and retention of clients. Clients come and go to salons depending on whether their hairdressing needs and requirements are met, and it cannot be said that they are necessarily attached to the salon itself. It is not far-fetched to conclude that clients tend to be attached to stylists instead. The salon merely provides an avenue for the expression of a relationship between the stylist and the client. This is the trend in all professions where clients require intimate contact and attention.

[36] The approach of Corbett J in *Nachtsheim v Overath* clearly favoured the principle of sanctity of contracts, which dictated that restraint of trade agreements, like all others which are not unlawful or *contra bonos mores*, must be performed and if necessary be enforced. The same theme ran through the decision of Didcott J in *Roffey v Catterall, Edwards & Goudre (Pty) Ltd*[25] . However, with the advent of the new constitution, the strict

[25] 1977 (4) SA 482 (N) at 493 , where it was held that;

application of the principle of sanctity of contracts in regards to the enforcement of restraint of trade agreement to the exclusion of other considerations had to change as was evident from *Barkhuizen v Napier*[26], where the Constitutional Court (per Ngcobo J) held that the principle of contract *pacta sunt servanda* was not a sacred cow that should trump all other considerations. The Court accepted that constitutional values of equality and dignity may prove to be decisive when the issue of the parties' relative bargaining positions was before the court, and that all law, inclusive of the common law of contract, was now subject to constitutional control. In the end, the principle was confirmed that the application of the principle *pacta sunt servanda* was therefore subject to constitutional control.

[37] The above approach was similarly followed in *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff & Another,* where it was held that the principle of *pacta sunt servanda*, that agreements freely entered into must be honoured, although important, must be balanced against public policy considerations that seek to encourage gainful employment, and against the constitutional right to be employed and to trade freely.

[38] Within the context of the constitutionally guaranteed right to human dignity[27] and the freedom of trade, occupation and profession[28], and the authorities referred to subsequent to courts' decision in *Nachtsheim v Overa,* it can now be accepted that the enforcement of restraint of trade provisions is no longer a purely contractual matter, especially in such cases where respondents claim that the service that they provide to clients cannot be divorced from their own personal attributes, and thus falling outside the realm of protectable interests.

[39] The hairdressing industry as already indicated is unique. It does not as with ordinary conventional industries, entail mere provision of services of goods nor does it ordinarily involve the selling, buying and/or delivery of specialised products. It is appreciated that salons obviously provide an avenue for the

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"I am satisfied that South African law prefers the sanctity of contracts. That principle is firmly entrenched in our system, where it shows its' head in so many places. Freedom of trade does not vibrate nearly as strongly through our jurisprudence"

[26] 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 15

[27] Section 10 of the Constitution

[28] Section 22

forging of relationships with clients, but in the end, and as in this case, the nature of the service provided to clients ordinarily involves an application of the stylists own personal skills, expertise, and know-how. To some extent, it can even be argued that there is an element of a human touch involved in the provision of services in such an industry. Kruger is therefore correct in his assertions that the very nature of the product serviced in the light of these considerations cannot by all accounts be construed to be the product of the employer or its proprietary interests.

[40] The clients in such an industry ordinarily get attached to the stylist rather than the salon. To therefore equate the skills, know-how and experience of a hairdresser or hair stylist inclusive of his or her personality to that of a product capable of accruing to the employer as proprietary interest is clearly taking us back to an archaic master and servant system, where the salon owner not only owns the property, but also the inherent skills, expertise, know-how and *persona* of the stylists. This cannot be in keeping with the tenets and values enshrined in our constitution.

<u>Conclusions:</u>

[41] Even though on the common cause facts Kruger went to the competition in breach of his restraint of trade undertakings, the applicant failed to surmount the hurdle of demonstrating that even if some of its clients followed Kruger to Jingles, it was Kruger through any other means other than his inherent skills, know-how and experience, that induced them to follow him.

[42] There is no merit in the applicant's contentions that all it seeks to do is merely to restrict Kruger from relying upon the relationship he had established with the clients whilst still in its employ, or from taking advantage of those client relations, and utilising his skills, knowledge and experience for the benefit of Jingles. What the applicant seeks to do with the enforcement of the restraint agreement is effectively to preclude Kruger from making use of his own skills and abilities which are part of his *persona*, which attributes are incapable of being converted into a protectable proprietary interest accruable to anyone.

[43] Kruger has been in the hairdressing industry since 2000, and I accept that his skills and expertise can only be said to be in that field. There is nothing placed before the Court that suggests that Kruger during his employ or training by the applicant, was exposed to any particular special techniques, methods, secrets, or specialised products which are unique to the applicant, and which would make his own personal attributes unique for the purposes of a legitimate claim to any proprietary interest deserving of protection.

[44] To conclude, all that Kruger would be doing having joined Jingles is to apply his skills, knowledge and know-how even if acquired while in the employ of the applicant. To therefore deprive him of the benefits of utilising the only skills and knowledge he has, would be inimical his constitutional rights to be employed and to trade freely. Such a restriction in this case would not serve to protect any discernible or recognisable proprietary interest, and would equally be unreasonable, contrary to public policy and unenforceable.

[45] It is worth repeating that any attempt in enforcing a restraint of trade in circumstances where a proprietary interest has not been demonstrated is purely an attempt at eliminating competition, and this cannot be countenanced. In my view, the facts of this case point to this application being intended to eliminate competition, especially near or around the prime area of Nelson Mandela Square in Sandton.

[46] Similarly, even if it might be argued in this case that Kruger in the course of his employment had agreed to subject himself to a restraint on the exercise of his knowledge and skills, and should thus be held to his undertaking, the facts nonetheless indicate that at the time when the applicant sought to enforce the restraint, it had no interest to protect other, than the 'investment' it had made in Kruger over the 18 years of his service. Accordingly, and based of these further two grounds, it should be concluded that Kruger had succeeded in discharging the onus of proving that the enforcement of the restraint would be unreasonable and contrary to public policy[29].

[29] See *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* at 507D-H; *Automotive Tooling Systems (Pty) Ltd v Wilkins and Others* at para 10.

[47] In the light of no protectable interests having been demonstrated, the enquiry into weighing up of the interest of the parties qualitatively and quantitatively becomes moot. Even if for some reason the facts of this case had disclosed something of a protectable interest, (which is not the case), it is my view that those interests, both qualitatively and quantitatively,do not outweigh Kruger's interest to remain economically active and to apply his skills, knowledge and know-how in the industry of his choice. Thus, in regards to the relief sought, it should be concluded that even if it is appreciated that the applicant's alternative remedies are limited if not non-existent, I am satisfied that the other elements of the relief have not been satisfied, and thus the application ought to be dismissed.

[48] In regards to costs, it is trite that this court ought to take into account the requirements of law and fairness in accordance with the provisions of section 162 of the LRA, and rule of practice that costs follow the result does not apply in this Court[30]. Furthermore, it had long been held by the Labour Appeal Court in *Ball v Bambelela Bolts (Pty) Ltd*[31] that since restraint of trade disputes raises a constitutional issue, a rule of costs following the results does not apply. To that end, the appropriate order to make is that of each party paying its own costs.

<u>Order:</u>

[49] Accordingly, the following order is made:

1. The applicant's application is dismissed.

2. Each party is to pay its own costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

[30] *Sibongile Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1 at paragraphs 22 - 24

[31] [2013] 9 BLLR 843 (LAC).

APPEARANCES:

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