THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J2249/17

In the matter between:

TWINCARE INTERNATIONAL (PTY) LTD **Applicant**

(Registration Number:1995/002691/07)

and

DEBORAH NEL **Respondent**

Heard: **19 June 2018**

Delivered: 20 July 2018

Summary: Deregistered entity has no *locus standi* – amendment to substitute a party is untenable.

JUDGMENT

NKUTHA-NKONTWANA J.

Introduction

[1] The applicant approached the Court by way of urgency seeking to enforce a service, confidentiality and restraint agreement (the agreement) entered into

between the parties in 2006. The period of the restraint is 24 months and the scope is nationwide.

[2] The matter was placed on the urgent roll of 5 October 2017 before Van Niekerk J and was struck of the roll with costs. However, the applicant was directed to approach the Judge President of this Court for an expedited allocation, hence these proceedings.

[3] The application is vigorously opposed by the respondent and takes two points *in limine*. Firstly, the respondent argued that the applicant has no *locus standi* to launch this application by virtue of it being finally deregistered. Secondly, that the applicant has failed to set out sufficient grounds or merit of urgency.

Background

[4] The applicant is involved in the professional beauty industry and distributes professional retail hair, skin and nail care products with a national customer base. The services offered by the education division include assisting customers in the sale of products, educate their own staff in product education and basic communication, sales, advertising, merchandising, administration, computerisation, goal setting, and motivation skills and teaching customers how to run a more professional, profitable and efficient business.

[5] The respondent was employed by the applicant as an educator in the Skincare Division sometime in April 2006 and was involved in a countrywide education programme to train the staff members of the applicant's customers who are mainly salons. According to the applicant, the respondent was also part of the dedicated sales, education and marketing team responsible for selling the applicant's products and forging, preserving, enhancing and maintaining relationship with its customers.

[6] In May 2006 the respondent signed the agreement in terms of which she agreed to be bound by a restraint of trade for 24 months subsequent to the termination of her employment in tandem with other service and confidentiality undertakings.

It would seem that sometime in May 2013 there was a section 197 of the Labour Relations Act[1] (LRA) transfer of the respondent's contract of employment to an entity called Golden Beauty consequent to its amalgamation with the applicant. It is not clear from the papers before the Court as to how Golden Beauty acquired the applicant's name yet again. Nonetheless, what is clear is that as at about June 2013, at least, the entity called Twincare International with registration number 1993/006350/07 emerged. In fact, an unsigned letter dated 16 June 2013 purporting to be the respondent's letter of appointment evinces the transition. Also, that letter refers to an unsigned copy of an updated agreement which noticeably reduced the scope of the restraint to only the Skincare division and period of the restraint to 12 months. Both parties distanced themselves from the updated agreement as it is not signed. Save, for the mention that the company is defined as Twincare International (Pty) Ltd with registration number 1993/006350/07.

[7] The respondent resigned from her employment with the applicant effectively at the end of February 2017 on the basis that she was retiring for health reasons. In a letter accepting her resignation, the applicant sternly warned the respondent as follows:

> '5. In terms of the signed restraint agreement concluded between you and the company you are reminded that:
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> 5.1 for period of one year from 17th February 2017, within each province of South Africa, you may not, in the manner detailed in the restraint agreement, became involved with any third party which carriers on the business including, without limitation, any service relating to Wholesaling and/or its subsidiary from time to time an any other services relating to the business conducted by the skin and care division of the company from time to time;

[1] Act 66 of 1995 as amended.

5.2 in order to protect the company's interest in its confidential information and trade secrets you may not at any time after termination of your employment –

5.2.1 use, divulge or disclose to any third parties any of the company's trade secrets;

5.2.2 retain copies of any written instructions, drawings, notes, memorandum or records relating to the company's trade secrets…'

[8] In September 2017, almost 7 months after her resignation, the respondent was seen by the applicant's employees at the event called Expo for Professional Beauty (Beauty Expo) promoting a rival product called Mary Cohr in breach of the agreement. In these proceedings, the respondent seeks to enforce the restraint agreement in its entirety.

Locus Standi

[9] The applicant is cited as Twincare International (Pty) Ltd with registration number 1995/002691/07. This registration number is referred to in the notice of motion, Founding Affidavit and its annexures and in particular annexures 'X1'- resolution by its directors; 'A' - respondent's fixed term contract; 'B' - agreement; 'C' - respondent's appointment letter; 'D' - amalgamation letter; 'F' - training agreement; 'K', 'L' and 'M - confirmatory affidavits.

[10] The respondent's online search with the Companies and Intellectual Property Commission (CIPC) revealed that the applicant had been finally deregistered as of 8 March 2017. Accordingly, the respondent's assail to the applicant's claim is that, as a deregistered company, the applicant has no *locus standi* to launch these proceedings and/or enforce any of its rights as its legal persona ceased to exist.

[11] In response, the applicant launched an interlocutory application wherein it seeks leave to amend and supplement the founding papers in the main application. The

interlocutory application was served on the respondent on 3 October 2017 and she was given until the next day, 4 October 2017, to file her notice of intention to oppose and answering affidavit. The respondent's answering affidavit, opposing the interlocutory application, was only served and filed on 7 June 2018. The applicant objects to the respondent's answering affidavit on the basis that it was filed out of time. I do not think much time should be spent on this issue as the applicant is seemingly oblivious of the fact that this matter was instituted as an urgent application and the Rules of procedure are somewhat relaxed.

[12] Quintessentially, the applicant seeks to amend its founding papers and annexures as mentioned above by removing the registration number 1995/002691/07 and substituting with the registration number 1993/006350/07. The explanation proffered is that the defect came as a result of a typographical error which was overlooked because the application was launched on urgent basis. Nonetheless, the applicant is indeed Twincare International (Pty) Ltd as reflected in the CIPC certificate.

[13] On 3 October 2017, the board of directors of Twincare International (Pty) Ltd, 1993/006350/07 passed a resolution stating that the was a typographical error in the founding papers and accordingly authorised Mr Stavros Dimitriadis, the Chief Executive Officer and the Director who is also the deponent to both the founding affidavit in the main application and the supporting affidavit in the interlocutory application, to act on behalf of the company.

[14] The applicant's counsel submitted that the application for leave to amend and supplement must be granted in the interest of justice; and that the respondents opposition and overly technical approach, notwithstanding the explanation by the applicant, is aimed at impeding the right of the applicant to access to justice. That is so because the applicant has conceded to the amendment by preparing and taxing the bill of costs pursuant to the matter being stuck off the roll under the Twincare International (Pty) Ltd 1993/006350/07, so it was further argued.

[15] The respondent's opposition is mainly premised on the contention that the applicant in the interlocutory application still lacks the requisite *locus standi* to

amend the founding papers in the main application by virtue of the fact that it is the same applicant who lacks *locus standi* to launch the main application. The applicant further contents that there are two different legal entities at stake and that the one before the Court had been deregistered and it would seem, an incorrect party. Therefore, the applicant's application to emend and supplement constitutes an irregular step as it is clear that the applicant seeks to substitute or replace or alternatively, to or join in a party into these proceedings, so it was further argued.

[16] It is a settled fact that the Court has a discretion to grant or refuse an amendment; a discretion which profusely tilts towards the proper ventilation of disputes.[2] In *Affordable Medicines Trust and others v Minister of Health and Another,*[3] the Constitutional Court endorsed the practical rule that 'amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for cost, or unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to amend was filed.'

[17] In the present case, the main obstacle facing the applicant is the reality that there are two entities involved in this matter. The Twincare International (Pty) Ltd with registration number 1995/002691/07 (Old Twincare) is a separate legal entity from Twincare International (Pty) Ltd 1993/006350/07 (New Twincare). In fact, even the restraint covenant sought to be enforced is concluded in the name of the Old Twincare. To ignore this fact is to pierce the corporate veil and ignore the uniqueness of legally incorporated entities. Also, it is common cause that there was a corporate rearrangement through amalgamation of the Old Twincare and Golden Beauty and the emergence of the New Twincare, which is said to be the Old Twincare's successor in title. The Old Twincare was subsequently deregistered.

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[2] *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2003] ZASCA 144; 2004 (3) SA 160 (SCA) at para 12.
[3] [2005] ZACC 3; 2006 (3) SA 247 (CC) at para 9.

[18] In *Miller and Others v Nafcoc Investment Holdings Co Ltd and Others*,[4] the Supreme Court of Appeal (SCA) held that the deregistration 'puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceases to exist on death. Once there has been deregistration there is obviously no purpose in a corporate post mortem and no-one would have the authority to conduct one.' Consequently, deregistration automatically terminates the office of a director as nobody can be a director of a non-existent company and any act by such company is void.[5]

[19] Even though the applicant's counsel submitted that the amendment sought by the applicant is to actually correct a typographical error, in my view, this is not a case of mere misnomer. The effect of the amendment would be to introduce a new applicant (New Twincare). It is clear that the Old Twincare is defunct by virtue of deregistration and accordingly has no *locus standi* to institute the main application. The respondent's counsel correctly submitted that the applicant's attempt to introduce a new party by way of an amendment is fatally flawed.[6] A new party cannot be added or substituted under the guise of an amendment.[7]

[20] On this ground alone, I am convinced that this matter stands to be dismissed. In fact, my conclusion accords with the view expressed by the Constitutional Court in *Areva NP Incorporated in France v Eskom Holdings SOC Ltd and another,*[8] that:

> 'It seems to me that…where a litigant has failed to show that it has standing, the Court should, as a general rule, dispose of the matter without entering the merits

[4] 2010 (6) SA 390 (SCA) at para 11.
[5] Supra at para12. However, the Court have been amenable to take into account the *de facto* control of the deregistered company. In Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd [2015] 2 All SA 322 (SCA), it was found that the reinstatement of deregistered company has complete retrospective effect, including validation of corporate activities during period of deregistration. That is not the case in this instance.
[6] *M&V Tractor & Implement Agancies BK v Vennootskap D S U Cilliers and Seuns; Hoogkwartier Landgoed (Edms) Bpk;Olierivier Landgoed (Edms) Bpk* 2000 (2) SA 571 (NC) at 579H-I.
[7] .*Associated Paint and Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v* Smit [2000] ZASCA 11; 2000 (2) SA 789 (SCA); [2000] 2 All SA 115 (A) (28 March 2000) at para11.
[8] 2017 (6) BCLR 675 (CC) at para 41.

> and that it should only enter the merits in exceptional cases or where the public interest really cries out for that.'

[21] Similarly, the present case does not cry for that. Firstly, the process is a nullity since it is instituted by a deregistered company. Secondly, the applicant was alerted to the lack of *locus standi* as early 4 October 2017, as this point was raised for the first time in the respondent's answering affidavit. The applicant ought to have been better advised on the correct legal process to remedy the flawed litigation. A fresh application or substitution would have sufficed.

Merits

[22] Even if I am wrong in the conclusion I have come to above, I am not convinced the applicant has made out a case for the enforcement of the agreement.

[23] It is common cause that the respondent was employed in the applicant's Skincare Division and dealt only with two products, Guinot and Mary Cohr. As an educator, she only dealt with salons, who were the applicant's primary clients. When her daughter, Mrs Jenna Olendzki-Brown (Mrs Brown), the applicant's erstwhile marketing manager at its Johannesburg branch, purchased the right to distribute Mary Cohr products, the respondent conducted training solely in Guinot. Ms Brown and her sister are the shareholders of a company called Natural Elegant Life (Pty Ltd (NEL) which is the sole distributor of Mary Cohr products. NEL is the applicant's competitor.

[24] The crux of the respondent's' opposition is that she did not breach the restraint provisions and that the applicant has no protectable interest. Conversely, when confronted by the applicant about the breach of the agreement, on 18 September 2017, she furnished an undertaking not use or divulge any information obtained whilst in the employ of the applicant and for period of 12 months from the date of her resignation, not to solicit, entice, or interfere, *inter alia,* with the applicant's clients and suppliers, and not to persuade, entice or encourage any of the applicant's employees to terminate their employment and to join her.

[25] I accept that the applicant has a legitimate interest in protecting its confidential information, particularly, the marketing strategies, costs sensitive and price points of numerous brands of products; and customer connections. However, I reckon that the Old Twincare agreement goes beyond what is reasonable to protect the applicant's legitimate business interests.

[26] It is an established principle that the reasonableness of a restraint of trade is determined with reference to public policies that enjoin parties to abide by the contractual obligations and the constitutional right to freely choose a trade, occupation, or profession and to practice such.[9] Therefore, for a restraint to be reasonable and enforceable, it must serve to protect an interest, which, in terms of the law, requires and deserves protection.[10] In *Labournet Labournet (Pty) Ltd v Jankielsohn and Another,*[11] quoted with approval in *Aqatan (Pty) Ltd and Aquatan (Pty) Ltd v Janse Van Vuuren and Another*[12] referred to by the respondent's counsel, the LAC stated that:

> 'According to the Appellate Division in *Basson v Chilwan and Others,*[13] the following questions require investigation; namely, whether the party who seeks to restrain has a protectable interest, and whether it is being prejudiced by the party sought to be restrained. Further, if there is such an interest – to determine how that interest weighs up, qualitatively and quantitatively, against the interest of the other party to be economically active and productive. Fourthly, to ascertain whether there are any other public policy considerations which require that the restraint be enforced. If the interest of the party to be restrained outweighs the interest of the restrainer – the restraint is unreasonable and unenforceable.
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> It is now clear from, *inter alia, Basson* and *Reddy* that the reasonableness and enforceability of a restraint depend on the nature of the activity sought to be restrained, the *rationale* (purpose) for the restraint, the duration of the restraint, the area of the restraint, as well as the parties' respective bargaining positions.

[9] *Labournet (Pty) Ltd v Jankielsohn and Another* [2017] ZALAC 7 at para 39.
[10] *Supra* at para 41.
[11] Supra at paras 42 to 45.
[12] [2017] ZALCJHB 141; (2017) 38 ILJ 2730.
[13] 1993 (3) SA 742 (A) at 767E-I.

The reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced.[14] With reference particularly to the facts of this matter, it is an established principle of law that the employee cannot be interdicted or restrained from taking away his or her experience, skills or knowledge, even if those were acquired as a result of the training which the employer provided to the employee.[15]

Even though it is acknowledged that it is difficult to distinguish between the employee's use of his or her own knowledge, skill and experience, and the use of his or her employer's trade secrets, it is accepted that an employee cannot be prevented from using what is in his, or her, head.[16]

Also relevant to this matter are the principles relating to the reasonableness of the duration of the restraint. This aspect is generally assessed as part and parcel of assessing the reasonableness of the restraint, but it bears mentioning that the duration must the rational and reasonable. It cannot be reasonable if it is not rational.' (Emphasis added)

[27] Turning to the present case, as sated above, there are two restraint agreements, the one the applicant seeks to enforce was concluded in 2006 with the company being the Old Twincare and an unsigned copy reflecting the company as of the New Twincare. In short, the respondent is restrained for a period of 24 months from the date of her resignation from taking up employment or being engaged or associated with any company or entity that sells, markets and/or renders any business, services and products similar to or competitive with:

27.1 Any business or activities or products carried on and/or rendered or provided by the applicant's hair, nail and skin care division (all the applicant's divisions) at any time the during the period of her

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[14] See: *Reddy v Siemens Telecommunications (Pty) Ltd (above)* at 497F, at para 16; *Ball v Bambalela Bolts (Pty) Ltd (above)* at para 17.

[15] See: *inter alia*, *Easy Find International SA (Pty) Ltd v Insta Plan Holdings 1983 (3)* SA *917 (W)* at 929F-930A and the cases cited there.

[16] See; for example, *Northern Office Microcomputers (Pty) Ltd v Rosenstein [1981] 4* All SA *509; 1981 (4) SA 123 (C); Knox D'Arcy Ltd v Jamieson [1992] 4* All SA *275; 1992 (3) SA 520 (W).* In, inter alia, *Automotive Tooling Systems (Pty) Ltd v Wilkens 2007 (2) SA 271 (SCA) at 282E-G*, it was held that the skills which an employee acquired in the course of developing his or her trade, even if they were specialised, did not constitute a protectable interest of the employer who sought to restrain the employee.

employment. That include any services relating to wholesaling and/or retailing to wholesaling and/or retailing of sold products sold by all the applicant's divisions and/or its subsidiaries from time to time to or for the benefit of any person whomsoever or attempting to do so (prescribes services).

27.2 any company, person, firm or association, partnership. Trust, business, close corporation or other entity or undertaking that is a client or had been serviced by all of the applicant's divisions at the time of the applicant's resignation or 12 months prior. That includes entities the respondent had had contact with during her employment with a view of rendering the prescribes services (prescribes clients).

[28] The unsinged agreement dated 9 July 2013 that would have been concluded by the New Twincare sought to reduce the restraint period from 24 months to 12 months and limit the scope of prescribed services and prescribed clients to the skincare division. Even though nothing turns on the New Twincare agreement as it was never formalised, it nonetheless gives credence to the respondent's argument that the Old Twincare agreement is too wide, vague and ambiguous and as such its enforcement would be completely unreasonable.

[29] The applicant failed to explain the rationality for seeking to enforce the unsevered untrammelled restraint agreement. I am disinclined to enforce a restraint agreement which is patently unreasonable in relation to the nature of the protectable interest when balanced with the countervailing respondent's right to work in a new role where the confidential information she had acquired from the applicant would be irrelevant. The respondent was involved in the Skincare Division as the educator, dealing with specific clients who are mainly salons. Other than being seen at the Beauty Expo 7 months after her resignation, there is no evidence that she had attempted to solicit or entice the applicant's clients or employees to join NEL.

[30] What is fatal to the case of the applicant is the fact that the respondent has furnished it with an undertaking not to violate the restraint obligations for a period of 12 months. The respondent failed the explain why it rejected the 12 months undertaking when the respondent was not a senior manager. Clearly the applicant's persistence with its claim for unrestricted enforcement of the agreement is unreasonable as it is contrary to the 12 months' period it has communicated to the respondent when accepting her resignation. The applicant's counsel would this Court to believe that the 12 months' period in that letter was just another typographical error. I am convinced. However, even if it is an error, it is a fatal one in the circumstances.

[31] In addition, the 12 months' period undertaken by the respondent expired at the end of February 2018 and, as at the hearing of the matter, it was almost 9 months from 18 September 2017, the date the undertaking was communicated to the applicant. There was nothing placed before the Court to indicate that the respondent's undertaking was not made in good faith. As a matter of fact, the applicant's counsel conceded that it would seem that the respondent has at least complied with her undertaking as there were no further allegations of breach of the restraint agreement reported. As things stand,16 months have also passed since the respondent's resignation and there is a great possibility that the confidential information has lost its value.

Conclusion

[32] In the circumstances, I am persuaded that the applicant has no *locus standi* to institute these proceedings and the substitution of a party under the guise of an amendment is impermissible. Alternatively, I find that the restraint of trade agreement is unreasonable and accordingly unenforceable.

Costs

[33] Both parties seek attorney and client costs *de bonis propriis*. I, however, do not think that this matter presents the extraordinary circumstances to award attorney and client costs *de bonis propriis*. Even though the launch of these proceedings was misconceived, I am not convinced that the applicant

'acted or conducted itself in a *mala fide*, …capricious, brazen and/or cowboyish manner in its approach to the litigious process and not have cared what the consequences of its acts or actions would be on the legal process and/or the other side.'[17]

[34] In *SA Liquor Trader's Association v Gauteng Liquor Board,*[18] addressing the costs *de bonis propriis*, the Constitutional Court stated that : judgment in the case of:

> "An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy."

[35] Pertinently, in *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd and Others, Telkom SA Soc Ltd and Another v Blue Label Telecoms Ltd and Others,*[19] the Court stated that:

> 'It is true that legal representatives sometimes make errors of law, omit to comply fully with the Rules of Court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not however per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetent and a lack of care.'

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

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[17] *Rudman v Maquassi Hills Local Municipality and Others* [2013] ZALCJHB 166; (2014) 35 ILJ 765 (LC) at para 35.
[18] 2009 (1) SA 565 (CC) at 582 F.
[19] [2013] ZAGPPHC 261; [2013] 4 All SA 346 (GNP); 2014 (3) SA 265 (GP) at para 35.

Order

1. The application is dismissed with costs on a party to party scale.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Advocate I L Posthunius
Instructed by :	McLarens Attorneys
For the Respondent:	Advocate H Van Beek
Instructed by:	Schindlers Attorneys