



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NUMBER: D3438/2024

In the matter between:

UMHLANGA REHABILITATION CENTRE

APPLICANT

and

BHAVNA SEWRAM

RESPONDENT

ORDER

The following order is made:

1. The late delivery of the Respondent's heads of argument is condoned, with no order as to costs.
2. The application is dismissed with costs, such to be taxed on Scale A.

JUDGMENT

BOND AJ

[1] At the outset, I must thank both counsel for their thorough heads of argument. Although the Respondent's heads were late, both sets were clearly well researched and of great assistance in this matter.

[2] The current matter concerns itself with the enforcement of a 'restraint clause' in an employment contract. The Applicant is a Close Corporation which carries on business providing physiotherapy services in two major hospitals in the Umhlanga area of KwaZulu-Natal. The Applicant cites itself as a well-established physiotherapy practice with further specialisation into rehabilitative physiotherapy.

[3] The contract of employment concluded between the parties in and during November 2022, is common cause. Its terms are as may be expressly provided for in the contract. There are no averments relating to any amendment, rectification or variation of the agreement.

[4] It is further common cause that the Respondent, a senior physiotherapist was in the employ of the Applicant from 7 January 2023 until she resigned on or about 28 September 2023. Her term of employment was therefore approximately eight full months prior to her resignation.

[5] There are three issues which need to be addressed in this matter and were, with gratitude of the court, succinctly canvased in oral argument. These are:

- (a) the relief being sought;
- (b) the interpretation of the 'restraint clause'; and
- (c) whether or not a protectable interest has been established and is worthy of protection.

[6] In oral argument I had raised with the Applicant's counsel, elements pertaining to reasonableness of the restraint. Rightfully so, it was highlighted that the Respondent did not lay any factual opposition on the grounds of reasonableness.

Condonation

[7] The Respondent's heads of argument were delivered out of time, only reaching the court at about 13h00 on Monday 09 December with the matter set down for hearing on 10 December 2024. A substantive application for condonation was delivered. The Applicant's counsel correctly indicated that he did not oppose the later delivery of the heads and would rather proceed with the matter. The Applicant's counsel also indicated that he did not persist with the late delivery of the answering affidavit.

[8] Accordingly, the late delivery of the Respondent's heads of argument falls to be condoned, with no order as to costs.

Relief sought

[9] One of the first aspects addressed by counsel for the Applicant was in relation to the order sought in the notice of motion.

[10] Relevant here, is that the Applicant seeks, at paragraph one of the notice of motion, the enforcement of a restraint for a period of two years from the date of the order.

[11] When questioned, counsel for the Applicant was unable to suggest what may support the order directing a restraint, from the date which the order was made as opposed to it commencing from the date of the termination of the agreement.

[12] I was not given authority for the proposition. Logic dictates, that if the 'restraint clause' is to be upheld, the commencement date for the restrain would be the date of termination of the Respondent's employment.

[13] Further, the Applicant seeks sizable relief in paragraph two of the notice of motion, which also appears to have no origin in the papers. In argument, the Applicant's counsel submitted that the relief sought in paragraph two of the notice of motion was incidental to that sought in paragraph one. I cannot agree with this submission.

The ‘restraint clause’

[14] The starting point of any contractual dispute is an examination of the clause giving rise to the right or remedy. In the current case the ‘restraint clause’ is found at paragraph 15 of the employment agreement and reads as follows:

‘15. Trade Restriction

2 year 8km restriction in event of termination / expiry of Contract’

[15] It appears plain to me that this clause is lacking in substance. There is no indication as to, at least:

- (a) a definite date as to when the two-year period commences;
- (b) what ‘8km restriction’ refers to;
- (c) what is restricted for which ever period may be applicable;
- (d) what interests are sought to be protected; or
- (e) any suggestion in wording that the Respondent cannot practise her trade at Gateway or Umhlanga private hospitals.

[16] When I asked the Applicant’s counsel to address me on how the provisions of the ‘restraint clause’ can equate to the relief being sought, the suggestion was that I had the power to read into the clause that which was contended for by the Applicant.

[17] While I accept that this is true, the clause itself is so scant for detail, that I would be required to read in detail to such a degree that I may be accused of contracting for the parties. In the well-known decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹ it was held that:

‘...Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made...’

[18] In my view the Applicant bears the onus to prove the contractual terms upon which it bases its relief. Another aspect worth mentioning, is that in its papers, the

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

Applicant seems to indicate the importance of the 'restraint clause'. If this is so, it begs the question why so little effort was put into drafting this clause.

[19] Regard must also be had to the types of individuals who may enter into such restraints. As Wallis AJ stated in *Den Braven SA (Pty) Ltd v Pillay and Another*:² '...spanning the spectrum from the hugely successful businessperson who sells the business that he or she has built up for massive amounts of money and is required to sign a restraint of trade agreement in order that the purchaser may protect its investment, to relatively humble employees who may be required to sign such an agreement as a matter of rote and possibly *in terrorem* to deter them from seeking a more advantageous position ...'

[20] The Respondent in the current instance clearly falls into the latter category.

[21] I find a strong parallel with Daffue J in *Correia Spares CC t/a Omega Motor Spares v Croucamp*³ where he stated:

'...I am not prepared to read into the contract a term that the applicant failed to put in writing. The applicant insisted on the agreement and either drafted the document or instructed someone to draft it. In the event that the agreement - particularly clause 28 - is incurably ambiguous or lacking certainty ...'

[22] While I accept the Applicant's submission that I am able both to read into the clause to a certain limited degree and to restrict certain of its terms (should they be proven, such as duration of a restraint), if the full extent of such terms conflict with the demands of public policy, I find myself in agreement with what was stated by Sutherland DJP:⁴

'... the legal principles, as I understand them, do not confer on me the powers of Father Christmas. I cannot rescue the un-rescuable.'

[23] It is common that SMME businesses are reluctant to seek advice from attorneys, and less so to employ attorneys to prepare important legal agreements. This pattern, fuelled undoubtedly by the rising cost of legal charges, often results in

² *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) para 35.

³ *Correia Spares CC t/a Omega Motor Spares v Croucamp* [2021] ZAFSHC 99 para 19.

⁴ *Robert v MEC for Public Transport and Road Infrastructure of the Gauteng Department* 2023 JDR 2878 (GJ) para 25.

unforeseen circumstances by the time the matter reaches a litigious stage. That being said, once the matter has reached a litigious stage, it is then too late to cure the challenges which have arisen, and the court cannot then, at that late stage, return to the contractual drawing board.

[24] I find that clause 15 of the employment agreement is so vague and lacking of definition that it cannot support the Applicant's relief as claimed.

[25] For the purposes of this judgment, I will still consider the other aspects of the matter as was dealt with during the oral address and in both parties' insightful heads of argument.

Approach to be taken

[26] A court adjudicating a dispute relating to restraint of trade should follow the approach adopted in *Basson v Chilwan*⁵ where the following four questions were identified in determining the reasonableness of restraint of trade agreements:

- (a) Does the one party have an interest that deserves protection after termination of the agreement?
- (b) If so, is that interest threatened by the other party?
- (c) In that case, does such interest weigh 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 that requires the restraint to be maintained or rejected?

[27] The balancing act is required where although the public interest requires parties to comply with their contractual undertakings, it is also in the public interest that all persons shall be granted an opportunity to remain economically productive to enable them to earn a living and to support their families.

[28] In *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd*⁶ the Constitutional Court quoted with approval, the dictum of *Automotive Tooling Systems (Pty) Ltd v Wilkins*⁷

⁵ *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767F-H.

⁶ *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC) para 35.

⁷ *Automotive Tooling Systems (Pty) Ltd v Wilkins* [2007 \(2\) SA 271 \(SCA\)](#) para 8.

where it was held that a restraint will be considered unreasonable, contrary to the public interest and unenforceable “if it does not protect some legally recognisable interest of the employer, but merely seeks to exclude or eliminate competition.”

[29] There can be no justifiable submission that any particular industry or trade has an inherently protectable interest. A court must analyse each case on its presented facts to determine whether a protectable interest has been established.

[30] In the current instance, in argument it was submitted that the doctors which refer patients to the Applicant’s practice are trade connections, which constitute a protectable interest. Trade connections are, in many cases found to be protectable interests, but as stated above, no particular trade connection is inherently protectable. A case must be made out in the founding affidavit as to why any element of the Applicant’s business may constitute a protectable interest. Whether the necessary criteria are satisfied is a question of fact in each case, and in many, one of degree.

[31] As was submitted in argument, the Applicant relies on the provisions of paragraphs 11.3, 11.4 and 12.2 of the founding affidavit. These provisions however set out very few facts upon which I am able to make any finding.

- (a) Paragraph 11.3, indicates, at a high level, that the Respondent had access to ‘relevant internal systems’, but there is no actual indication as to what internal systems a physiotherapist’s practice may have, which are ‘confidential’ as averred by the deponent earlier in the same paragraph.
- (b) Paragraph 11.3 does mention the word trade connections, but also does not go any further to suggest what those actually are.
- (c) Paragraph 11.4 suggests that the Respondent ‘acquired knowledge of confidential strategy and pricing processes belong to the applicant’. I struggle to accept that any pricing process can reasonably be held to be a protectable interest in a service industry open to the public at large, where objectively any member of the public can call the Applicant’s offices and enquire as to the costs of treatment.

- (d) The remainder of paragraph 11 contains generic allegations which ask for inferences to be drawn from the averments discussed above, which also contain no primary facts of their own.
- (e) Paragraph 12 continues along a similar fashion of calling on the court to draw inferences, without disclosing any primary facts from which such inferences can be drawn. Interestingly, at paragraph 12.3 the Applicant's deponent avers that 'The period of restraint is necessary allow (sic) the applicant to appoint a new employee, train them in the relevant processes, and to enable the employee to become acquainted to the applicant's clientele to such an extent that it becomes plain to the applicant's clientele that the new person is the one with whom they must interact.'
- (f) To my mind, this is demonstrative that no protectable interest has been established. The Applicant's own averments suggest that the period is required to train a new staff member. That is nothing more than an internal procedure and a course of conduct which flows naturally from an existing staff member leaving the Applicant's employ.
- (g) For the avoidance of any doubt, I have considered the other allegations set out in the founding affidavit and find no other primary facts upon which I can make a finding that a protectable interest has been established.

[32] In its heads of argument, the Applicant relied heavily on the case of *Van Veijeren v Kruger*,⁸ a decision of Seegobin J in the Pietermaritzburg High Court. This case is however distinguishable on the facts. I say this because in *Van Veijeren*:

- (a) the employee had been employed for nine years, whereas in the current instance the Respondent was employed during January and resigned during September of the same year. This period of approximately 9 months is therefore far shorter in comparison;
- (b) the Applicant's business was situated in three small centres, being Dundee, Newcastle and Vryheid, whereas in the current instance, the places of trade of

⁸ *Van Veijeren v Kruger* 2016 JDR 1346 (KZP).

the Applicant are major private hospitals in KwaZulu-Natal's busy commercial district of Umhlanga; and

- (c) the employee was the practice manager, and as found by Seegobin J, 'the face of the practice'. In the current matter, the Respondent does not hold such positions and can never have been said to be the 'face of the practice' after being employed for approximately 9 months.

[33] In *Rawlins and Another v Caravantruck (Pty) Ltd*,⁹ Nestadt JA quoted from an earlier decision, with approval, stating:¹⁰

'such personal knowledge of and influence over the customers of his employer . . . as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection...'

[34] Being guided by the Appellant Division in this matter, I was unable to determine any primary facts set out which would lead me to draw an inference that the Respondent had such 'such personal knowledge of and influence over the customers of his employer' as was restated in *Rawlins*.

[35] I am supported in this view given that the Applicant makes the averment at paragraph 12.3 of its founding affidavit that a 'two year restraint period' is required to 'enable the employee to become acquainted to the Applicant's clientele...'. It then follows that the Respondent had not even made it halfway through the period required to become acquainted with the Applicant's clientele.

[36] I therefore cannot find that the Respondent has the sufficiency of personal knowledge of and influence over the customers of the Applicant which would be required to establish a protectable interest in this case.

Order

[37] In the result, the order which I make is as follows:

1. The late delivery of the Respondent's heads of argument is condoned, with no order as to costs.

⁹ *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A).

¹⁰ *Ibid* at 541F-G.

2. The application is dismissed with costs, such to be taxed on Scale A.

BOND AJ

Case information

Date of Hearing: 10 December 2024

Date of Judgment: 14 January 2025

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