



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 18748/2024

In the matter between:

**SWAGGERS HOUSE OF BEAUTY (PTY) LTD
t/a ATLANTIC BOUTIQUE**

Applicant

and

VANESSA DORFLING

Respondent

JUDGMENT DELIVERED ON 26 NOVEMBER 2024

VAN ZYL AJ:

Introduction

1. This is an urgent¹ application for an interdict restraining the respondent from working in competition with the applicant within a 10km radius of the applicant's

¹ Although the issue of urgency was originally in dispute (this application having been instituted two months after the applicant had discovered that the respondent was working within the area of the restraint), both parties had, as a result of a postponement previously granted, had ample opportunity for the delivery of answering and replying papers, as well as comprehensive heads of argument, by the time that the application was argued. I indicated during the hearing that I was not inclined to strike the matter from the roll for want of urgency, and the parties therefore made submissions on the merits of the application with the view to obtaining an order based on the merits.

premises at the Atlantic Golf Estate in Melkbosstrand. The restraint is to endure for a period of 12 months from the date of the respondent's resignation from the applicant's employ on 30 April 2024.

2. At the time of her resignation, the respondent was employed with the applicant as a senior hairstylist. She had been working as a hairstylist for over 20 years, and was in the applicant's employ for about 18 months, from September 2022 to , as I have indicated, 30 April 2024.
3. The respondent admits the existence of the restraint clause. She also admits that she is rendering services as a hairstylist in Melkbosstrand within the area of the restraint, at another salon located about 1,16km from the applicant's premises. She contends, however, that the clause serves no protectable interest, and that it would be unreasonable to enforce the restraint in the circumstances.
4. The applicant seeks final relief on motion, and the principles enunciated in *Plascon Evans*² as to the resolution of disputes of fact therefore apply. The *Plascon-Evans* principle and the courts' robust approach thereto was summarised as follows in *Cape Town City v South African National Roads Agency Ltd and others*:³

"[165] ... In the absence of oral evidence, any genuine dispute of fact on the papers is resolved, for purposes of determining the case, on the basis of an acceptance of the respondent's version, unless the respondent's evidence is so far-fetched and untenable as to defy belief. The test for finding such untenability has been described as 'a stringent one'. The probabilities are plainly a relevant consideration in this regard. While a mere balance of probabilities on the papers is not enough, the untenability or far-fetchedness of a version may be established if the improbability of the evidence is towards the extremity of the negative end of the continuum of the measure of probability."

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

³ 2015 (6) SA 535 (WCC) at para [165].

5. On the papers and in the course of argument there were many accusations to and fro about inconsistencies in the parties' respective cases, and thus as to whose version should be accepted. It is not necessary to list all of these complaints. In my view, none of the perceived inconsistencies pointed out by the applicant in relation to the respondent's affidavits render the respondent's evidence so blatantly implausible as to be rejected on the papers. I consider the respondent's evidence in this context.
6. The main factual disputes on the papers are whether the respondent has solicited the applicant's previous clients by approaching them and inducing them to leave the applicant and follow her to the new salon; had access to the applicant's computer and thus had access to confidential information, including client lists, client records, clients' contact details and client cards; and has caused the applicant to suffer financial loss as a result of her work as a hairstylist within 10 km of the salon.
7. Since final relief is sought,⁴ it is trite that the applicant has to show a clear right, the absence of an alternative remedy and, if the interdict should not be granted, that it will suffer irreparable harm. As regards a clear right, the Court has to consider whether there is an interest deserving of protection, and thereafter consider the issue of reasonableness at the hand of the factors proposed in *Basson v Chilwan and others*,⁵ namely: (1) Does the one party have an interest that deserves protection at the termination of the employment? (2) If so, is that interest threatened or prejudiced by the other party? (3) Does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (4) Is there an aspect of public policy having nothing to do with the relationship between the parties, which requires that the restraint either be maintained or rejected?
8. Fundamentally, the purpose of enforcing restraints of trade is to protect an

⁴ See *Crazy Splash Swim School (Pty) Ltd v Nortje and others* (2023) 44 ILJ 2538 (WCC) at para [39].

⁵ 1993 (3) SA 742 (A) at 767G-H.

employer's protectable proprietary interests.⁶ The fact that an 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 her skills and knowledge, even if acquired whilst in the applicant's employ. An applicant must show that the restriction on the ex-employee's activities serves to protect a recognisable proprietary interest.⁷

9. Interests sought to be protected can generally be divided into two categories. The first is confidential information or trade secrets which are 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. The second is relationships or trade connections built with customers, potential customers, suppliers and others, all of which form part of a business's incorporeal property known as goodwill.⁸ In *Hirt & Carter (Pty) Ltd v Mansfield and another*⁹ the Court stated:

"In my view, for an employer to succeed in establishing that trade secrets and confidential information are an interest justifying protection by the restraint, it should demonstrate in reasonably clear terms that the information, know-how, technology or method, as the case may be, is something which is unique and peculiar to the employer and which is not public property or public knowledge, and is more than just trivial."

10. The existence of these interests requires a factual enquiry, as it is not sufficient for an applicant to lay claim to them based on the mere existence of a restraint of trade agreement or the alleged breach thereof. A case needs to be made out that there indeed exist proprietary interests worthy of protection. The respondent, in turn, must demonstrate that the agreement is unenforceable for some or other reason.¹⁰

⁶ *Sibex Engineering Services (Pty) Ltd v Van Wyk and another* 1991 (2) SA 482 (T).

⁷ *P B Hairdressing Organization (Pty) Ltd v Kruger and another* [2018] ZALCJHB 308 (6 June 2018) at para [24].

⁸ *Massmart Holdings Ltd and others v Vieira and others* [2015] ZALCJHB 451 (3 November 2015) at para [6].

⁹ 2008 (3) SA 512 (D) at para [57].

¹⁰ See *Massmart supra* at para [4].

11. To be enforceable, a restraint of trade must be reasonable.¹¹ 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.¹²

The restraint clause

12. The clause in the present matter reads as follows:

“Upon termination of this contract for whatever reason or in the event of an (sic) dismissal. (sic) The Employee agrees that they will not perform services same as per schedule 4.3 of this agreement for a period of 12 months from date of termination in a radius of 10km from Atlantic Links (1 Fairview drive (sic), Atlantic Beach Golf Estate, Melkbosstrand) in their own capacity nor accept any employment from any business similar in nature.”

13. There was no “schedule 4.3” as referred to in the restraint clause attached to the papers. Upon enquiry, counsel for the applicant informed the Court that the reference was in fact to clause 4.3 of the employment agreement. This clause reads as follows:

“4.3 JOB DESCRIPTION

4.3.1 To perform all hair care services offered at Atlantic Boutique and act in the best interest of the company regarding improving business.

4.3.2 To perform a high-quality service and to always act professionally.

¹¹ *Crazy Splash Swim School (Pty) Ltd v Nortje supra* at para [59].

¹² *Sunshine Records (Pty) Ltd v Frohling and others* 1990 (4) SA 782 (A) at 794C-E; *MPU Communications (Pty) Ltd v Griffiths and others* [2024] ZALCJHB 29 (7 February 2024) at para [17].

4.3.3 To advise clients on all services and products available at Atlantic Boutique.

4.3.4 To assist with reception duties/such related duties.

4.3.5 To keep all client information up to date on a daily basis (client cards).

4.3.6 To ensure sanitization protocols is (sic) strictly follow (sic) in according (sic) with COVID-19 regulations.

4.3.7 To ensure the workstation is clean at all times.”

14. The clause clearly does not describe the nature of the services that are subject to the restraint, but rather the manner in which the respondent, as employee, should conduct herself. The applicant refers to the respondent as a “hairstylist”, and the respondent does the same. Neither party relies on the performance by the respondent of any particular services. In these circumstances, the restraint purports to cover all of the services generally rendered by a hairstylist in the course of a normal workday.

15. It is in this context that the question arises as to what the applicant’s protectable interest is.

A protectable interest?

16. It is common cause that when the respondent took up employment with the applicant in September 2022, she was already regarded as a senior stylist. There is no evidence that the respondent learnt her craft, or any particular aspect thereof, whilst in the applicant’s employ – on the papers she attended one training session for which the applicant footed the bill. It is accepted, therefore, that she had entered, and later left, the applicant’s employ with certain skills already part of her skills and capacity arsenal.

17. The respondent has placed heavy reliance on the matter of *P B Hairdressing Organization (Pty) Ltd v Kruger and another*.¹³ The applicant submitted that *P B Hairdressing* is distinguishable from the present matter and that it therefore does not assist the respondent. Although there are certain distinctions, they are not material in all respects, and I do regard the case as helpful for present purposes. This is particularly so in relation to the question of whether the applicant has demonstrated a protectable interest.

18. In *P B Hairdressing*, the respondent, one Kruger, had taken up new employment 1,7km from the applicant's premises.¹⁴ In considering whether to enforce a restraint of trade, the Court emphasised that the hairdressing industry is unique and does not entail the mere provision of services or goods, nor does it ordinarily involve the selling, buying or delivery of specialised products. While salons provide an avenue for the forging of relationships with clients, the nature of the service provided to clients ordinarily involves an application of the stylist's own personal skills, expertise, and know-how:

*"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."*¹⁵

19. 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. The Court accordingly held that Kruger was correct in his assertions that the very nature of the product serviced in the light of these considerations cannot by all accounts be construed

¹³ [2018] ZALCJHB 308 (6 June 2018).

¹⁴ See para [16] of the judgment.

¹⁵ See para [28] of the judgment.

to be the product of the employer or its proprietary interests.¹⁶ The Court indicated:

“[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 appreciate 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.”

20. The Court considered that clients in the industry ordinarily get attached to the stylist rather than the salon. To equate the skills, know-how and experience of a hairdresser or hairstylist, inclusive of his or her personality, to that of a product capable of accruing to the employer as proprietary interests would be reverting to the 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. The Court concluded that doing so would not be consistent with the

¹⁶ At para [38].

tenets and values enshrined in the Constitution.¹⁷

21. The Court accordingly held that the restraint of trade was unenforceable since all Kruger was doing at the competitor salon was applying his skills, knowledge and know-how. To deprive Kruger of the benefit of utilising the only skills and knowledge he has, would be inimical to his constitutional rights to be employed and to trade freely. Finally, the Court found that such a restriction would not serve to protect any discernible or recognisable proprietary interest, and would equally be unreasonable, contrary to public policy and unenforceable:

*"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."*¹⁸

22. These comments are, in my view, equally apposite in the present matter – and perhaps even more so given the particular circumstances pertaining to the respondent. Notably, in *P B Hairdressing* the respondent had worked for the applicant for about 18 years, and had entered its employ as a trainee hairdresser. The respondent in that case therefore acquired much of his skill while he was in the applicant's employ, and within the applicant's support system. In the present matter, as I have indicated, the respondent worked for the applicant for a period of less than two years, and she was already a capable and experienced stylist at the time she entered the applicant's employ.

23. It is of course so that the fact that a risk exists as to the use of confidential information or trade secrets is sufficient¹⁹ to satisfy the harm requirement under the prevailing test for the enforcement of restraints. In *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall*

¹⁷ At paras [39]-[40].

¹⁸ At para [45].

¹⁹ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para [20].

(aka Baghas) and another²⁰ it was held:

“Where the ex-employer seeks to enforce against his ex-employee a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has in fact utilised information confidential to it - merely that the ex-employee could do so. ... the ex-employer 'has endeavoured to safeguard itself against the unpoliceable danger of the [ex-employee] communicating its trade secrets to a rival concern after entering their employ. The risk that the [ex-employee] will do so is one which the [ex-employer] does not have to run, and neither is it incumbent upon the [ex-employer] to inquire into the bona fides of the [ex-employee] and demonstrate that [he or she] is mala fide before being allowed to enforce its contractually agreed right to restrain the [ex-employee] from entering the employ of a direct competitor.”

24. I agree, however, with the submissions made on the respondent's behalf that the applicant has failed to identify any specific information which it considers to be confidential and justifying the enforcement of the restraint clause. On the respondent's evidence, she was not in a position to gain access to any such confidential information – this is dealt with in some more detail later in this judgment. According to the respondent she had no knowledge of the applicant's costing, sales, suppliers, or business strategies. As I have indicated, it is not disputed that at the time that the respondent commenced employment with the applicant she was already an experienced hair stylist. It follows that the respondent is using her own skill and training to practice her profession. The respondent cannot be prevented from using her general knowledge, skill, and experience to earn a living. Enforcing a restraint of trade to do so would be unreasonable.²¹

25. In the absence of a protectable interest or proof of any harm or threat of harm to a protectable interest, the applicant's attempt to enforce the restraint clause against the respondent amounts to an attempt to stifle competition. A restraint of

²⁰ 2004 (4) SA 174 (W) at para [13.4.1].

²¹ *Bonnet & another v Schofield* 1989 (2) SA 156 (D) at 160A-B.

trade provision with the sole aim of stifling competition is against public policy and is unenforceable.²²

26. In the premises, it would be unreasonable to enforce the restraint against the respondent. In the words of *P B Hairdressing*:

“[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.”

27. I am of the view that the position in the present matter is the same. I nevertheless deal briefly with the applicant’s allegations as to the respondent’s access to confidential information, her alleged inducement of the applicant’s customers, and the financial harm allegedly suffered by the applicant as a result.

Access to the applicant’s confidential information

28. The applicant argues that the respondent had access to its customers’ contact details in the course of her employment, and that she must have used such information to lure the applicant’s customers away to her new salon.

29. There is, however, no reason evident from the papers to reject the respondent’s evidence that she had not in the course of her employment with the applicant obtained confidential information that would enable her to gain an advantage over

²² See *Aston International College Ballito (Pty) Ltd v Erasmus and another* [2023] ZAKZDHC 1 (24 January 2023) at para [16].

the applicant in her (the respondent's) new employment milieu.

30. The respondent's involvement with the online booking system was limited to the making of bookings – she had no access to customer details. Managing her bookings is not to be equated to managing the client information system. A receptionist who was in the applicant's employ prior to and at the time of the respondent's resignation, confirms under oath that she (the receptionist) was the only one who had handled the reception area and thus the interface with customers. She was the one who was responsible for updating client information kept on the electronic system known as SalonBridge. The receptionist confirms that the respondent did not have access to the relevant computer.

31. In fact, the IT specialist who examined (at the applicant's behest for the purposes of this application) the relevant logs on the applicant's booking system indicated as follows: *"She logged in with her individual profile, made bookings, updated bookings, etc. But nothing more than that."* The IT specialist confirmed that the respondent *"had access to SalonBridge as a therapist/individual, where she could manage her own bookings. Sometime after, her access was updated to reception, where she could manage bookings for all the therapists"*.

32. According to the receptionist, the applicant's manager was however adamant that staff members were not allowed to work at the reception desk or use the computer under any circumstances. The only persons allowed in the reception area and who had access to the computer and work phone were the receptionist, the manager, and an assistant. They were the only people allowed to handle customer payments. No other staff members or employees (including the respondent) were allowed to deal with payments or customer information⁵

33. According to the receptionist the client cards used at the applicant's salon contained no contact information for customers, other than their names and surnames. In any event, to the receptionist's knowledge, the respondent never contacted any of the applicant's customers when she resigned from the salon.

34. All of this is supported by the fact that the respondent's employment contract

itself expressly provides that an employee such as the respondent “*agrees that no customers will be contacted directly for any reason whatsoever, including moving appointments, cancelling appointments and that all communication will be channelled through Swaggers House of Beauty or by approval in writing*”. It is accepted, on the papers, that the respondent adhered to this provision.

Inducing the applicant’s customers, and causing the applicant financial harm

35. The applicant argues that the respondent induced its (the applicant’s) customers to follow her to her new place of work. The applicant contends that, given the fact that the respondent is rendering services to some of the applicant’s erstwhile customers (who the respondent had dealt with as a hairstylist in the employ of the applicant) the only conclusion to be drawn is that the respondent solicited these customers.
36. This is not borne out by the evidence viewed in its totality. The respondent denies ever contacting or approaching the applicant’s customers, and explains that some of her previous customers approached her themselves after they had found out that she had left the applicant’s employ. The respondent’s version is consistent with the evidence on record, including confirmatory affidavits from three of the customers she had assisted while she was still employed by the applicant.
37. These customers testified that the respondent never informed them that she was leaving the applicant’s salon, and never contacted them to advise that she was working elsewhere. One of these customers had been told by a friend that the respondent had left, and the other personally sought out the respondent at her new location because of her exceptional skills and professionalism. This customer also explains that the respondent’s new salon is a very small set-up with only two seats on a rent-a-chair model. It could never be considered a threat to a large, well-established salon like the applicant’s, which is located in a residential estate next to a golf course and which has access to a steady stream of potential clients.

38. The applicant complains, in its affidavits, that there was a marked decrease in sales over the period August 2023 to August 2024. According to the applicant, the only change over that period was the respondent's resignation. Therefore, it says, the respondent's conduct must have been the cause of the loss. The applicant argues that the respondent's clear intention was to rely on the applicant's good name and established clientele to build up her own customer base, so that she could open her own salon and hope that the applicant's customers would follow her.
39. The list of customers on which the applicant relies, however, shows that many of the persons who no longer make use of the applicant's services failed to return to the applicant long before the respondent left the applicant's employ. There is no point in speculating as to the reasons why those customers did not return. The applicant's salon offers all types of beauty treatments, apart from hairstyling services, including nail and spa treatments. The drop in profits could relate to any of the services.
40. The situation is equally opaque in respect of the customers who failed to return after the respondent's departure. It is of course so that a stylist like the respondent has the opportunity (and an employer would probably call it a responsibility) to forge and maintain personal relations with customers. As such, a "regular client" would almost without fail report to a specific stylist each time they visited the salon for a hair treatment or styling. This by itself does not, however, render an employee such as the respondent guilty of inducing such customers to leave the applicant upon the employee's resignation.
41. The respondent's evidence suggests that the decrease in the applicant's profits is the result of the applicant's own mismanagement of the salon rather than the fact that the respondent is working as a hairstylist within 10 km of the salon. In email correspondence to the applicant's management, a representative of the Atlantic Beach Homeowners' Association (the applicant's salon is located within the estate) expressed concern about the *"situation in the salon, given ... the high staff turnover... and there is growing concern amongst residents and members"*. The high staff turnover is likely to be a contributing factor to the applicant's loss of

business. When the respondent submitting her resignation, two other stylists also resigned. The stylist who was appointed after the respondent's resignation left less than a month later.

42. The applicant had in fact notified the Homeowners' Association during October 2024 of its intention to sell the salon. Whilst it is unclear when the applicant made this decision, it is reasonable to assume that it was some months ago, perhaps even prior to the commencement of this litigation. The respondent contends that the fact that the applicant intends to sell the salon supports the conclusion that the salon has been experiencing financial difficulties for some time which cannot be attributed to a single employee – the respondent - resigning and working as a hair stylist within a 10km radius of the salon.

43. The applicant's director and manager, moreover, were both in hospital over the period May 2024 to July 2024 at the time when they were responsible for running the salon. This could explain the decrease in profits in August 2024. In the circumstances, it is unlikely that the respondent's departure and her rendering services within 10km of the applicant's salon could cause such a significant decrease in profits in the four-month period between her resignation in April 2024 and August 2024.

44. The long and the short of the matter is that the decline in revenue could be a result of various factors. In my view, it cannot be concluded that the applicant's financial loss was occasioned by the respondent's conduct. On the papers, the applicant has not made out a case to the effect that the respondent has lured away its customers in order to establish herself at her new place of employment.

45. In all of these circumstances, the mere fact that the respondent now works within the 10km radius stipulated in the restraint clause is not sufficient to enforce the restraint of trade against her. I have already found that the applicant has failed to prove that any protectable interest has been harmed or threatened. On the papers, it has not been established that the respondent has solicited clients or used the client connections she established during her employment with the applicant in manner that has harmed or will harm the applicant's interests. In the

absence of harm or threat of harm to a protectable interest the restraint clause cannot be enforced.

Costs

46. There is no reason to depart from the general rule as to costs in the present matter.²³ In the circumstances, I am of the view that the general rule should be adhered to, and that costs should follow the event. The parties were agreed that such costs should include counsel's fees on Scale B.

Order

47. In the circumstances, the following order is granted:

1. **The application for the amendment of the notice of motion is granted.**
2. **The applicant shall pay the costs of the application for amendment and the costs occasioned by the amendment, including counsel's costs on Scale B.**
3. **The main application is dismissed, with costs, including counsel's costs on Scale B.**

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

²³ Prior to hearing argument on the merits I granted an order amending the notice of motion *inter alia* to make provision for the grant of a costs order (which had been omitted when the application was issued). I ruled that the costs of the amendment application (which was opposed) and any costs occasioned by the amendment were to be borne by the applicant, including counsel's costs on Scale B.

Counsel for the applicant:

C. M. van der Merwe, instructed by
Craucamp Attorneys

Counsel for the respondent:

J. Foster, instructed by Thomson Wilks Inc.