IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case no: 553/2015
Date heard: 19.2.2015
Date delivered: 10.3.2015

In the matter between:

BEAUTIFUL YOU HEALTH AND BEAUTY CLINIC (PTY) LTD **Applicant**

vs

LE'ANNE MOOLMAN **First Respondent**
FRIKKIE MARITZ **Second Respondent**

JUDGMENT

MALUSI AJ:

[1] This is an application for an interdict to enforce a restraint of trade agreement. The application is opposed only by the first respondent whilst the second respondent did not participate in the application. In this judgment, I will refer to the first respondent as the respondent.

[2] The applicant has been conducting business as a beauty saloon providing services, including beauty therapy, treatments and sale of beauty products to the public for a period in excess of 20 years. It presently trades from premises in Walmer, Port Elizabeth.

[3] The respondent, is a former employee of the applicant currently trading as Harmony Health. The respondent had entered into a contract of employment with the applicant with effect from the 16th December 2011. She graduated from a college where she trained as a beauty therapist and her position with the applicant was her first job.

[4] The relevant terms in the contract of employment are encapsulated in clause 25 which provides:

> "25.1 The employee undertakes not to be engaged in the establishing of a new business be it direct or indirect or as a shareholder, partner, member of a close corporation, director of a company or in any other capacity within one year after termination of this agreement within a radius of 50km of the employer.
>
> 25.2 The employee acknowledges and agrees that the aforesaid restraint is fair, reasonable and necessary for the protection of his employer, his employer's trade name and the goodwill attached hereto.
>
> 25.3 Without prejudice to any other rights which the employer may have in law, the employee acknowledges that the agreed damages due to his/her employer will be an amount of R5 000.00 in respect of each calendar month during which any breach of the aforesaid restraint continues, and that the employer shall be entitled to recover such amount, and any associated recovery costs, from the employee in respect of such breach."

[5] The applicant averred at length regarding the nature of the relationship the respondent had established with customers. A picture was painted of particularly personal relationships the respondent had established with a number of customers due to her personality. The respondent did not dispute

the relationships save for the intimacy content to describe the relationships as part of her duties she was expected to perform.

[6] The applicant averred that the respondent had access to client information and pricing structures which was readily available to all employees. As such the respondent has had access to the applicant's entire client base. The respondent strenuously denied these averments. Though conceding knowledge of the client base as an employee she pointed out she did not keep an electronic or hard copy of what amounted to thousands of applicant's clients.

[7] On the 4th February 2015, the respondent tendered her resignation from the applicant's employment. She indicated that she would open her own beauty salon though details were not disclosed to the applicant. The respondent averred her reason for resigning was poor salary and erratic commission payments by the applicant. On the same day the applicant was informed by a long standing customer that the respondent had offered her treatment at respondent's own saloon. Later the applicant's investigations revealed that the respondent had contacted at least ten other customers informing them about her new saloon. The respondent denies that this was an attempt to poach the customers. She avers that all the customers were informed of her plans whilst she was in the applicant's employ.

[8] On the 5th February 2015, the applicant discovered that the respondent had set up a facebook page advertising her recently opened saloon. The applicant's investigations revealed that the facebook page was established on the 31st January 2015. The page has proven to be popular since its publication with some of the applicant's customers browsing the page.

[9] On the 10th February 2015 the applicant's attorney wrote to the respondent demanding she desists from violating the restraint of trade and seeking an undertaking to comply from her. The respondent's attorneys replied that the restraint of trade in paragraph four above is aimed solely at eliminating competition. It was asserted the clause does not identify a legally recognised interest worthy of protection. This precipitated the launch of the present application.

[10] The law regarding restraint of trade agreements is presently settled after an early period of uncertainty. The seminal judgment in ***Magna Alloys and Research (SA) (Pty) Ltd v Ellis***[1] confirmed restraint of trade agreements as valid and part of the law of contract. That judgment and subsequent ones laid down the following principles (a summary of the decisions some of which are verbatim quotes):

[1] 1984 (4) SA 874 (A)

(a) Restraint of trade agreements are valid and enforceable unless their enforcement will be contrary to public policy. It offends public policy to enforce an agreement that is unreasonable.

(b) In order to determine the reasonableness of a restraint of trade agreement the court must consider the following:

(i) does the applicant have an interest that deserves protection after termination of the agreement?

(ii) if so, is that interest threatened by the respondent?

(iii) does the applicant's interest weigh qualitatively and quantitatively against the interests of the respondent to be economically active and productive?

(iv) are there other aspects of public policy, having nothing to do with the relationship between the parties, that require the restraint to be enforced or rejected?[2]

(v) does the restraint of trade agreement go further than what is reasonably required to protect the interests of the applicant?[3]

(c) What is required is a value judgment which requires two principal policy considerations, *viz*:

(i) public interest requires that parties should comply with their contractual obligations as encapsulated in the maxim *pacta servanda sunt*.

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[2] Basson v Chilwan and Others 1993 (3) SA 742 (A), at 767G-H; Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA)

[3] Siemens at para 17

(ii) constitutional values and common law allow all persons to be productive and the freedom to engage in trade and commerce or the professions.[4]

[11] *Mr Mullins*, who appeared on behalf of the applicant, submitted that the restraint of trade is enforceable as all the legal requirements have been satisfied. He further argued that the applicant has satisfied all the requirements for the grant of final relief.

[12] *Ms Zietsman*, who appeared on behalf of the first respondent, submitted that the applicant has not specified a protected interest. She argued in the alternative even if there is a protected interest it is unreasonable to protect such an interest.

[13] The main issue for decision is whether the relevant clause in the agreement discloses an interest worthy of protection.

[14] It is my view that clause 25.2 identifies three interests to be protected, *viz*:

(a) the employer;

(b) the employer's tradename; and

(c) the employer's goodwill.

[4] Esquire System Technology (Pty) Ltd v Cronje and Another, unreported judgment, Labour Court, Johannesburg, Case no J22442/10, para 36 and the cases cited therein

In the context of the agreement the protection of the employer can only mean protection from competition. It has been held a restraint of trade which its sole purpose is to prevent competition is unenforceable.[5] To the extent the agreement seeking this purpose is unenforceable.

[15] *Mr Mullins*, argued that trade name and goodwill encompass customer lists and trade connections. I agree. Both the trade name and goodwill relate to knowledge and esteem outsiders have of the applicant's business. They can be measured by how popular the business is to the public (business connections) or the esteem it is held by its peers (trade connections). These interests are worthy of protection. It has been held that the employee who seeks to turn their employers confidential information, trade or customer connections for their benefit acts in a reprehensible fashion.[6]

[16] The applicant has provided evidence that the respondent has contacted at least ten of its clients. The respondent admits the contacts but avers that they occurred whilst she was still in the employ of the applicant. I am of the view that this is an interest of the applicant worthy of protection. The applicant does not have to rely on an undertaking by the respondent not to contact its customers when it has a valid agreement. I am of the view that in the circumstances where the loyalty of the customers to the respondent and a

[5] Branco and Another t/a Mr Cool v Gale 1996 (1) SA 163 (E) at 176A-C
[6] Den Braven SA (Pty) Ltd v Pillay 2008 (6) SA 229D in para 33

relationship with customers is admitted, it is imperative that the respondent be restrained.

[17] I have further considered that on the evidence before me, the industry appears to have peculiar characteristics. Customers develop close relationships with the therapists which are easily transported in the event that the therapist practises her trade somewhere else.[7] This is the type of relationship envisaged in *Branco* where the learned Judge reasoned that the employee should be restrained to protect the employer's trade connections.[8] Though the respondent tried to downplay the closeness of the relationship, I am satisfied it is the type of relationship where she could easily influence the customers. The positive comments ("likes") on her business facebook page is proof of that, if any was required.

[18] The restraint of trade provides that the respondent be restricted for a period of 12 months within a radius of 50km from the applicant's premises. The notice of motion reduced the period to six months. *Ms Zietsman* argued that the restraint of trade is unreasonable as the respondent is a 23 year old female who only wants to use her skills and abilities. The radius is too wide as it effectively includes the entire city of Port Elizabeth, so it was argued.

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[7] Bergh N.O and Another v Van Der Vuver and Another unreported judgment, East London Circuit Local Division, Case no 526/2010

[8] Branco *ibid* at 177C

[19] The applicant has effectively tendered to reduce the period of validity of the restraint. The reduced period appears to be sufficient time to allow another therapist in the employ of the applicant to establish a relationship with the customers that were serviced by the respondent. Both the period and the radius have been found in similar circumstances to be reasonable.[9] The relatively young age of the respondent and her gender are a neutral factor on their own. They do not render the restraint unreasonable as there is no allegation of inequality of bargaining power at the time the agreement was concluded nor that the agreement is unduly oppressive.

[20] *Ms Zietsman* submitted that the requirements for the grant of a final interdict have not been satisfied. She argued that clause 25.3 of the agreement provides an alternative remedy. I do not agree. The damages provided in the clause are not a satisfactory remedy. It is common cause that the respondent has established relationships with a number of customers. The evidence before me indicates the industry is highly competitive. The purpose of the interdict is to prevent an exodus of customers to the respondent's salon due to her influence she acquired whilst still applicant's employee. A damages claim or even an award is more an apparent remedy than a real remedy in those circumstances.

[9] Bergh *ibid* at para 60; Pietersman and Another v Reabow and Another, unreported judgment, East London Circuit Local Division, case no 374/2014 at para 24

[21] The applicant's interests satisfied the requirement for a real right to be established. The evidence has also established that there is a reasonable apprehension of an injury being committed. The contact the respondent made with the applicant's customers satisfied this requirement.

[22] In the circumstances and for the above reasons it is ordered that:

22.1 The first respondent is interdicted and restrained with immediate effect from being involved in a business, directly or indirectly, in any capacity whatsoever, which is in competition with the applicant, within a 50km radius of the applicant's premises for a period of 6 months.

22.2 The first respondent shall surrender all confidential information in her possession relating to the applicant's business such information to include:

22.2.1 all email addresses of applicant's clients;

22.2.2 all mobile phone numbers of applicant's clients.

22.3 The first respondent pays the costs of the application.

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T. MALUSI
ACTING JUDGE OF THE HIGH COURT

For the applicant	:	Mr N.J. Mullins
Instructed by	:	Strauss Daly Attorneys PORT ELIZABETH Ref: Mr VC Tee/BEA104/0001
For the first respondent	:	Ms T Zietsman
Instructed by	:	Pagdens Attornyes PORT ELIZABETH Ref: RH Parker/djs/DYN4/0005