

SOUTH AFRICA / JUDGMENT

Claire Kourie Physiotherapists Inc v Nyimba (120605/2024) [2025] ZAGPPHC 62 (27 January 2025) [2025] ZAGPPHC 62

COURT

North Gauteng High Court, Pretoria

BEFORE

MP Kumalo

CASE / FILE NUMBER

120605/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG

DIVISION, PRETORIA

CASE NO.:

120605/2024

(1)

REPORTABLE: N

(2)

OF INTEREST TO OTHER JUDGES: N

(3)

REVISED: Y

(4)

Signature:

Date:

27.01.2025

In

the matter between:

CLAIRE

KOURIE PHYSIOTHERAPISTS INC

Applicant

and

WEZI

NYIMBA

Respondent

JUDGMENT

Kumalo J

INTRODUCTION

[1]. The Applicant in this matter seeks, on urgent basis, final interdictory relief against the Respondent in terms of a restraint of trade agreement contained in an employment agreement concluded between the parties on 7 January 2019.

[2]. On 1 September 2024, the Respondent resigned from the Applicant's employ on a two months' notice to expire on 31 October

2024. The Applicant elected to place the Respondent on garden leave for the remainder of the notice period.

[3]. The application is opposed on several grounds and the Respondent submitting that the Applicant has not satisfied the legal requirements to justify an urgent hearing. Further, Respondent argued that the restraint clause is unreasonable and contrary to public policy as it imposes undue restrictions on the Respondent's Constitutional right in terms of section 22 to choose trade, occupation freely and earn a livelihood.

[4]. It is common cause between the parties that there was an employment relationship between them and that on 7 January 2019, the parties signed an employment agreement which incorporated a restraint of trade clause.

[5]. On 11 October 2024, and whilst Respondent was still servicing her notice period, the Applicant put her on garden leave. This, it is alleged was the result of the Applicant being advised that the Respondent was bad-mouthing the Applicant to the referring doctors and the Applicant noting that the Respondent would be starting her own practice.

[6]. In the correspondence regarding the issue of the garden leave, the Applicant further required the Respondent to confirm that she would uphold the restraint of trade she signed.

[7]. The Respondent did not respond personally or revert on the issue but appointed her current attorneys of record who addressed on her behalf correspondence to the employer, the Applicant, Claire Kourie Physiotherapists Inc.

[8]. The issues addressed in the said correspondence related to the "Agreement of Sale" of the practice entered between the Respondent and Claire Kourie, the deponent to the Applicant's founding affidavit who is the 100% owner of the Applicant, the history thereof and where the parties found themselves in relation thereto.

[9]. Further, the correspondence raised the issue alleging that the restraint of trade was unreasonable and hinders her ability to find suitable employment and required the Applicant to waive the restraint of trade applicable to the Respondent.

[10]. The Applicant carries a physiotherapy business practice at Life Healthcare Hospital Fourways. It generates its revenue through services rendered by physiotherapists and the majority of the physiotherapy services rendered by it are from the referring doctors practising from their rooms at the hospital.

[11]. Applicant alleges that it had developed a close working relationship with the said doctors and without their support, the practice would not be sustainable at the hospital. Such relationships are maintained by the physiotherapists in the manner in which they carry out their duties. The Respondent, whilst in the employment of the Applicant had to maintain such relationships with the referring doctors.

[12]. The Applicant argued that it has established special relationship of trust with the referring doctors and those doctors constitute a significant part of its goodwill and trade connections. The Respondent was also known amongst the doctors in the hospital through her employment with the Applicant and at times she was required to work with those doctors without supervision.

[13]. The Applicant further alleged that almost immediately after the Respondent tendered her resignation, two of the doctors terminated their relationship with the Applicant.

[14]. The Applicant submitted to this court that it is clear that the Respondent has approached these doctors for work in direct breach of her restraint clause with the Applicant.

[15]. In short, the Applicant argues that its trade connections and customer base constitute its protectable interests and customer base and that such trade connections constitute the goodwill it has with the doctors who make the referrals at the hospital.

[16]. The Respondent opposes the application on various fronts including the urgency and argued that there is no urgency in the matter and if there is any, it is self-created.

[17]. Respondent submitted that the Applicant became aware of her resignation as early as 1 September 2024 but filed this application on 22 October 2024. It is argued that the delay of 7 weeks demonstrated that the Applicant did not regard the matter as urgent initially, undermining its argument for urgency presently.

[18]. In response to the above, the Applicant states that in its attempt to avoid litigation, its attorneys addressed letters of demand to the Respondent seeking an undertaking that she would comply with her restraint undertakings. It was only when the Respondent refused to give the undertaking that the application was filed.

[19]. No other reason has been proffered for the delay of 7 weeks since it learnt of the Applicant's resignation.

[20]. It would appear what prompted the correspondence to demand an undertaking that the Respondent would comply with the restraint is the deponent's allegations that she learnt from the hospital manager that two doctors presumably Drs Mogolane and Moja had requested the hospital to allow the Respondent to continue with their work. Based on the information, she concluded that the Respondent must have approached the two doctors for referrals, in direct contravention of her restraint of trade.

[21]. The deponent further alleged that the Respondent defamed the Applicant to the two doctors, claiming to them that the Applicant's quality of service had suffered whilst the Respondent was on leave.

[22]. Without delving into the issue of whether or not the Respondent is/was responsible for the Applicant's woes, I am of the view that these allegations are without substance. My view is based on the whatsapp exchange messages attached to the deponent's founding affidavit to the Applicant's application.

[23]. The messages do not support the Deponent's conclusions that the Respondent bad-mouthed the Applicant or that the Respondent is responsible for the Applicant's misfortunes or its imminent loss of clientele.

[24]. Dr. Moja's message to the Deponent is clearly an expression of his and patients' frustrations with the manner in which the Applicant provides services, which frustration was acute during the absence of the Respondent.

[25]. This court needs to determine firstly if the Applicant's application is urgent as alleged. If indeed it is urgent, whether the Applicant has demonstrated sufficiently to this Court that it has a protectable interest worthy to be protected by a restraint of trade.

[26]. It is correct that applications to enforce restraint undertakings are inherently urgent by their nature and this principle has been restated in a number of decisions both in this Court and the Labour Court. However, that does not relieve the party who so alleges to establish the urgency.

[27]. Other than stating that one of the fundamental considerations in any assessment of urgency is the ability of the applicant to obtain the relief it seeks in the ordinary course, no other facts or factors were brought to the attention of this Court for its consideration of the urgency of the matter.

[28]. Respondent on the other hand argued that the urgency in the matter was self-created. Applicant knew about the resignation of the Respondent as far back as 1 September 2024 but only launched its urgent application on 22 October 2024.

[29]. The delay in bring the application from the said date is a period in excess of 7 weeks and the Respondent argues that this demonstrates that the Applicant did not regard the matter as urgent initially, undermining its argument for urgency now.

[30]. Further it is argued that the Applicant's claim for reputational harm arising from the alleged "bad-mouthing" are speculative and unsupported by direct evidence. It is argued that this fails to demonstrate any actual, imminent threat warranting urgent relief, as required by the principles set out in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[1] where the Court said the following:

"[5] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of 6(12) of the Uniform Rules. The aforesaid sub rule allows the court or a Judge in urgent applications to dispense with the forms and service provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such procedure as to it seems meet. It further provides that in the affidavit in support of an urgent application the applicant "... shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."

[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.

[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.[2]

[9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded

substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If, however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.”

[31]. In this matter, the Applicant knew about the Respondent’s resignation as early as 1 September 2024 but only brought the urgent application only on 22 October 2024. No credible explanation is given for the delay of approximately 7 weeks in approaching this Court for its intervention.

[32]. The deponent to the Applicant’s founding affidavit seems to suggest that she was jogged to action only after 11 October 2024 when she placed the Respondent on garden leave because of the Respondent bad-mouthing the Applicant to the referring doctors and having noted from third parties such as hospital management and staff that she would be starting her own practice.

[33]. It is unfortunate that the Applicant does not anywhere in the papers provide any confirmatory affidavits from the people she allegedly heard from and is therefore inadmissible hearsay.

[34]. The Respondent on the other hand denied the allegation. To further compound issues, on 16 September 2024, the deponent to the Applicant’s founding affidavit addressed correspondence to both Drs Mogolane and Moja expressing her sadness and disappointment that they would like the Respondent to continue physiotherapy with their patients rather than her practice and asked to meet them.

[35]. The good doctors agreed to meet her and in one instance she cancelled as she was due to fly out to Plettenburg Bay.

[36]. It is instructive to read Dr. Moja’s reasons for the termination of his practice working relationship with the Applicant. He complained about a lack of consistent staff force or locums in the Applicant’s practice to service his patients. He stated that the issues became glaring when the Respondent was booked off for an extended period.

[37]. He further complained about his patients not being seen, being attended to late and an overall deterioration in the quality of the service. More telling is that he complained that his patients cannot even attach a face to the name and had voiced their concerns to him on numerous occasions. Based on all these factors, he concluded that the working relationship with the Applicant is not viable.

[38]. On the other hand, the Respondent is lauded as a hard-working person in the four years that the deponent had been away and according to Dr. Moja, the patients loved her and they do not want to lose her. Hence the concern he had when he learned of the Respondent’s resignation.

[39]. The relationship between Dr. Mogolane and the Applicant is clear that it was only cultivated during the absence of the deponent.

[40]. To my mind, it is also clear from the above that the decision of the doctors to terminate their relationship runs deeper than what is suggested by the Applicant. It has a lot to do with the doctors' dissatisfaction with the services of the Applicant.

[41]. What also is clear at least from Dr. Joma's chat with the deponent is that the services required are of a personal nature. The fact that his patients could not attach a face to the name is an issue of great concern. In Dr. Joma's words... "the lack of a consistent staff force or locums in the practice to service the patients, every other weekend it's a different person which does not bode well for continuity of care for the patients."

[42]. This leads this Court to conclude the situation that the Applicant finds itself has little to do with the Respondent's alleged breach of restraint but has everything to do with how the Applicant runs its practice.

[43]. It was argued on behalf of the Applicant that, for some years, it developed a close working relationship with the referring doctors and without their support, its practice would not be sustainable at the hospital. That may be true that without the referring doctors its practice would not be sustainable, but that does not entitle it to the protection that it seeks without further ado.

[44]. The Applicant is a juristic person and renders services through its personnel. The relationships are cultivated and maintained by the said personnel. It matters to the doctors and their patients who renders those services and, in that regard, can be regarded as personal in nature.

[45]. As correctly argued by the Applicant, the main issues for this Court to determine is (i) whether the Applicant in these circumstances has demonstrated a protectable interest(s) which is threatened by the Respondent's conduct at the hospital and therefore justify the enforcement of the admitted restraint of trade, and if a protectable interest has been demonstrated, (ii) whether the Respondent has discharged her onus to establish that it is unreasonable to enforce the restraint of trade in the circumstances.

[46]. It is this Court's view that the Applicant has failed to demonstrate a protectable interest which is threatened by the Respondent's conduct at the hospital (my emphasis).

[47]. There are several considerations that ought to be taken into account before the restraint against the Respondent is enforced in these circumstances.

[48]. Firstly, the evidence of the Applicant does not establish that it is about to lose its clientele because of the conduct of the Respondent other than the fact that she has resigned from the employ of the Applicant.

[49]. Whilst the Applicant alleges that the Respondent has approached the hospital management with the request to open her practice, there is no direct evidence to confirm this allegation. The Respondent's criticism that this allegation constitutes inadmissible evidence is well-founded. Other than the confirmatory affidavit of a fellow employee, nothing is attached from management or the identity of the management person who so informed the deponent to the Applicant's affidavits is disclosed.

[50]. On the other hand, the applicant itself attached whatsapp chats with one of the doctors that it regards as key to the survival of its practice who states clearly what his unhappiness is with the Applicant's practice and why he is terminating the relationship.

[51]. The reasons given do not by any stretch of imagination establish any unlawful conduct on the part of Respondent.

[52]. I am not convinced that the Applicant has laid proper foundation to prove that the Respondent has engaged in any unlawful conduct which resulted in the situation that it finds itself with the two doctors that have expressed their dissatisfaction with the Applicant's services.

[53]. It is clear from the papers of both the Applicant and the Respondent that the decision of the two doctors has something to do with the Respondent's resignation from the Applicant, it has everything to do with their dissatisfaction with the services that the Applicant renders for them.

[54]. Those facts do not in any way support the contention that the Respondent has breached her restraint of trade agreement as alleged.

[55]. The Respondent deposed to an affidavit under oath stating that she told the doctors and staff about her resignation at the hospital as she believed it was the right thing to do since she had a working relationship with them.

[56]. I am of the view that there was nothing sinister or untoward about her conduct in that regard.

[57]. In the circumstances, the following order is made:

1. The Applicant's application is dismissed; and
2. The Applicant is to pay to the costs of this application on scale C.

MP Kumalo

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant: Adv E Muller Instructed by: Elliot Attorneys Inc For the respondents: Adv SL Salela Instructed by: Boqwana Burns Attorneys Date of the hearing: 05 November 2024 Date of judgment: 27 January 2025

[1] [2011] ZAGPJHC 196

[2] See: Nelson Mandela Metropolitan Municipality v Greyvenouw 2004 (2) SA 81 (SE) at 94C–D; Stock v Minister of Housing 2007 (2) SA 9 (C) 12I–13A.

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