
SOUTH AFRICA / JUDGMENT

Dr DM De Jongh & Associates No. 64 Incorporated v Botha and Another (34071/2017) [2018] ZAGPPHC 570 (13 April 2018) [2018] ZAGPPHC 570

COURT
North Gauteng High Court, Pretoria

BEFORE
Hattingh

CASE / FILE NUMBER
34071/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH
AFRICA
GAUTENG DIVISION, PRETORIA

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER
JUDGES

(3)

REVISED.

CASE

NUMBER: 34071/2017

13/4/2018

In

the matter between: DR
DM
DE JONGH & ASSOCIATES NO. 64 INCORPORATED
APPLICANT
and
DR
BELINDA
BOTH A
FIRST RESPONDENT
MIMOSAMED
(PTY)
LTD
SECOND RESPONDENT

JUDGMENT

HATTINGH AJ

[1]. The applicant sought the court's indulgence and asked for condonation to the late filing of its replying affidavit. After hearing arguments by all the parties the court finds that the applicant gave a valid and reasonable explanation for its lateness and that there was no wilful default. The condonation application is therefore granted.

BACKGROUND FACTS

[2]. The applicant is Dr DM De Jongh & Associates No 64 & Associates Incorporated, a company duly incorporated in terms of the Laws of the Republic of South Africa and having its principle place of business at Medicross Pretoria West, Church Street, Pretoria West.

[3]. The first respondent is Dr Belinda Botha, an adult female doctor with chosen address at [...], Gauteng.

[4]. The second respondent is Mimosamed (Pty) Ltd. As no relief was sought against the second respondent as an interested party the court shall not refer to this party anymore.

[5]. The applicant's principal business is that of a primary medical, dental and ancillary healthcare centre located at Medicross Pretoria West, Church Street, Pretoria West. It was furthermore clear that the administrative practice was administered by Medicross Health Care Group (Pty) Ltd. The applicant provides a structure within which doctors can practice for their own account whilst their administrative services are taken care of whilst associated to the Medicross brand.

[6]. The first respondent used to be a doctor with the applicant. Both parties entered into a consultancy agreement. The material terms of the consultancy agreement, inter alia, were:

6.1. That the applicant conducts the practice of a medical centre and wishes to engage the services of the first respondent as a medical practitioner to provide medical services to the applicant's patients at Medicross Pretoria West.

6.2. That the arrangement would not be a contract of employment but an agreement between two independent contractors.

6.3. The restraint of trade portion contained in clause 8 of the consultancy agreement is constructed as a remedy to protect the applicant against suppression in the event of the first respondent terminating her consultancy agreement.

RESTRAINT OF TRADE PORTION IN CONSULTANCY AGREEMENT

[7]. It was agreed that during the period of the first respondent's engagement that she would acquire:

- considerable confidential information relating to the operations and procedures of the applicant;
- knowledge of the trade secrets and knowhow of the applicant relating to its activities.

[8]. It is further stated that such aforesaid confidential information and trade secrets are of considerable value to the applicant and the applicant has in the past and will in the future continue to protect such information and trade secrets. It was also contracted that if the first respondent should use such confidential information and trade secrets then the applicant would suffer damages.

[9]. To protect the interests of the applicant the first respondent undertook that she would not during the currency of the agreement and after date of termination of the agreement, reveal to anyone, firm or corporation any trade secrets or confidential information, procedure or dealings or any information concerning the organisation functions, transactions or affairs of the applicant or any requirements or services provided to them by the applicant and shall not use or attempt to use any such information in any manner which may injure or cause loss to the applicant.

[10]. The first respondent in turn undertook in favour of the applicant that she would not directly or indirectly during the currency of the agreement and for a period of 3 years after date of termination of the agreement and within a radius of 4 kilometres as the crow flies of the medical centre:

- 10.1. be employed by; or
- 10.2. carry on or assist financially or otherwise be engaged or concerned or interested in, or
- 10.3. be a director, shareholder, partner, member or trustee directly or indirectly of, or
- 10.4. act as a consultant or advisor to or agent or representative for;

10.5. any person, partnership, trust, business, firm, body corporate or incorporate or other juristic person which;

is involved in the establishment of any medical practice which competes with the practice or any other medical practice conducted at the medical centre or carries on any business which is similar to or competing or endeavouring to compete with such business as the company may be carrying on.

[11]. The first respondent acknowledged that:

11.1. She carefully considered the provisions of the restraint clause;

11.2. She agrees that the restraint imposed upon her and after taking into account all relevant circumstances and found it reasonable in terms of subject matter, period and area and are reasonable and necessarily required to maintain the goodwill of the company and that if she should at any time disputes the reasonableness of any of the restraints, then the onus of proving such reasonableness would be upon her; and

11.3. She has entered into the agreement freely and voluntarily and that no circumstances exist for her alleging either now or in the future that she was at a disadvantage in agreeing to the restraints contained herein or were other than in equal bargaining position with the company in agreeing to such restraints.

HISTORY TO THE INVOLVEMENT OF THE FIRST RESPONDENT IN THE APPLICANT AND THE CONDUCT COMPLAINED ABOUT

[12]. It is common cause between the parties that the first respondent took up offices and started practising at Pretoria West Medicross before or about September 2002. It is furthermore not in dispute that such an agreement was signed on 30 September 2002 by both parties.

[13]. It is furthermore common cause that the first respondent was escorted off the premises of the applicant.

[14]. The parties differ regarding the circumstances that led up to the relationship becoming strained. It is clear that the first respondent whilst in the employment of the applicant booked afternoons out to "Mimosamed Proprietary Limited". There exists real evidence to this.

[15]. It was furthermore confirmed that whilst she was still in the employment of the applicant she consulted privately with some of those patients introduced to her at the practice of the applicant. The first respondent went so far as to confirm in her answering affidavit that she send some of these patients to the applicant to fetch their medical files.

[16]. It is furthermore clear, that even before the first respondent left the applicant, she was practicing as a medical doctor at Mimosamed, which was her own practice.

[17]. The first respondent was so brazen about this that she send out a bulk sms to many of the patients of the applicant to inform them that she is now practicing for her own account at Mimosamed. It is clear that the first respondent used the information/telephone numbers that she had access to whilst in the service of the applicant. It was furthermore information that was not in her memory, but rather information so stored on her cellphone.

[18]. The applicant alleged that the first respondent removed two patient files, the property of the applicant, from the premises of the applicant. The excuse presented by the first respondent regarding this was that she had to remove these files, because there was blood test results that were to be given to the patients. The court does not understand why it was necessary to remove these files to inform these patients about blood results. A simple phone call from the premises of the applicant would have sufficed. Alternatively she could have made a photocopy of only the blood results.

[19]. On the 17th January 2017 a letter was dispatched by the applicant to the first respondent indicating that there is a restraint agreement and that the first respondent must desist from her conduct.

[20]. As no response was forthcoming from the first respondent, further correspondence from Whalley & Van Der Lith Inc. was addressed to the first respondent, again requesting her to desist from running a medical practice in contravention of a consultancy agreement and more specifically the restraint of trade part thereof.

[21]. On the 25th January 2017 the applicant cancelled the agreement with the respondent.

[22]. This gave lead to a letter by the attorneys of the first respondent on the 27th January 2017 stating and admitting that the first respondent has practiced at Mimosamed. In the correspondence a host of reasons are highlighted by the first respondent about her unhappiness whilst working for the applicant.

[23]. Thereafter the applicant and first respondent parted ways, which lead to the present application before this court for an order that the first respondent be interdicted and restrained for a period of 3(three) years from acting as a consultant with the second respondent and directly within a radius of 4 (four) kilometres as the crow flies from Medicross Pretoria West, Church Street, Pretoria West be either employed, carry on or assist financially or otherwise be engaged or concerned or interested in or be a director, shareholder, partner, member or trustee directly or indirectly of and/or act as a consultant or advisor to or agent or representative for any person, partnership, trust, business, firm, body corporate or incorporated or other juristic person, which entity or operation of any medical practice which competes with the practice or any other medical practice conducted at the medical centre or carries on any business which is similar to or competing or endeavouring to compete with such business as the company may be carrying on.

[24]. It is common cause that the first and second respondent fall within the radius of 4 (four) kilometres, as the crow flies, from the practice of the applicant and that the 3 (three) years whilst the restraint of trade is in force ends on 27 January 2020.

[25]. The first respondent's opposition to the restraint is that the said restraint of trade is unenforceable primarily because there are no legitimate proprietary interest worth protecting by the restraint of trade and thus unreasonable.

[26]. Public policy requires contracts to be enforced including restraints of trade. This is consistent with the constitutional values of dignity and autonomy. The restraint agreement in this matter is not against public policy and should be enforced[1] .

[27]. It was stated in *J Louw and Co (Pty) Ltd v Richter and Others*[2]

"Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one of which unreasonably restricts the covenantor's freedom to trade or to work. In so far as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference

to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant.

Account must also be taken of what has happened since then, and in particular, of the situation prevailing at the time enforcement is sought."

[28]. The substantive law as laid down in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[3] is that a restraint is enforceable unless it is shown to be unreasonable which necessarily casts an onus on the person who seeks to escape it. This is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role[4].

[29]. This court must make a value judgment with the following two considerations to ascertain if the agreement is reasonable. Firstly, public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*[5]. Secondly, that all persons should in the interest of society be productive and be permitted to engage in trade and commerce or the professions.

[30]. Restraint agreements also reflect our constitutional values. Freedom to contract is an integral part of the fundamental right referred to in Section 22 of the Constitution. Section 22 guarantees: "[E]very citizen... the right to choose their trade, occupation or profession freely", which reflects the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as contemplated by the constitution[6].

[31]. Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint[7]: "(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 weight 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 that the restraint be maintained or rejected." This enquiry includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests[8].

[32]. There is no doubt that the applicant has a proprietary interest worth protection in terms of clients and client's detail that came to the attention of the first respondent during her tenure at the applicant. It can furthermore not be excluded that some of these clients (patients) that was introduced to her, went with the first respondent. This is the springboard doctrine. In the matter of BHT Water Treatment (Pty) Ltd v Leslie[9].

"In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given...In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant, nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential

information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the services of a competitor."

[33]. On the version of the first respondent she practiced for 19 years with the applicant. It cannot be disputed that during that time she must have been introduced to many patients of the applicant. In this regard the court would like to refer to *De Klerk, Vermaak & Vennote v Coetzer en 'n Ander*[10]:

"Daar moet in gedagte gehou word dat Vennootskappe deur professionele persone gevorm word juis omdat dit wedersydse voordele inhou vir die individuele vennote. Uiteraard sal elke vennoot terwyl hy in vennootskap praktiseer, kennis en vaardigheid opdoen wat hom toekom en onlosmaaklik aan hom verbonde is. Dit is vergelykbaar met die verhouding tussen werkgewer en werknemer. In *Filmer and Another v Van Straaten* 1965 (2) SA 575 (W) het Claassen R dit soos volg gesiel (op 579 E- F):

'A man's aptitude, his skill, his dexterity and his manual or mental ability may not nor ought to be relinquished by an employee. They are not his master's property, they are his own, they are himself.'

Die eerste respondent het vir 'n tydperk van 18 jaar onder die vaandel van die applikant as prokureur praktiseer. Die feit dat die eerste respondent kliente gewerf het kan nie uitgesonder word as 'n bate wat net hom toekom nie. Inteendeel word dit van die afsonderlike vennote in 'n prokureurspraktyk verwag om hulle voltyds daarop toe te spits om die belange van die vennootskap (of dan die maatskappy) na te streef deur dienslewering asook, meestal die werwing van kliente. Die applikant se klient, so beweer die eerste respondent, het hom as persoon kom spreek - nie omdat hy werkzaam was by die applikant nie 'maar in die lig van sy betrokkenheid in die gemeenskap'. Ek meen tog dat dit nie betwyfel kan word nie dat dit juis sy betrokkenheid by die applikant was, wat die eerste respondent primer daartoe in staat gestel het om 'n klient basis daar te stel. Deur sy indiensneming by die applikant, was die eerste respondent in staat gestel om kontak te maak met bestaande kliente van die applikant. Die klienteverhoudings is verstewig en het die eerste respondent verdere kliente verwerf. Onder hierdie omstandighede het die applikant, na my mening, sy klienteverhoudings as 'n beskermingswaardige belang bewys... „

[34]. The court has no doubt that an objective possibility does exist that the first respondent took some of the applicant's clients with her. It is highly likely that the first respondent could have induced some patients to follow her to a new practice. It is furthermore clear from the evidence that the first respondent even started her medical practice whilst she was still delivering medical services to the applicant.

[35]. It is further clear from the case law that the court can also enforce such a restraint of trade agreement against the second respondent under certain circumstances. It is clear that the court would be entitled to pierce or lift the corporate veil. If this is done in the present case it is quite clear that the second respondent is merely the tool of the first respondent to circumvent the implications of the restraint of trade clause.

[36]. The court quote from the matter of J Louw and Co (Pty) Ltd v Richter and Others: "The covenantor had formed the company, the Court found, with the specific intention of using it to evade the restraint or manipulating it so that it did in his interests and for his benefit things which he was not at liberty to do personally. It had amounted from the beginning to a 'mere cloak or sham', to naught but a 'device', a 'stratagem', a 'mask', as Lord Hanworth MR characterised it."

[37]. The above is clearly also applicable to the second respondent, Mimosamed Proprietary Limited.

[38]. The court now turns to the question if the term of the restraint, being a period of 3 (three) years after the date of termination of the agreement, is a reasonable term. I am of the view, taking into account the nature of the relationship between doctor and patient that the term of 3 (three) years seems to be too long.

[39]. In this regard I would like to refer to the matter of *Ntsanwisi v Mbombi*[11]. In this case the parties were two general medical practitioners practising in the town of Giyani who entered into a partnership agreement. A restraint of trade clause in the agreement stated that the respondent at the termination of the partnership would not be entitled to practice for 3 (three) years as a medical practitioner or in any related field in Giyani or in a radius of 50km from the practice. After termination of the partnership the respondent set up a rival practice in the same town.

[40]. It was stated in the above matter that[12]: "Yet I have a difficulty in understanding why the restraint should endure for three years. The purpose is obviously to make it impossible for such patients of the applicant's practice as would be so inclined to transfer their allegiance to the respondent. I do not understand why they should be held in check for three years. I cannot accept that the period is intended to capture all patients up to those who see their doctor every three years. The restraint is more appropriate for patients who see their doctor regularly. The less often they see their doctor the more tenuous the customer connection would be.

The legitimate purpose of the restraint can only be to withhold the option of going over to the respondent from those patients who might be so inclined for such a time as is necessary for the applicant to take the necessary steps to retain and nurture the loyalty of his patients. It is obvious that he would need time to rearrange his practice to fill the gap left by the respondent, whether by means of locums, professional assistants or new partners.

Once he has done that and made his patients accustomed to the substitutes for the respondent there is no reason to prolong the restraint. I cannot accept that the period must be long enough for the applicant's patients to forget the respondent and for their desire to be treated by him to vanish. In the circumstances I do not see any justification for a restraint of more than 12 months. The purpose of a restraint is not to punish.,,

[41]. This court is in full agreement with the view of Botha J in the abovementioned case as it relates to the time that the restraint should be in force. This court further finds that in this matter a term, of 12 (twelve) months would have been sufficient to protect the applicant's proprietary interest in terms of the clients.

[42]. This period of 12 (twelve) months has now expired. This court is also not going to make an order without any effect. This court nonetheless must still apply its mind to the aspect of costs. The applicant was entitled to an order for costs, albeit for a shorter period of time. It is clear from the evidence that the conduct of the first respondent lead to this matter coming before this court.

[43]. It is clear from the evidence that the first respondent has already started her medical practice, Mimosamed, whilst she was still under contract to consult with the patients of the applicant. This clearly was against the terms of the consultancy agreement with the applicant. It is furthermore clear that the applicant practiced as a medical doctor which was evident from an internet search. This fact was also not denied by the first respondent.

[44]. It is furthermore clear from the evidence by the applicant that the first respondent indeed informed, at least some of the applicant's clients that she now also practice for her own account. This was also not denied by the first respondent.

[45]. Notwithstanding a letter of demand dispatched to her by the applicant's attorney stating that the first respondent is in breach of her consultancy agreement she brazenly carried on practising as a medical practitioner in contravention of her consultancy agreement but also tried to coerce clients of the applicant to consult with her directly.

[46]. This conduct should not be condoned by this court.

[47]. In the result the following order is made:

1. No order is made in respect of the relief claimed;
2. The first respondent is to pay the costs of this application on a party and party scale.

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

[1] Reddy v Siemens Telecommunication (Pty) Ltd 2007 (2) SA 486 (SCA).

[2] 1987 (2) SA 237 (N) 243 B- C.

[3] 1984 (4) SA 874 (A)

[4] Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA) para 14

[5] SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) 767A.

[6] Affordable Medicines Trust v Minister of Health [2005] ZACC 3; 2006 (3) SA 247 (CC) para 59.

[7] Basson v Chilwan & Others 1993 (3) SA 742 (A) 767 G- H.

[8] Reeves and Another v Marfield Insurance Brokers CC and Another [1996] ZASCA 39; 1996

(3) SA 766 (A) 776 A- .F

[9] 1993 (1) SA 4 7 (W) 571- 58D

[10] 1999 (4) SA 115 (W) page 125.

[11] 2004 (3) SA 58 (T) [12] page 64.

[11] 2004 (3) SA 58 (T)

[12] page 64.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2018/570.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/dr-dm-de-jongh-associates-no-64-incorporated-v-botha-and-others-unknown-topic-agpphc-2018>

Prepared on 11 October 2026 · Esheria