

SOUTH AFRICA / JUDGMENT

Megan's Nail and Beauty Studio (PTY) LTD v Ahmed (17063/2018) [2018] ZAGPPHC 242 (19 April 2018) [2018] ZAGPPHC 242

COURT

North Gauteng High Court, Pretoria

BEFORE

Manamela

CASE / FILE NUMBER

17063/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 17063/2018

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

MEGAN'S

NAIL AND BEAUTY STUDIO (PTY) LTD

Applicant

trading

as PERFECT 10 NAIL AND BEAUTY STUDIO (PTY) LTD

and

SANIA

AHMED

Respondent

Dates

of Hearing

10 April 2018

Date

of Judgment

19 April 2018

JUDGMENT

MANAMELA, AJ

Introduction

- [1] The applicant, a franchised beauty therapy business, seeks urgent relief in the form of enforcement of a restraint of trade arising from an employment contract concluded with its erstwhile employee, the respondent. The employment contract contains a clause restraining the respondent from trading within a 5 to 30 kilometres radius for a period of 18 months. The respondent resigned from employment of the applicant in January 2018 to establish and operate a franchised beauty therapy business of her own. The applicant now seeks that this Court restrain the respondent not to operate the business similar to hers within a radius of 15 kilometres and for a period of 12 months, which the applicant submits are reasonable terms under the circumstances. The respondent, on the other hand, disputes the validity and enforceability of the restraint of trade on a number of grounds.
- [2] The matter came before me in the urgent court on 10 April 2018, whereat Ms AD Theart appeared for the applicant and Mr LM Malan for the respondent. I reserved this judgment after listening to oral submissions by counsel. I now take advantage of the opportunity to express my gratitude to counsel for the heads of argument filed.
- [3] The issue to be determined in this matter is primarily the enforceability of the restraint of trade. However, the respondent raised the issue of non-joinder of the Imbalie Group, the franchisor of the Perfect 10 franchise under which both the applicant's and respondent's businesses operate. However, at the hearing of the application Mr Malan for the respondent did not appear to be vigorously, if anything at all, pursuing this issue. I do not think anything turns on this as in my view, the Imbalie Group do not have a real and substantial interest in the issue for determination in this application, which is clearly located within the employment contract concluded between the applicant and respondent. The only other issue to be dealt with is urgency, which I turn to after a brief narration of the relevant background to the matter significantly based on the common cause or undisputed facts.

Brief relevant background

- [4] The respondent was employed by the applicant from 01 February 2016, initially as an assistant manager, but with effect from 01 December 2016, as a beauty technician. She signed two contracts for the aforementioned positions, which both contained identical restraint of trade clauses. The restraint of trade clause, liberally put, restricts the respondent from joining a competitor of the applicant within a radius of 5 to 30 km from the location of applicant's business for a period of 18 months, after leaving the applicant's employment. The applicant's business is located at Mall of the South, Aspen Hills, Klipriver, Johannesburg.

- [5] The respondent resigned from the applicant's employment on 21 January 2018. Her sister, who was also in the employ of the applicant, also resigned and was to leave at the end of March 2018, presumably to join the respondent's new business. The respondent's business is located at Columbine Square, Mondeor Johannesburg, about 5.6 kilometres from the applicant's business.
- [6] On 02 March 2018, the applicant's sole director and shareholder, Ms Megan Faith Bisset received a telephone call from an administrator of Perfect 10 franchise requesting a transfer of the respondent's sister from the applicant's business to a new business. This appears to have been the moment when the applicant became aware of the existence of the respondent's new business. On 05 March 2018, the applicant's attorney addressed a letter to the respondent requesting the respondent to adhere to the terms of the restraint of trade. On 08 March 2018, the respondent reacted to the letter, through her attorneys, advising that she will not be acceding to the applicant's request. However, the respondent's letter mentioned that the respondent will refrain from divulging or using any of the applicant's client confidential information to any competitor or customer. A further and even broader undertaking was given by the respondent on 19 March 2018 again through her attorneys, in terms of which the respondent undertook not to directly or indirectly contact, approach, canvas or market to clientele of the applicant. The undertaking was rejected by the applicant on 19 March 2018, after this application had already been issued on 15 March 2018.

Urgency

- [7] The applicant submitted that this matter is urgent as it stands to lose 45% of its client-base to the respondent and its employees, to lose their income. It submitted that it has already started losing clients to the respondent. In other words, the applicant submits that the urgency in this matter arises from commercial interests.
- [8] On the other hand, the respondent submitted that this matter is not urgent and ought to be struck from the roll with costs. The respondent made the following submissions in this regard. She repeatedly and even prior to this urgent application being launched and later as part of her opposing affidavit gave an undertaking to the applicant that she and her sister will not in any way directly or indirectly contact, approach, canvas or market the applicant's clientele but this was rebuffed by the applicant. Therefore, there is no imminent threat or real apprehension which the applicant faces; the matter is moot and is only aimed at the elimination of competition from the respondent.
- [9] In the decision of Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd,^[1] the court found that urgency on commercial interests may justify the invocation of Uniform Rule 6(12), no less than any other interest, as each case must depend on its own circumstances. The dictum in Twentieth Century Fox was applied in this Division and elsewhere.^[2] Against the abovementioned submissions and authorities, I considered the matter to be urgent. I now proceed to deal with the merits of the matter.

Applicant's legal submissions

[10] The applicant submits that although the restraint of trade clause was crafted on advice, the applicant now considers the area and duration of the restraint of trade too wide. The applicant submits that a reasonable restraint should be for a radius of 15 kilometres and for a period of 12 months. In fact, the applicant prays for an order reflecting these terms. A distance of 15 kilometres is sufficient to discourage clients from travelling to respondent's business in preference over the applicant's business, rather than the current distance of 5.6 kilometres, the submission continues. It is also submitted that a research conducted by the applicant suggests that there is consensus in the beauty industry that a time-period or duration of 12 months would suffice. The Court is requested to "read down" the duration and range of the restraint of trade as aforementioned, instead of the original 5-30 kilometres and duration of 18 months for it to be unfair and unreasonable. This it is submitted, is supported by the authorities.[3]

[11] Further, the applicant makes the following submissions. The respondent has excellent interpersonal skills and had managed to develop and maintain relationships with various clients of the applicant whilst still employed with the applicant. The same applies to the respondent's sister. The relationship between client and therapist is a very unique and personal nature. Beauty and nail therapy requires intimate engagement with clients. It is submitted that the following dicta from the unreported decision of Bergh NO and Another v Van der Vyver and Another constituted authority for this view:

'I also take into account that restraints of trade are common in the industry, and,... for good reason: therapists develop relationships

with their clients which are easily transported in the event that the therapist should , for whatever reason, take up employment

elsewhere".[4]

As possessors of these traits or skills, clients are likely to want to continue the relationship with the respondent and her sister, when their business premises is located a mere 5.6 kilometres from the applicant's business. The respondent departed with full knowledge of the applicant's business client-base and has built excellent relationships with the applicant's clientele. The restraint is reasonable and enforceable as it serves to protect applicant's interest , including confidential information or trade secret and customer connections. The applicant suggests that it will lose at least 45% of its client base should the restraint of trade not be enforced.

[12] It is submitted that the respondent acquired her new business well knowing that this was in contravention of the restraint of trade clause in terms of the employment agreement with her erstwhile employer the applicant. It is also a view of the franchisor, apparently expressed in correspondences, that by employing her sister the respondent will be in breach of the restraint of trade.

Respondent's

submissions

- [13] The respondent labels this application by her erstwhile employer to be "a ruse in retaliation of a disgruntled applicant which has been financially crippled due to prevalent economic circumstance s' [5]
- [14] The respondent introduces herself as a qualified beauty therapist and somatologist. She states that she attended an 18 months ' course is somatology during 2013-2014, and did an international course in 2015 . She submits that this is her only trade, without which she will not be able to sustain a living and make ends meet. She previously moved from another employer conducting a similar business as the applicant to join the applicant, and this was without the current hassles.
- [15] She submits that there was another franchisee of Perfect 10 operating from the same spot as her business in Columbine Square which closed down in September 2017 for financial reasons. That business in Columbine Square was already functional by the time the applicant ' s business opened its doors in September 2015. She became aware of the opportunity at Columbine Square after she unsuccessfully tried to purchase the applicant' s business with assistance from her father.
- [16] The applicant 's objective in terms of this application is to eliminate competition, the respondent submits. The application was actually rendered unnecessary by the undertaking by the respondent not to do business with clients of the applicant. Further the Imbalie franchises system uses a system known as " Headstart" . Headstart is an electronic monitoring problem employed by the franchisors to monitor clients as to sales treatment and the like and enables a franchisee to monitor clients registered on the system and receives notices when a client receives treatment or services at another franchise within the system. All franchisees are to subscribe to the Headstart system for a fee. The applicant submits in its replying affidavit that Headstart is nothing, but a loyalty program which is only operational or relevant to those clients who subscribe to the program and not in respect of all clients.
- [17] It is also submitted that the applicant has failed to established any clear right necessary for final interdictory relief or even a protectable right in respect of the restraint of trade. The applicant has essentially failed to establish that it is the owner of the interest which it seeks to protect by way of enforcing the restraint of trade covenant, as the franchisor (i.e. the Imbalie Group) is the proprietor of the interests sought to be protected by the applicant as the franchisee.
- [18] Above all, the respondent submits that there is a real or genuine bona fide dispute of the material fact which cannot be determined by way of motion . It is suggested, by way of an example, that, there a dispute within the following areas: whether the applicant is the proprietor of the interest it seeks to protect; terms and conditions of the applicant's

franchise agreement; whether the applicant has proved existence of customer connections between the respondent and customers such an extent that there exists the real likelihood of the customers will follow the respondent. Further the respondent contends that the wording of the restraint of trade renders the application not only wide as to area, but also void for vagueness and therefore unenforceable. This is with regard to the reference in the restraint to the area as being " within a Skm-30 km radius". It is submitted in this regard that the restraint of trade clause is open to a few mutually destructive interpretations and a proper contextualised interpretation of the restraint of trade clause renders the clause to mean that the contemplated conduct is restrained within a 5 kilometres from the applicant's premises. This is the reason why the applicant attempted to cure the apparent defect by suggesting a 15 kilometres radius the respondent contends. But the restraint remains unreasonable and offends against public policy, which renders the restraint of trade covenant unenforceable. [6]

Applicable legal principles

[19] An agreement or covenant in restraint of trade is valid, but is unenforceable when its enforcement would be contrary to public policy

and is unenforceable to the extent of it being contrary to public policy. 7 This is a principle of law ushered in by the decision of *Magna Alloys & Research (SA) v Ellis*[7] which altered the position that prevailed before in terms of which South African courts applying principles of the English law, held that an agreement of restraint of trade was *prima facie* void and unenforceable, the onus being on the person seeking to enforce the restraint of trade to show that it was reasonable *inter partes*. [8] If in the circumstances of the particular matter, a restraint of trade will unreasonably restrict the covenantor's freedom of trade or to work, such an agreement will be considered contrary to public interest. This is a factual enquiry and there are no predetermined rules which would render restraint of trade clauses automatically unreasonable. Restraint of trade is considered contrary to public

policy and unreasonable if it does not properly do so a protectable interest of the party seeking to enforce.

[20] However, in our constitutional democracy, it may be necessary for the party wishing to enforce the restraint of trade to establish why the restraint ought to be considered a reasonable limitation of the constitutional right of freedom of trade, occupation and profession in terms of section 22 of the Bill of Rights incorporated in the Constitution of the Republic of South Africa, 1986 (the Constitution)[9] Therefore, there is potential shift of the onus in this regard.

[21] On the other hand, that the court seized with the matter, has the discretion to partially enforce the restraint of trade by restricting the scope of operation to what is found or deemed to be reasonable ,

[10] but this exercise should not amount of re-casting of the provisions of the agreement or major plastic surgery.[11]

[22] In the decision of *Basson v Chilwan and Others*, [12] the Appellate Division (as the Supreme Court of Appeal was known then) confirmed that the restraint of trade agreements are binding on the basis of *pacta sunt servanda*, unless the party seeking to avoid them can show that they are against public policy.¹⁴ In *Chi/wan* the court held that there are four questions to be asked in this connection: "

- (a) Is there an interest of the one party which is deserving of protection at the termination of the agreement? (b) Is such interest being prejudiced by the other party? (c) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?
- (d) Is there another facet of public policy having nothing to do with the relationship between the H parties but which requires that the restraint should either be maintained or rejected?" [13] And that in as far as the interest in (c) surpasses the interest in (d), the restraint would as a rule be unreasonable and accordingly unenforceable this aspect differing from case to case. [14] I use these questions for a determination to be made in this matter and same would be reflected as subheadings, although combining the second and third questions.

Is there an interest of the one party which is deserving of protection at the termination of the agreement?

[23] The applicant submits that it is aiming to protect its clientele and business interests which may have become accustomed to being served by the respondent and also the respondent's sister due to the intimacy of the relationship in the industry. Consequently, it is submitted that those customers that were served by the respondent are attached to the respondent and, by extension her sister. These customers may move away their allegiance towards the respondent's new business. On the other hand, the respondent contends that there is no protectable interest as everything in the applicant's business belongs to the franchisor, the Imbalie Group. In my view, this submission by the respondent is, with respect, misplaced, as the references to proprietorship in the franchise agreement are aimed at protecting the interests of the franchisor, in case of breach by the franchisee, and finds no application in this matter.

[24] In my view, there is indeed protectable interest on the part of the applicant represented by the clients, particularly those that may have been serviced by the respondent, whilst employed by the applicant.

Is such interest being prejudiced by the other party? If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?

[25] The applicant further submits that there is a risk of harm to the applicant's trade connections with its customers. It referred in this regard to the decision of *Den Braven SA (Pty) Ltd v Pi/lay and Another* [15] which it contends set out the correct legal position for the employers seeking to enforce the restraint of trade on the basis currently alleged by the applicant. In this decision, it is stated at the relationship must be such that the employee acquires such personal knowledge and influence over the customers of his or her employer, to an extent this would enable the employee, if competition was allowed, to take advantage of his or her employer 's trade connection. The criteria for this includes consideration of the following: duties of the employee; personality of the employee; frequency and duration of contact between him and the customers;

where the contact takes place; what knowledge he gained, and general nature of the relationship respect of formation of attachment from between them. The court further determined that 'the connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business " .

[26] The applicant further submits that some of its clients may have already moved over to the respondent 's business. This is so, despite the undertaking given by the respondent not to market or canvas the applicant 's clients. Should this be correct, it will definitely

amount to prejudice on the part of the applicant, but not much was proffered by way of evidence in this regard, particularly the extent or number of such clients. The applicant speculated that it will lose about 45% of its business, but, again, there is no credible evidence proffered in this regard. Therefore, I am unable to conclude that there is prejudice on the part of the applicant although one could imagine the potential of prejudice due to the nature of the business and the proximity of the location of contending parties' businesses.

[27] However, in my view, whether there is potential prejudice or not, the circumstances of this matter do not support the claim made by the applicant for a number of reasons. The respondent was only employed by the applicant for around two years, from 01 February 2016 to 21 January 2018. In the two years , she was only a beauty technician from 01 December 2016, as she was initially employed as an assistant manager. Therefore, she was involved in the app li cant 's business

as a detection technician for about 12 months. It is common cause that she joined the applicant 's business after being employed

elsewhere and she is said to have brought some clients over, when joining the applicant's business. She is qualified for her trade and has been involved in the industry, including whilst undergoing training since 2014. In my view, it is conceivable that some of the clients or even any significant number of them may have been accumulated by the respondent in prior activities and that clients may prefer her services due to her training and skills acquired away from the app li cant's business. Further , it is said that there are other businesses of similar nature in the area, including those within the Perfect 10 franchise stable. Therefore, competition appears to be high and it is conceivable that some of these aspects are having or would have an adverse bearing on

the applicant's business rather than the competition posed by the respondent's business. One has to also consider the undertaking given in wide terms by the respondent not to directly or indirectly do anything with regard to the applicant's customers. I do not consider the applicant's contention that clients may only be discouraged to follow the respondent if the distance is increased from 5.6 km to about 15 km. In the applicant's own view there is loyalty based on intimacy in the industry rather than the attitude and conduct of the respondent with regard to the restraint of trade contained in her erstwhile employment contract. Also, consideration has to be given to the fact that the restraint of trade as currently crafted appears vague and this may be the reason why the applicant sought relief in the reflected in the notice of motion, including a request for the

reading down of the restraint of trade clause.

Is there another facet of public policy?

[28] I did not detect any facet of public policy, other than the potential limitation of the respondent's constitutional right of freedom of trade, occupation and profession. The respondent has submitted that beauty therapy or participation in the impugned industry is her life, as she trained and has been involved in it to earn a living, and further that restriction would have adverse financial and other consequences. The applicant has not shown that such restriction or limitation would be reasonable and has by all means sought to only avoid the potential competition the respondent's business may create. I do not consider public interest will be served by any restriction, particularly when considering that there is already a distance of 5.6 km between the businesses and the existence of other businesses of a similar nature' including Perfect 10 franchises.

Conclusion

and Costs

[29] Further, I do not deem it warranted to consider "the reading down" suggested by the applicant regarding the area and period of the restraint of trade. And this is for the reasons expressed above. Therefore, in my view, this application ought to be unsuccessful and will consequently be dismissed with costs.

[30] The respondent had prayed for costs on attorney and client scale upon dismissal of the application. I do not consider this warranted under the circumstances. Although unsuccessful, the applicant has attempted to pursue a legitimate cause and there is nothing, including its rejection of the undertaking offered by the respondent, warranting deviation from an order of costs on a party and party scale.

Order

[31] For the abovementioned reasons, the following order is made:

(a) the application is dismissed with costs.

K. La M. Manamela

Acting Judge of the High Court 19 April 2018

19 April 2018

Appearances:

For the Applicant

AD Theart

Instructed by

De Klerk & Marais Inc

Lynnwood Ridge, Pretoria

For the Respondent

LM Malan

Instructed by

Adams & Adams Inc ,

Lynnwood Manor, Pretoria

[1] [1982] 3 All SA 679 (W).

[2] See Bandle fnvesrmenrs (Pty) ltd v Registrar of Deeds and Others 200 I (2) SA 203 (SE) at 213 E- F; and reported decisions of this Division in the matter of between National Airways Corporation (Pty) Ltd v Beagles Run Investments 25 CC, under case number 35554/2009 per Emerson AJ, handed down on 17 August 2009 at par 1 2 the matter of South African National Roads .lgency lrd v Chief Registrar of Deeds and Others. case number 9447/2009 per Makgoba .I (as he then ll'as) handed down on 31 March 2009

[3] See National Chemsearch (SA) (Pty) ltd v Barrowman and Another 1979

(3) SA 1092 {T}. see further Magna Alloys and a Research (SA) (Pty) Ltd v Ellis 1984 4 SA 874

[4] Case number: EL526 /20 I 0 , East London Circuit Local Division, per Plasket J at par 6. 1

[5] See par 9 of the opposing affidavit on indexed p 38.

[6] See Recycling Industries (Pry) ltd v Mohammed and Another 1981

(3) SA 250 (E) at 2568-E and 2590 Top industries (Pry) ltd v Gee-Six Superweld CC and 01hers 200 I (2) SA 146 (W) at 161 E/F - H/1 and 16 IJ - 1'62A. See Magna Alloys & Research (SA) v Ellis

[1984] ZASCA 116; 1984 2 All SA 583 (A)· 1984 4 SA 874 (AD).

[7]Ibid.

- [8] See generally Du Bois, F. (gen ed) et al Wille's Principles of South African Law , 9 edition (Juta Cape Town. 2007) at 8)6 and the authorities cited there.·
- [9] See Fidelity Guards Holdings (Pty) ltd t/a Fidelity Guards v Pearmain 2001
- (2) SA 853 (SE) at 862; Canon KwaZulu-Nata/ (Pry) Ltd t/a Canon Office Automation v Booth 2005
- (3) SA 205 (). Section 22 of the Constitution reads: "Every citizen has the right to choose their trade , occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'
- [10] See Magna Alloys at 896.
- [11] See National Chemsearch SA (Pry) ltd v Barrowman 1979
- (3) SA 1092 (T) at I JI 7.
- [12]
- [1993] ZASCA 61; 1993 (3) SA 742 {A}.
- [13] See Chi/ wan at headnote (p743) and p 767
- [14] Ibid
- [15] 2008 (6) SA 229 (D) at par 6.

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