N IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVSION)

CASE NO: 1147/2016

In the matter between:

HOW DO YOU WANT IT (PTY) LTD
T/A DREADLOCKS STUDIO ONE Applicant

And

THANDILE MATYUMZA First Respondent

ZIYANDA MATYUMZA Second Respondent

ZIZIPHO MGQOLOZANA Third Respondent

ZAMA MTHETHWA Fourth Respondent

BUHLE MAPHASA Fifth Respondent

SPHAMANDLA NKOHLA Sixth Respondent

ZIZIPHO MGQOLOZANA Seventh Respondent

BHEKISISA MJOLI Eighth Respondent

JUDGMENT

MBENENGE J:

[1] The applicant, a private company with limited liability and conducting business as a special dreadlocks hair salon in East London, Queenstown, Butterworth, King Williams Town and Mthatha, seeks to enforce a restraint of trade clause embodied in service agreements allegedly concluded by and between the applicant and the

respondents on diverse occasions. The notice of motion prays, in the main, for an order interdicting and restraining the respondents from –

> "1.1.1 Soliciting the custom of and dealing with or in any way transact in competition to the applicant, any business, company firm, undertaking, association or person which has been a client of the employer;
>
> 1.2.2 Approaching, advising or contacting in order to, directly or indirectly solicit the custom of any person or entity who was a customer with whom or to whom, on behalf of the applicant, negotiations, discussion or representations were entered into or made during the period of the respondents' employment with the applicant;
>
> 1.1.3 Being directly or indirectly employed by or have an interest in , either as an employee, principal, agent, member, shareholder, director, partner, consultant, financier or advisor or in any other capacity in any concern or entity which carries on the same business or a business similar to or like the business of the applicant....".

[2] The applicant has further prayed that the order sought be operative the Province of the Eastern Cape over.

[3] For purposes of this judgment it is necessary to quote the relevant restraint of trade clause in its entirety. The clause reads:

> "**21. RESTRAINT OF TRADE**
>
> 21.1 The Employee acknowledges that he is one of the key personnel by the Employer and by reason of his employment is possessed of and shall continue to have access to the company's accumulation of trade secrets, formula's, price lists, lists of client and / or other confidential information.
>
> 21.2 The Employee acknowledges that if, on termination of his/ her employment for any reason, he/ she takes up employments or otherwise becomes associated with or interested in any competitor of the Employer, the Employer's proprietary interests will be materially prejudiced and he therefore recognises that good and lawful reasons exist for the Employer to be protected. The Employee acknowledges that the provisions herein after set out are fair and reasonable and necessary for the protection of the proprietary interests of the Employer.
>
> 21.3 Specifically for the purposes of this particular clause, the following words shall have the following meaning(s):
>
> 21.3.1 "**Business**" shall mean any person, business, company, association, corporation, partnership, undertaking, trust, whether incorporated or not;
>
> 21.3.2 "**Interest/ interested**" shall mean interested or concerned directly or indirectly, whether as proprietor, partner, shareholder, employee, agent, financier, shareholder or in any other capacity whatsoever, and / or permitting his/ her name to be used in connection with or in any manner relating thereto;

21.3.3 **"The territory"** shall mean the following municipal district of the province of the Eastern Cape:

21.3.3.1 East London - Buffalo City Municipality;

21.3.3.2 King William's Town - Buffalo City Municipality;

21.3.3.3 Butterworth – Mnquma Municipality;

21.3.3.4 Mthatha – King Sabata Dalindyebo Municipality;

21.3.3.5 Port Elizabeth – Nelson Mandela Metropole.

21.3.4 "**The Employer**" The Employer shall mean Dreadlocks Studio One, its successors in title and/ or any other companies, subsidiaries or legal entities within the Employer's group of companies.

21.4 all the provisions of this restraint of trade shall strictly apply to the Employee in respect of all clients, activities, undertakings, business, operations and services of the Employer.

21.5 The Employee records that he agrees to the restraint of trade in consideration of:

21.5.1 All benefits which has all will accrue to him from the Employer

21.5.2 His/ her knowledge of and/ or access to the business methods, business secrets, technological information and data and/ or manufacturing/ service methods of the Employer, which are to be known to and which will be gained by him/ her;

21.5.3 The goodwill factor and technological, manufacturing, service and sales expertise in a business and/ or undertaking such as the business and/ or undertaking of the Employer;

21.5.4 the confidential nature of the information, documentation and other data relating to the clients of the Employer, which are available to the Employee;

21.6 In terms of this restraint of trade, the Employee specifically undertakes and agrees to:

21.6.1 **not** to be interested in any business in the territory which carries on business, manufactures, sells, or supplies any commodity or goods, brokers or acts as agent in the sale or supply of any commodity or goods and/ or performs or renders any service, in competition with or identical or similar or comparative to that carried on, sold, supplied, provided, brokered or performed by the Employer, during the period of the employment of the Employee up to and including the last day of the employment of the Employee; **and**

21.6.2 **not** to solicit the custom of or deal with or in any way transact with, in competition to the Employer, any business, company, firm, undertaking, association or person which has been a client to the Employer in the territory during the period of **2 (two)** years preceding the date of termination of the employment of the Employee; **and**

21.6.3 **not** to directly or indirectly offer employment to or in any way cause to be employed any person who was employed by the Employer as at the termination of the employment of the

Employee or at any time within a period of **2 (two) years** immediately preceding such termination.

21.6.4 Each and every restraint in this entire clause shall operate and be valid and binding for a period of **2 (two)** years in the territory, calculated from the date of termination of employment of the Employee in terms of this agreement. This restraint shall apply irrespective of what the cause or reason of such termination may be and whether the fairness of the termination of the Employee's employment is challenged or not by the Employee.

21.7. Each restraint in this entire clause shall be construed as being severable and divisible and applicable to the Employee, whether that restraint is in respect of:

21.7.1 Nature of business or concern;
21.7.2 Area or territory;
21.7.3 Articles, commodities or goods sold and/ or supplied;
21.7.4 Services performed or rendered;
21.7.5 Company or concern entitled to the benefit thereof

21.8 Each restraint in this entire clause shall be deemed in respect of each part thereof to be separately enforceable in the widest sense possible from the other parts thereof, and the invalidity or unenforceability of any part thereof shall not in any way affect or taint the validity or enforceability of any other part of such restraints, or in fact any other terms of this agreement.

21.9 All restraints in this clause are for the sole benefit of the Employer.

21.10 The Employee specifically acknowledges and agrees

21.10.1 That he has carefully read and considered all the terms and provisions of this clause relating to the restraints applicable to him;

21.10.2 That this clause and / or all the restraints contained therein, after taking all circumstances into account, are fair and reasonable; and

21.10.3 That should he at any time dispute the reasonable or fairness of any of the provisions of this clause and/ or restraints, then and in such event he will have the onus to provide or prove such unreasonableness or unfairness." Sic.

[4] The applicant upon whom it is incumbent to allege and prove the agreement and its breach by the respondents,[1] has, besides motivating why the application deserves of being heard as one of urgency, alleged that the respondents were employed by the applicant on different occasions. The first and second respondents terminated their services with the applicant without giving the requisite notice on or about 26 April 2016, whereas the third to the eighth respondents are said to have left

[1] Harms, *Amler's Precedents of Pleadings*, Butterworth (2015) 8ed, pp 324 – 6.

the employ of the applicant without due notice on different occasions between May and June 2016.

[5] The service agreements concluded by and between the applicant and the respondents in East London, within this court's area of jurisdiction, embody the restraint of trade clause referred to in paragraph [3] above. In the case of the first and second respondents the restraint of trade is to endure for two years from the date of termination of services, whereas in the case of the rest of the respondents for a period of six months. The applicant has alleged that this court has jurisdiction to entertain this matter purely by reason thereof that the agreements giving rise to the cause of action were concluded in East London.

[6] The launch of the application was triggered, not by the alleged untimely termination of services by the respondents, but by the following events:

> "23 On the 24th August 2016. After the respondents left employment on the 26th of April 2016, I saw the first respondent outside the premises of the applicant coming to fetch one of the applicant's old clients and walking towards the direction of union street. I suspected the first respondent to be convincing the client that since she has cut ties with the applicant the client should then follow her to her new trading area situated at ANO's HAIR BOTIQUE, Shop No. 5, Union Street, East London.
>
> 24 At that time, I had already noticed that between the months of April and June 2016, the 1st to the 8th respondent terminated the employment without notice to the applicant, the applicant experienced a diminishing number of clients, in all of Queenstown, East London and King Williams Town branches, which causes a dwindle in the income and turnover of the business.
>
> 25 My curiosity became increasingly wide after having noticed that the first respondent was in breach of the restraint provisions. Sometime last week on the 27th August 2016, I met with one of the usual customers of the applicant from whom I grasped that she was invited by the 1st respondent to Ano's Hair Salon in East London where the first respondent now moved to and trades in the same business. The client has apparently been attending to the first respondent for the past two months.
>
> 26 I then continued to make a further search in King Williams since I was intrigued by the changing turnover of the business of the applicant, on my arrival in King Williams Town I noticed that the 2nd to the 4th respondents are trading solely at Perfect Point Salon in King Williams Town in defiance of the restraint clause and have continued to turn clients from going to the applicant's branches to do business.
>
> 27 Thereafter, I requested one of my staff members to record the whereabouts of the fifth to eighth respondents. I also discovered that the same situation takes place as well in Queenstown were the 5th to the 7th Respondent have done similar acts and trading at Lukhanji Retail Park in Komani street and have been contacting the applicant's clients to stop doing business with the applicant and come them.
>
> 28 I also witnessed that the 8th Respondent is operating on his own account at Lukhanji Mall in Queenstown and has also made contacts with the applicant's

> clients. The effects of the changing financial stability of these branches of the applicant made me realise that the applicant is now in competition with the respondents with applicant's clients. This conduct was of course in defiance of the restraint of trade clause signed by the parties." Sic.

[7] It is these events, narrated in the applicant's founding affidavit, that are the *fons et origo* of this application, and which constitute the breach relied on by the applicant. The applicant solicits protection from this court and, to that end, has alleged that the exploitation of the trade connections of the applicant by the respondents to fulfill their self-interest is not only prejudicial to the applicant's financial interests but poses a threat to the interests of the remaining employees who run the risk of not receiving their salaries due to the sudden decrease in the applicant's business turnover. It is further contended that the continued loss of income resulting from the breach of the restraint of trade agreement might render the applicant's business dysfunctional.

[8] The application is being opposed by the respondents, but only the first respondent, allegedly on behalf of the other respondents as well, has deposed to the affidavit filed in opposition to the application. The other respondents have not delivered any confirmatory affidavits in support of the allegations made by the first respondent in the opposing affidavit. The respondents' attorney's authority to represent all the respondents has, however, not been challenged.

[9] The first respondent, whilst not contesting the citation of the parties to these proceedings, has denied that the sixth respondent is involved in a dreadlock undertaking and has alleged that he is an employee of Avis car hire. The fact that the respondents had been in the employ of the applicant and have left such employment is not placed in dispute. The first respondent further denies that the respondents ever bound themselves to the restraint of trade clause in question, but does not deny that they signed the relevant service agreements.

[10] Most importantly, the first respondent claims to have no knowledge of whether the rest of the respondents concluded identically worded service agreements embodying the restraint of trade clause subject to this application. He also claims to have no knowledge of all the allegations implicating the respondents as having acted in breach of the restraint of trade clause.

[11] At the hearing of this application four preliminary issues were raised on behalf of the respondents. It was contended, first, that the application lacked urgency. Second, the applicant was accused of raising disputes of fact rendering it inappropriate for the applicant to institute an application, and not an action. The third preliminary point raised was that the applicant's cause of action is unsustainable due to lack on its part to allege that the business is unique. Finally, it was contended that the failure on

the part of the applicant to indicate or state the amount of remuneration received by the respondents rendered the employment contract null and void.

[12] The respondents' contention of lack of urgency is predicated on the ill-begotten notion that the cause of action in this matter arose on or about 26 April 2016, when the first respondent is said to have touted customers who had attended upon the applicant's premises in East London. 26 April 2016 is the date the first respondent is alleged to have left the employ of the applicant. It is clear from the factual background presented above that the date on which the first respondent touted customers was 24 August 2016, and not 26 April 2016. The application was launched within a reasonable time after the first breach of the restraint of trade agreement was committed. As long as the issue concerning the alleged breach has not been resolved the applicant's continued operation as a business entity would remain uncertain. This case is not of importance to the applicant only, but to the respondents as the affected individuals. Even though this matter is commercial in nature**,** it is sufficiently urgent.[2]

[13] The argument that the applicant has raised disputes of fact is devoid of merit. In the first place, the first respondent has claimed to have no knowledge of the essential allegations made in the applicant's founding affidavit. It is trite law that a statement of lack of knowledge coupled with a challenge to the applicant to prove part of his or her case does not amount to a denial of the averments by the applicant.[3] Subject to what is stated in the penultimate paragraph of this judgment, there is no dispute of fact as to the existence of the restraint of trade agreement and its breach by the respondents.

[14] The third point *in limine* relating to the uniqueness of the business whose interests are sought to be protected is similarly devoid of merit. As already pointed out above, the party wishing to enforce a restraint of trade agreement need only allege and prove the agreement and its breach by the respondent/s.

[15] It is so that the amount of remuneration payable to the respondents is not specified in the agreements. That does not, however, render the agreement in its entirety invalid, especially where, as here, the employees are remunerated on a commission basis.

[16] There is not much to be said on the merits of this application. This is so because of the cavalier attitude adopted by the respondents in opposition to the

---

2 *Cekeshe and Others v Premier, Eastern Cape and Others*1998 4 SA 935(Tk) D at 948D-H; see also *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) at 89A wherein it was held that breaches of restraint of trade have an inherent quality of urgency.

3 *Gemeenskapontwikkelingsraad v Williams (2)* 1977 (3) SA 955 (W) at 957E; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163; *Saflec Security Systems (Pty) Ltd v Group Five Building (East Cape) (Pty) Ltd* 1990 (4) SA 626 (E) at 631D.

application. They have either proffered a bold denial to the essential allegations or claimed to have no knowledge of those allegations. For instance, they do not dispute having signed the agreements. No confirmatory affidavits placing the facts applicable to the second to eighth respondents have been filed. The respondents' cavalier attitude is further demonstrated by the first respondent's claim to have no knowledge of the breach alleged by the applicant, even though the deponent to the founding affidavit has presented a welter of detail regarding how each of the affected respondents is said to have acted in breach of the agreement.

[17] Even in a constitutional dispensation any party to any agreement where a restraint clause is regarded as material is free to agree to include such a clause in the agreement and the common law in this regard is of general application.[4] One would have expected the respondents to seek to absolve themselves from the restraint of trade agreements by proving that, at the time enforcement is sought, the restraint is directed solely at the restriction of fair competition with the covenantee and that the restraint is not, at that time reasonably necessary for the legitimate protection of the covenantee's protectable proprietary interests (goodwill or trade secrets),[5] or alleging and proving that the enforcement of the restrictive conditions would be contrary to public policy.[6] The respondents did not come anywhere near raising that contention.

[18] The next issue for determination is the area of operation of the restraint of trade agreement. The restraint of trade clause specifies the areas in which it is applicable; these being Port Elizabeth, East London, King Williams Town, Butterworth and Mthatha. One can immediately discern that Queenstown is not part of the area of operation of the restraint of trade agreement. It is trite law that parties are bound to the terms of their agreements. This is true for the applicant as well. The restraint of trade agreement is operational in the areas defined as *"the territory*". In these circumstances, this court is not in a position to enforce a term that is not part of the restraint of trade in question. Therefore, the prayer to enforce the restraint of trade agreement in Queenstown cannot stand.

[19] It is not clear from the papers whether the respondents are *incolae* or *peregrini* within this court's area of jurisdiction. Having regard to the territorial nature of jurisdiction and the principle of effectiveness, this court would have jurisdiction to grant the prohibitory interdict sought if the act complained of is to be

---

4 *Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) 862B-C.

5 *Value Logistics Limited v Smith and Another* [2013] (4) AllSA 213 (GSJ).

6 *Magna Alloy and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 893.

prevented within the area over which the court exercises jurisdiction.[7] This court lacks the jurisdiction to enforce the restraint of trade agreement in areas outside of its area of jurisdiction. Even upon the application of the principle enunciated in *Zokufa v Compuscan (Credit Bueau)*[8] i.e. that if the requirements for the grant of an interdict are satisfied by facts within the territorial jurisdiction of a High Court, the court will possess the jurisdiction to decide the matter, the prohibitory interdict sought relates, in part, to conduct complained of in King Williams Town, Butterworth, Mthatha, and Port Elizabeth, outside of this court's area of jurisdiction, rendering the order sought in respect of those areas incompetent.

[20] From what is stated above, nothing stands in the way to granting the relief sought by the applicant insofar as it relates to East London. The application insofar as it relates to all respondents, albeit that it applies to East London, must therefore succeed. The applicant has been successful in demonstrating that it is possessed of legitimate interests which it seeks to protect by means of the restraint. This is so regardless of the fact that the application has succeeded in relation to the East London area only. There is no reason why costs should not follow the result. I was urged to consider the parlous financial position of the respondents and not to award a cost order against them on that basis. No facts were pleaded from which I could even begin to exercise my discretion in the respondents' favor.

[21] I therefore make the following order:

21.1 The respondents are interdicted and restrained from:

21.1.1. soliciting the custom of and dealing with or in any way transacting in competition to the applicant, any business, company, firm, undertaking, association or person which has been a client of the applicant;

21.1.2 approaching, advising or contacting in order to, directly or indirectly, solicit the custom of any person or entity who was a customer with whom or to whom, on behalf of the applicant, negotiations, discussions or representations were entered into or made during the period of the respondents' employment with the applicant;

---

7 Pistorius D, *Pollak on Jurisdiction*, 2 ed (1993) JUTA Cape Town at 115; *Ex parte Winter* 1948 (3) SA 377 (W); *Kibe v Mphoko and Another* 1958 (1) SA 364(O); *Mtshali v Mtambo* 1962 (3) SA 469 (GW).

8 2011 (1) SA 272 (ECM) at para [61].

21.1.3 being directly or indirectly employed by or have an interest in, either as an employee, principal, agent, member, shareholder, director, partner, consultant, financier or advisor or in any other capacity in any concern or entity which carries on the same business or a business similar to that of the applicant.

21.2 The duration of the restraint in respect of the first and second respondents shall be two years from 26 April 2016, and six months from 31 May 2016 in the case of the third to eighth respondents.

21.3 The territory of application of the interdict shall be East London

21.4 The respondents shall pay the costs of this application, jointly and severally, the one paying the other to be absolved.

_____

S M MBENENGE

JUDGE OF THE HIGH COURT

Counsel for the applicant:	Mr D Skoti Instructed by MT Klaas Attorneys East London
Counsel for the respondents:	Mr V Msikinya Instructed by Tshiki and Associates Queenstown C/O Mtima Attorneys East London
Date heard	21 September 2016
Date Delivered	27 September 2016