IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) ~~REVISED~~

17/2/2020
DATE

SIGNATURE

CASE NO: 1859/2020

In the matter between:

LITTLE STARS EARLY INTERVENTION CENTRE NPC
t/a THE STAR ACADEMY Applicant

and

JENNA-LEE KIM WHITE First Respondent

ROBYN DUNVILLE Second Respondent

JUDGMENT

MIA, J

[1] This is an opposed application in which the Star Academy (the applicant) seeks to enforce restraint of trade undertakings contained in the employment contracts concluded with the first respondent (White) and second respondent(Dunville). The application is opposed by the respondents who deny any breach of the agreement. The applicant is a

non-profit company situated in Highlands North Johannesburg. It provides services in several centres in Johannesburg, Pretoria, Durban and Cape Town to assist children diagnosed with autism through the use of applied behavioural analysis (ABA) and Centre for Autism and Related Disorders (CARD) programmes. The respondents were employed by the applicant and received extensive training in ABA and CARD programmes.

[2] The main issues for determination are:

2.1 Whether the contract of employment by the Star Academy and White in 2013 was nullified by the Independent Consultancy Agreement (ICA) concluded by the Star Academy and White during 2015.

2.2 Whether the contract of employment concluded by the Star Academy and the Dunville was on the same terms as White's 2013 contract of employment.

2.3 Whether White and Dunville have breached, or are intent on breaching, the restraint of trade undertakings.

BACKGROUND

[3] White was employed by the applicant initially in 2009 when she signed a service agreement which constituted an employment contract and contained restraint of trade undertakings which are contained in paragraph 13 and are extensive. She was trained by the applicant intensively. The service agreement contained a restraint of trade clause which provided that White would not:

> *"A Open a facility that provides these services or uses the methodologies utilized at the Star Academy;*

B Accept employment with a similar institution to the Star Academy.... And uses the methodologies and teaching skills which are the intellectual property of the Star Academy and of CARD;

C Undertake any work or economic activity which is based on the utilization or exploitation of the intellectual property of the Star Academy or Card.

It is specifically recorded that you agree that the above limitations and restraints are fair and reasonable"

In addition to the above clause there was a further restraint in paragraph 16 of the contract concluded in 2013 namely:

"16.2 You undertake that for the duration of your employment with the Company and for the period of 3 (three) years after termination of your employment by either party and for any reason whatsoever that you shall not, whether directly or indirectly, and whether or not for reward:-

16.2.1 encourage, entice, incite, persuade, or induce any employee of the Company to terminate his or her employment with the Company;

16.2.2 solicit any existing client(s) of the Company or potential client(s) that the Company has identified or is in negotiations for business purposes;

16.2.3 disclose to any person any confidential information belonging to the Company which comes to your knowledge as a consequence of your employment with the Company; and

16.2.4 use or attempt to use any confidential information for your own personal benefit, or for the benefit of any other person or organization, or in any manner whatsoever other than in accordance with your duties and responsibilities to the Company

and consistent with the obligation of honesty and integrity expected of a person holding your position."

[4] White resigned from her employment in December 2019. Her resignation letter indicated 20 December 2019 to be her last day of employment. On the 6 January 2020 she requested an employment letter which she took the liberty of preparing herself for the applicant's convenience. In this letter she recorded her employment with the applicant from August 2009 until December 2019. She recorded her role initially as case supervisor and then recorded that she was promoted to the position of clinical director. During this time she stated on behalf of the applicant that she *"consulted with supervisors on their cases, made media appearances and trained staff."*

[5] White however disputes being in the employment of the applicant and contends that an ICA was signed which regulated the working relationship and permitted her to accept other assignments for her own account. According to White, the ICA concluded on 18 June 2015 replaced the employment contract. Paragraph 13 thereof states:

> *"this contract nullifies any previous contracts and placement acceptances signed between the parties hereto"*

White disputes that there was any further agreement concluded thereafter and denies signing a restraint of trade agreement after June 2015. She also notes that the applicant has failed to produce a further contract of employment containing a restraint of trade.

[6] When it comes to Dunville, she commenced employment with the applicant early in January 2012 and remained with the applicant for five years until she left for the United Kingdom in 2015. She did not enjoy the working conditions at the applicant and sought alternative

employment. She left South Africa to teach in Newcastle in the United Kingdom. During this time she kept in touch with White. Based on the 2009 restraint and Dunville leaving the applicant's employment in 2016, Dunville contends that the one year restraint expired in 2016.

[7] Upon Dunville's return Ms. Gerschlowitz, the director of the applicant, agreed to re- employ Dunville on certain conditions which included a higher salary and a better working environment. Dunville recalls signing an employment agreement in 2011 but not in 2018. She denied that she entered into a written service and restraint agreement identical to the one signed with White in 2013 or 2015. She returned in 2018 and resumed employment once more with the applicant and signed a training agreement. The training agreement which is signed and attached to the applicant's founding affidavit states above Dunville's signature:

> "I accept the terms and conditions in this Training Agreement and agree to comply with them and all other instructions and policies issued or introduced by the Company or CARD USA from time to time"

[8] The applicant relies on salary advice slips which date from 2018 and 2019 to prove the employment relationship with the respondents and especially White who denies the employment relationship. The respondents objected to the admissibility of these on the basis that the applicant could not make out its case in its replying affidavit.

[9] Both White and Dunville recognized that the applicant utilized a unique and identifiable methodology for assessing children with Autistic Spectrum Disorder, Attention Deficit Hyperactivity Disorder, Development Delay and other learning disorders. They also acknowledged that the applicant applies and utilizes the unique Centre

for Autism and Related Disorders skills programme. They received extensive training in the methodology. During the course of their employment they worked with clients and developed close relationships with clients and their parents.

[10] In January 2020 a cease and desist letter was issued by Skills Global wherein it recognized the applicant as an international affiliate with the license to access the SKILLS platform and having its own unique domain. It notes further that the platform was created specifically for children assisted by the applicant and any unauthorized use of either the brand or platform constituted a violation. This letter was attached to the applicant's replying affidavit in an attempt to prove a restraint on the respondents access to CARD programmes whilst not employed by the applicant.

URGENCY

[11] The applicant required that the restraint operate for one year throughout South Africa from December 2019 in respect of White and November 2019 respectively in respect of Dunville. It asserted that it could proceed in the ordinary motion court as this would render the remedy ineffective as the substantial portion of the period of twelve months would have passed rendering the restraint ineffective and eroding the protection it sought. It further relied on the actions of both White and Dunville which came to its attention and asserted that they have actively breached and intend to breach the restraints of trade in the future by offering the same or similar services to their clients and or by enticing their clients.

[12] The courts have held the view that restraints of trade are inherently urgent in nature. In the case of *Helukable SA (Pty) Ltd v O'Toole and Another* (42861/2017) [2017 ZAGPJHC 411 (15 December 2017) the

restraint was operative for one year. Regarding urgency the Court stated"

> " When a restraint is of such limited duration, and it is clear that substantial redress will not be afforded to the applicant if the matter is only heard in the normal course, then such a matter should be treated as a matter of urgency"

Restraint of trade disputes are urgent especially where the restraint of trade is of limited duration and a referral of the matter to the normal roll will invalidate the period of protection requested in the relief sought. I thus deemed the matter urgent.

[13] Mr. Hollander, on behalf of the applicant, argued that the issue of the ICA was not addressed in the founding affidavit as White did not rely on the ICA when she was put to terms in respect of the restraint of trade agreement. Had White responded that she was not bound by the restraint of trade agreement, the applicant would have realized that White had not regarded herself as an employee contrary to her own indication in the letter of recommendation she drafted and requested the applicant to sign. It was only in the opposing affidavit that the issue first arose and the applicant was thus required to adduce evidence to rebut White's case that the ICA was in force and applicable.

[14] Mr. Hollander relied on the case of *Siebel's Hard Asset Fund Limited v Pouroulis* (44754/14) [2015] ZAGPJHC 247 where the Court per Meyer J acknowledged that an applicant could adduce evidence in its replying affidavit to refute a respondent's case where the respondent put up a defense for the first time in an answering affidavit. The respondents did not apply to strike out allegations from the replying affidavit which they believed ought to have been in the founding affidavit, nor did they seek indulgence to reply to any new facts raised in the replying affidavit.

[15] Rule 6(15) provides for the striking out of new matter in the replying affidavit if it is irrelevant to the case made out in the founding affidavit, *Tittys Bar & Bottle Store v A.B.C. Garage and Others* 1974(4) SA 362(TPD) at p 369 A-B) The respondents did not bring an application for the striking out and the applicant's response in the replying affidavit is understandably appropriate in the reply as it was intertwined with the issue of the restrainsts of trade agreements.

[16] Mr. Richards, appearing for the respondents argued that White and Dunville were not bound by a restraint of trade agreement at the time of their resignations. Dunville resigned initially in 2015 and the restraint of trade she signed was applicable for one year and ended in 2016. Dunville did not sign a restraint of trade when she resumed employment with the applicant in 2018. White relied on the ICA which she signed in 2015 which nullified all previous agreements, including the restraint of trade agreement signed in 2013.

[17] Further Mr. Richards argued that the applicant failed to produce any restraint of agreement regulating the relationship with White after the ICA was concluded. He argued that whilst the applicant recalls signing an employment contract with Dunville which incorporated a restraint of trade agreement it failed to produce it. The applicant was only in possession of the training agreement signed with Dunville because that was the only agreement concluded between the parties when Dunville resumed working at the applicant. The only way the applicant could succeed was if the court accepted an agreement referring to another agreement which the applicant refers to but does not produce.

[18] As far a White was concerned the ICA constituted the entire agreement between the parties which provided for White to accept assignments outside of Star Academy. The applicant expected the parties to revert

to the old agreement incorporating the restraint of trade agreements without there being proof that either respondent signed a further agreement incorporating a restraint of trade agreement after the initial agreement changed.

[19] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H - 635B, the court held

> "where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justify such an order... where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted"

[20] In *Basson v Chilwan and Others* 1993(3) SA 742 (A) at 776H- Botha JA in a separate judgment stated:

> "The incidence of the *onus* in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the *onus* because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade..."

[21] The applicant relying on restraint of trade agreement is required to proved the employment relationship and the restraint of trade agreement applicable as well as the terms there of. Thereafter the onus shifts to the employee to show that it would be unreasonable to enforce the restraint of trade. In applying the *Plascon Evans* principle it is evident that the respondents were employees of the applicant as evidenced by the salary advice slips indicating they were employees. The applicant was unable to produce a restraint of trade agreement for the period of employment after White concluded and ICA which clearly states the ICA nullified the previous agreements which would include the contract of employment. This includes restraints of trade agreements. The applicant has not proven that Dunville signed an agreement similar to the 2013 restraint of trade signed by White. Whilst the director of the applicant can recall signing an agreement, her recollection is that all Human Resource agreements are her responsibility. It is unusual that the only the old agreements would be in her possession but not the agreements she seeks to rely on. It is necessary to prove the documents to obtain the relief sought.

[22] The mass resignation staff and a departure of children from the applicant is explained by the respondent's as being due to an unsatisfactory working environment. White is the administrator of a Whatsapp group with the title being one of the children who was previously a client of the applicant. White's explanation avoids a clarifying explanation apparently to maintain confidentiality and by stating that having former employees of the applicant being part of the Whatsapp group with a former client being the subject does not constitute a breach of a restraint of trade agreement. The respondents' defence is that no restraint of trade agreement exists at present.

[23] The applicant has referred to the various restraint of trade agreements however none of the restraints of trade agreements appear to be

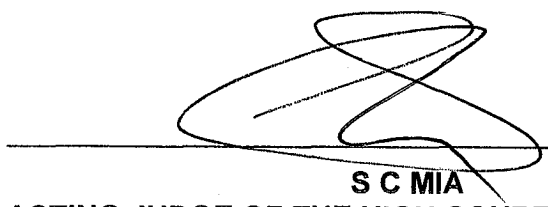
applicable at present. The applicant did not prove that there was a restrainst of trade applicable to Dunville when she resumed employment in 2018. The ICA concluded in 2015 superseded all previous agreements with the applicant between White and the applicant. No further restrainst of trade agreements were produced and the applicant cannot revert to the previous agreements which expired. Thus the ICA nullified all previous agreements. The applicant has not proven that Dunville signed an agreement similar to the 2013 agreement signed by White. The conclusion is that no valid restrainst of trade appear to be in operation against the respondents.

[24] On the issue of costs, both parties addressed me at length. In my view there is no basis to find that the applicant approached this court on the basis of spurious and wild allegations. It was justified in approaching the court in protecting an interest it believed was under threat. In view hereof I deem the usual costs order to be appropriate.

ORDER

[25] Having heard counsel and for the reasons above I make the following order.

"The application is dismissed with costs. "



S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	Adv. Hollander
Instructed by	:	Dewey Hertzberg Levy Inc.
On behalf of the respondent	:	Adv. Richards
Instructed by	:	Joubert Scholtz
Date of hearing	:	4 February 2020
Date of judgment	:	17 February 2020