IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 86343/14

In the matter between: 19/12/2014

SALON BODY THERAPY CC Applicant

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

19/12/14
DATE

SIGNATURE

and

NQABISA MBAXA **RESPONDENT**

JUDGMENT

Tuchten J:

1 This is a dispute between two wellness therapists. Both the parties carry on business in Randburg and provide aroma therapy and beauty care to persons of all genders. The dispute arises because the respondent used to work for the applicant. She became employed by the applicant on 4 August 2014 and resigned, her last day of employment being 30 September 2014. So the respondent worked for the applicant for over four years.

2 On 5 August 2010, the parties concluded a written agreement described in its heading as a "permanent employment contract - salary earners" Clause 2.1 of the employment contract provides for a probationary period of three months, after which, if the management of the applicant was satisfied with the respondent's performance, the employment contract would be automatically extended to a permanent contract. This provision provides expressly that the respondent would be "advised in writing" that her probationary period had been successful.

3 In fact, the respondent's probationary period was successful, as evidenced by the fact that she continued in the applicant's employ and left of her own volition. But the respondent was never "advised in writing" that her probationary period had been successful. She must, however, have been told either orally or by conduct that this was so because otherwise she would have left the applicant's employ. Counsel for the respondent argued that this meant that the employment contract was never extended to a permanent contract.

4 I do not agree. I do not think that the provision for written notification should be elevated to the status of an essential prerequisite for the validity of the employment contract after the conclusion of a successful probationary period. As I see it, the parties were entitled to

rely on the communication of the success of the probationary period by means other than in writing. The respondent received all the benefits promised to a permanent employee under the employment contract and never suggested that the parties were not bound by its terms until the present dispute arose. I therefore hold that the respondent is bound by the terms of the employment contract.

5 The employment contract includes a widely drawn restraint of trade. In terms, the respondent undertook that she would not, amongst other things, for a period of twelve months from the date of termination of the respondent's employment with the applicant and within fifteen kilometres of the applicant's business, (I summarise) compete with the applicant or contact or solicit the business of its clients. It is this restraint that the applicant seeks, in its full rigour, to enforce by the present proceedings, brought as a matter of urgency. The enforcement of the restraint is sought because the respondent carries on a competing business in Randburg, about four kilometres from the applicant's business.

6 Proceedings to enforce a restraint are generally urgent because the restraint is linked to a time period and therefore, viewed from the perspective of the party seeking to enforce it, a diminishing asset. The point taken by the respondent is that the applicant delayed

unconscionably in bringing her application. An employee of the applicant, Ms Steyn, and the respondent spoke on the telephone on about 15 October 2014. According to Ms Steyn, the respondent told her that she had learnt that the respondent might be in the employ of or operating a business similar to that of the applicant. In response to a question from Ms Steyn, the respondent confirmed that she remembered that she was bound by a restraint. The respondent confirmed that she had opened a business in "Boskruin". At Ms Steyn's request, the respondent confirmed that she would not contact the applicant's clients.

7 On 30 October 2014, however, Ms Steyn was informed that the respondent was in the employ of or the owner of the Skinology Skincare & Wellness Centre in Bromhof Village Shopping Centre, some four kilometres away from the applicant's business. The applicant's evidence does not disclose whether this shopping centre is in Boskruin.

8 Be that as it may, the applicant then elected to ignore the question of a potential breach of the restraint because of what Ms Steyn regarded as more pressing matters. As she puts it, her schedule and workload at other salons was exceptionally hectic. Ms Steyn consulted her attorney on 5 November 2014. On 8 November 2014, Ms Steyn went

to the applicant's business and, she says, discovered that business at that salon was down. She drew the conclusion that the lost business had been taken by the respondent.

9 On 4 December 2014, the applicant's attorney went to the respondent's business and established that the respondent was indeed its owner. It is of some significance that for reasons not explained by the applicant, no letter was written to the respondent recording what the applicant has put up in evidence and calling for an undertaking that the respondent would not act contrary to the restraint. It also seems clear to me that at the time of the telephone conversation around 15 October 2014, the applicant was content with the oral undertaking that the respondent would not contact the applicant's clients.

10 The present application was launched and served on 5 December 2014. It was argued that the urgency was self-created. I think that there is substance in this point. The applicant elected not to pursue the matter because, on the interpretation most charitable to the applicant, Ms Steyn did not think that the respondent would take any business away from the applicant. I do not think that the applicant has established that the respondent took business away from the applicant. It may be so; or it may be that the figures put up by the

applicant in reply are not accurate; or it may be that the applicant has lost market share to another competitor. On the issue of urgency, I prefer, however, to deal with the delay when dealing with the merits of the applicant's claim and allow the matter to proceed on that basis. After all, the parties have put before me all the evidence they wish to present and the case was fully argued.

11 It is well settled that a restraint will not be enforced when it is against public policy. In a case such as this, the question at this level is whether the restraint is necessary to protect an interest of the applicant which is deserving of protection.

12 The services offered by the applicant are described as run of the mill and not in any way extraordinary. This is no doubt so, viewed from the perspective of a seasoned industry participant. But I think that this overlooks the intimacy which must often arise between consultant and customer because of the actual physical contact that takes place within most of the consultant/customer interactions. I think that the customer connection of the applicant which is worthy of protection is therefore that which exists between the applicant and its customers who were attended to by the respondent herself. It is the intimacy which gives rise to the customer connection. I think that the protection should be limited to a restriction on the respondent's actually soliciting

the business of those customers for a reasonable period.. I am fortified in this conclusion by the concern, the only concern, displayed by Ms Steyn during her telephone conversation with the respondent on about 15 October 2014, ie that the respondent should not contact the applicant's customers.

13 What is a reasonable period? The papers are regrettably silent on this important point. There is however evidence, put up by the respondent, that the customers of participants in this industry are "notoriously fickle". This is denied by the applicant but because final relief is sought, the *Plascon-Evans* rule applies and the respondent's version must prevail in this regard. Similarly, the respondent denies having solicited ("lured") any of the applicant's customers. Weighing what evidence I have in this regard, and having regard to the fact that the respondent's customer connection through the applicant's salon was severed some two months ago, I think that a further period of four months would adequately protect the applicant's interests.

14 I have considered whether I should grant any order at all. If the applicant had asked for an undertaking consistent with the telephone conversation of about 15 October 2014, it would almost certainly have been given. But the applicant sought no undertaking at all. It allowed the respondent to continue running her business and incurring

obligations in the belief that the applicant did not object to her doing so as long as she did not contact the applicant's customers. And now, in this application, the applicant seeks that the full rigour of the restraint be enforced against the respondent. This would in effect force the respondent to close her business and would have catastrophic consequences for the respondent. And the enforced closure of the business would take place after the applicant had, during the telephone conversation to which I have so often referred, tacitly consented to the respondent's carrying on business. If the respondent had in fact brought the applicant under a misapprehension about where the respondent was carrying on business, I should have expected that this would have been highlighted in the founding affidavit. It was not. And as I have mentioned, the replying affidavit does not in terms make such an allegation. The enforcement of the restraint in its full vigour, therefore, would in the circumstances created by the applicant, lead to a great injustice.

15 I therefore hold against the enforcement of the restraint in its full rigour both because the applicant has not shown a protectable interest in this regard and because I decline to this extent to exercise my discretion in relation to the award of an interdict. This, as such, will not preclude the applicant from claiming from the respondent such

damages as it may prove it has suffered. What defences the respondent may put up to resist such a claim, is a different matter.

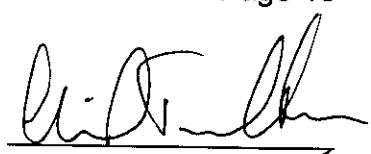
16 Against this, the respondent in her answering affidavit took the position, which I have found to be unjustified, that she was not bound by the terms of the employment contract after the termination of the probationary period. In the light of the denial by the respondent that the employment contract presently governs the position as between the parties, I think the applicant is entitled to an interdict against the solicitation of its customers.

17 The applicant has therefore had a measure of success in the application because the court has held in its favour at the level of contractual rights and obligations. The respondent, self-evidently, has also had a measure of success. I therefore think that there should be not order as to costs.

18 I make the following order:

1 The respondent is interdicted, until 30 April 2015, from soliciting the custom of any person to whom she rendered services while she was employed by the applicant.

2 There will be no order as to costs.



NB Tuchten
Judge of the High Court
19 December 2014

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