HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not reportable

Not of interest to other Judges

CASE NO: **77243/2015**

4/3/2016

In the matter between:

JOHANNES ARNOLDUS POTGIETER First Applicant

MCCOMB TRADING CC T/A SCISSORS HANDS Second Applicant

and

FRANCOIS MICHAEL MEYER Respondent

Heard: 25 February 2016

Order made: 4 March 2016

Delivered: 4 March 2016

Coram: Makgoka, J

Summary: Interdict – Restraint of trade - Sale of shares agreement- whether restraint was part of the agreement- rectification of agreement - whether restraint reasonable and enforceable

ORDER

1. It is declared that the restraint of trade clause in the agreement concluded between the first and second applicants, on the one hand, and the respondent, on the other, on 12 March 2015, is valid and enforceable;
2. The respondent is accordingly, interdicted from:
   2.1 having an interest in any hair or beauty salon or business within a radius of fifteen kilometres from the second applicant;
   2.2 encouraging any employee to leave the employment of the second applicant;
   2.3 interfering with the employment relationships between the second applicant and any of its employees;
   2.4 in any manner offering employment to, or employment to be offered to, or cause to be employed or assist in the employment of any employee or former employee of the second applicant;
3. The respondent is ordered to pay the costs of the application.

JUDGMENT

MAKGOKA, J

Introduction

[2] On 4 March 2016 I made an order interdicting the respondent from breaching the terms of a restraint trade in an agreement, in the following terms:

1. It is declared that the restraint of trade clause in the agreement concluded between the first and second applicants, on the one hand, and the respondent, on the other, on 12 March 2015, is valid and enforceable;
2. The respondent is accordingly, interdicted from:
   2.1 having an interest in any hair or beauty salon or business within a radius of fifteen kilometres from the second applicant;
   2.2 encouraging any employee to leave the employment of the second applicant;
   2.3 interfering with the employment relationships between the second applicant and any of its employees;
   2.4 in any manner offering employment to, or employment to be offered to, or cause to be employed or assist in the employment of any employee or former employee of the second applicant;
3. The respondent is ordered to pay the costs of the application.

[3] I undertook to furnish the reasons for that order later. These are the reasons. This first and second applicants seek to enforce a restraint of clause in an agreement.[1] They seek an interdict prohibiting the respondent from having any interest in any hair or beauty salon or business within a radius of 15 kilometers from the second applicant's business premises. The applicants further seek ancillary relief, concerning the solicitation of the employees of the second applicant.

[1] The application was initially brought on 6 October 2015 on an urgent basis. This court (per Jansen J) on 12 October 2015, ruled that the matter was not urgent.

The facts

[4] The facts are simple. The first applicant (Mr Potgieter) is the sole member of the second applicant, a close corporation, which conducts business of hair and beauty salon in Moreleta Park, Pretoria. Mr Potgieter and the respondent (Mr Meyer) were members of the second applicant, each holding 50% member interest in the second applicant. In March 2015 Mr Potgieter and the second applicant, on the one hand, and Mr Meyer, on the other, concluded a written sale of shares agreement in terms of which, among others, Mr Meyer's member interest in the second applicant was transferred to Mr Potgieter. The agreement also provided for the employment, by the second applicant, of Mr Meyer as a hairstylist on an interim basis from 1 March 2015 to 30 April 2015. The agreement also included a restraint of trade clause, which reads as follows:

'11.1 FM Meyer undertakes that he will not, for the Restraint Period, conduct or be in any way involved with or have an interest in any hair or beauty salon or business within a radius of 15 kilometers from Scissor Hands' current business premises at shop no.5, Olivewood Shopping Centre, which is on the corner of De Villebois and Wekker Street, Moreleta Park, Pretoria, which carries on business within the Republic of South Africa.

11.2 FM Meyer undertakes that during the Restraint Period, he will not, directly or indirectly have an interest in any entity or be involved in any business within a radius of 15 kilometers as indicated in clause 11.1-

11.2.1 relating to hair and beauty;

11.3 FM Meyer undertakes not to directly or indirectly, without first obtaining the written consent of JA Potgieter-

11.3.1 in any way encourage any employee to leave the employment of MCComb Trading;

11.3.2 in any way interfere with the employment relationship between MCComb Trading and any of its employees;

11.3.3 in any manner whatsoever offer employment to, or employ or cause employment to be offered to , or cause to be employed or assist in the employment of any employee or former employee of MCComb Trading.

11.4 The non-solicitation obligations of FM Meyer in terms of clause 11.3 above shall apply for a period of 24 (Twenty Four) months from the Effective Date of this agreement."

[5] On 10 September 2015 Mr Meyer resigned from the interim employment of the second applicant. On the same date, two other employees of the salon, Mr. Van Zyl and Me Viviers, who had also been employed as hairstylists by the second applicant, similarly tendered their resignations, also indicating that their last working day would be 26 September 2015. In respect of all three, the second applicant accepted their resignations and waived the notice period, thereby relieving them of their responsibilities with immediate effect. However, the latter two employees subsequently returned to the employ of the second applicant, on 12 September 2015 and 15 September 2015, respectively. They indicated to Mr Potgieter that it was Mr Meyer who had encouraged and enticed them to resign from the employ of the second applicant and join him in his new business venture.

The applicants' case

[6] In the founding affidavit deposed to on behalf of the applicants, Mr Potgieter state that on 10 September 2015 it came to his attention that Mr Meyer was rendering services as a hairstylist from a hair salon situated within the 15 km restraint of trade area. After a letter was written to the owner of the salon informing her of the restraint of trade to which Mr Meyer had bound himself, assurance was given that Mr Meyer would no longer render hair and beauty services there. It also came to the attention of Mr Potgieter that Mr Meyer was intending to open a hair and beauty salon at premises one kilometer from the salon of the second applicant.

The respondent's case

[7] In his answering affidavit, Mr Meyer does not deny the above factual averments. He, however, contends, in the main, that the agreement does not reflect the true agreement of the parties because the parties never agreed to a covenant of restraint of trade, and therefore seeks rectification of the agreement by expungement of the whole of the restraint of trade clause. He says that it was always understood between him and Mr Potgieter that he was to open a hair and beauty salon in Midstream, Centurion, which is within 15 km radius of the second applicant's salon, which intention fell through, for reasons which are not relevant to the present application.

[8] In the alternative, in the event his claim for rectification of the agreement not being upheld, Mr Meyer contends that the restraint of trade clause which the applicants rely on is unenforceable, on three grounds. First, he contends that the second applicant has no proprietary interest worth of protection and the restraint of trade clause should therefore not be enforced against him. Second, he argues that the restrictive condition in the restraint of trade clause is contrary to public policy and is 'out of proportion with any mandatory or persuasive precedent.' Third, he denies that he had encouraged any of the salon's employees to resign or that he had offered them employment. It is convenient to dispose of the last of the points (concerning the employees of the second applicant). Thereafter, I shall consider Mr Meyer's main argument, followed by a discussion on the enforceability of the restraint, as reflected in the specific defences raised in the alternative by Mr Meyer.

Solicitation of the second applicants' employees

[9] In this regard, there is direct evidence that Mr Meyer has actively solicited at least two employees of the second applicant (Mr Van Zyl and Me Viviers) to terminate their employment with the second applicant. Mr Meyer seeks to meet this allegation by broad denials, and by suggesting that the employees were unsatisfied with the management of the salon and maintenance of the premises. That is simply not enough, in the light of the confirmatory affidavits of both employees, in which they confirm that it was Mr Meyer who had solicited them to leave the employment of the second applicant. What is more, it is instructive that those employees tendered their resignations on the same date that Mr Meyer tendered his, and all three mentioned their last day as 26 September 2015. On these considerations, I am satisfied that the applicants are entitled to an interdict on this aspect.

Agreement not a true reflection of the parties' intention

[10] I turn now to Mr Meyer's main argument. According to Mr Meyer, the restraint of trade clause was inserted due to a common error between the parties under the circumstances which he describes as follows:

'Pursuant to the negotiation between the first applicant and I, he gave instructions to his girlfriend, Laurien Kemp, who is an attorney, to have an agreement drawn up. During March

2015, the said Laurien Kemp presented me with the agreement, I simply asked her whether everything is in order with reference to the purchase price of R10 000 and my continued employment on an interim basis. She responded by saying everything was in order and I proceeded to sign the agreement. I am a hairstylist and I am not *au fait* with legal documents and I had no reason to doubt what Laurie Kemp said to me. At no point in time could there have been any misapprehension of the fact that I would work in competition with the second applicant in Centurion. That much is revealed by the applicants own founding affidavit where the first applicant states under oath in paragraph 5.19 that I expressed my intention to him to open a hair and beauty salon in Midstream Estate even before we had signed that sale of members' interest agreement.

[11] Mr Meyer seems to suggest that he signed the agreement without reading it, because he says that he did not 'even know that the restraint of trade clause was in the agreement.' According to him, he would not have signed the agreement, had he known of the clause. I have to consider this, from a factual point of view, and legally. Factually, the suggestion that Mr Meyer did not read the agreement is not borne out by the facts. There are instances which indicate that he read the agreement before signing it. For example, he queried a few clauses relating to the amount of sale, dates of interim employment period and completed by hand, his *domicilium* address.

[12] What is more, and as correctly pointed out on behalf of the applicants, the restraint of trade clause was not hidden. It is clearly incorporated as part of the agreement, and reference to it is made in the definitions of the agreement. Furthermore, it appears that Mr Meyer had the agreement for more than two weeks before signing it, and thus had ample time to read the agreement. It is also telling that nowhere in the letters exchanged between the parties prior to the launch of the urgent application, was this point ever raised. It was raised for the first time in the answering affidavit, thereby giving credence to the suggestion that this was an after-thought defence. For these reasons I do not accept the assertion that there was any common error between the parties regarding the restraint of trade.

[13] In any event, as far as the law is concerned, the general principle here is that a person who signs a contract is taken to be bound by the ordinary meaning and effect of the words which appear over his or her signature.[2] The signer will be held

[2] *Coetzee v Van der Westhuizen* 1958 (3) SA 847 (T) at 851.

bound unless he or she can show, for example, that the other party misled him or her regarding the terms.[3] There is no such suggestion in the present case. For all of the above considerations, I accept that the parties agreed to a restraint of trade clause as part of the agreement.

Enforceability of the restraint

Proprietary interest

[14] It is trite that before an agreement of restraint of trade will be enforced, it must protect some proprietary interest of the person who seeks to enforce it.[4] It is generally accepted that a restraint is against public policy if it does not protect any proprietary interest but seeks merely to exclude competition. In *Super Safes (Pty) Ltd and Others v Voulgarides and Others* 1975 (2) SA 783 (W) at 785E-F the following is stated:

'A bare covenant not to compete cannot be upheld. A restraint against competition must, if it is to be valid, serve some interest of the person in whose favour it was inserted – the purchaser of business, for example, who requires protection against the erosion of its goodwill by the competition of the seller; or the employer who requires that his trade secrets and his trade connections be protected against exploitation by the man whom he is taking into his employment'.

[15] Mr Meyer contends that in the present case, there is no such proprietary interest. He says that the manner in which hairstylists operate is determinative of whether a hair salon has a proprietary interest worthy of protection. To become a hairstylist, he attended various courses and for which he paid himself. He acquired no training or special knowledge during his tenure with the salon. He also did not shape any special relationships with clients during his employ with the second applicant. He emphasizes that there is no specific skill that he has been taught by the salon. He further points out that there are approximately fourteen hair salon within two kilometers form where the applicant salon is situated and hairstylists even refer clients to each other. Mr Meyer further argues that he cannot be restrained from using his own skill, knowledge and experience as a hairstylist.

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[3] LAWSA Vol 5 Part 1, para 432.
[4] *Leyland SA (Pty) v Rex Events (Pty) Ltd* 1980 [4] All SA 598 (T).

[16] For that proposition, he placed reliance on *Automative Tooling v Wilkens.*[5] There, the respondents were specialist artisans and technicians, employed in the appellant's business in specialised technological field relating to the design of special purpose machines and tooling. The facts had established that the know-how acquired by the respondents was no more than specialist skill in manufacturing machines. Those skills did not belong to the appellant, but to the respondents as part of their general stock of skill and knowledge which they could not be prevented from exploiting. Accordingly, it was held that the appellant had no proprietary interest worthy of protection, and therefore, the restraint was inimical to public policy and unenforceable.[6]

[17] That is a far cry from what the applicants are seeking in the present case. They do not say that Mr Meyer's skills belong to the second applicant, and therefore he cannot use them. They say that he, as former owner and hairstylist of the business of the second applicant, he has developed connections with the clients of the second applicants, which puts him in a favourable position to lure them to his new business in competition with the second applicant. Therefore, reliance on *Automative Tooling* is misplaced, and misses the point of what the applicants' case is.

[18] The applicants' contention is simply that the clients and employees of the second applicant form the overwhelming majority of the goodwill of the business. They further emphasise that in the hair a beauty industry, the client basis is directly linked to the individual hairstylists and/or beauticians involved with the specific clients. This, according to Mr Potgieter, led him to insist that a restraint of trade clause be inserted in the agreement, in order to protect the second applicant against direct competition from Mr Meyer, which the latter accepted and bound himself willingly.

[19] In the nature of the hair and beauty business, it seems that client connection is important. In argument, counsel for the applicants referred me to *Xavier Hair Lab v*

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[5] *Automative Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA).
[6] Para 20.

Versace-Peters.[7] This case bears striking similarities to the present one. The facts briefly were that the sellers of a hair salon soon set up another hair salon in competition with the purchaser of their former business, despite a restraint of trade clause in the sale agreement. There, the court observed that it was clear from the wording of the restraint that the object of the restraint was to prevent the respondents, the sellers of the hair salon from engaging in a business, a hair salon, in competition with the business with resultant damage being caused to the goodwill of the applicant's business. The insertion of the restraint clause was to guard against this particular apprehension that the applicant had insofar as the respondents were concerned. In para 25 of the judgment, the court, having concluded that there was apprehension on the part of the purchaser that the sellers would unfairly set up competition, said:

'This apprehension is reasonable given that the respondents have had an opportunity to develop a personal relationship with the clientele, and the ability to influence them, to solicit their custom and divert them away from the applicant's business cannot be ruled out. In *Marion White Ltd v Francis* it was stated that:

> "It is accepted by the plaintiff company that the burden rests on them to establish that this covenant is one which is reasonable in the interests of the parties and reasonable in the public interest, and that it is for the protection of some interest of the plaintiff company's in respect of which the plaintiff company is entitled to protection. It is obvious that in an establishment such as a ladies' hairdresser's establishment the assistants who actually deal with the customers, who dress their hair, wash their hair, and do whatever else they do for the customers, provide a very important part of the personal contact between those engaged in the business and the customers of the business. That constitutes an important element of the goodwill of the business: and that is an interest which the employer is entitled to have protected".

(foot notes omitted)

[20] In *Branco and Another t/a Mr. Cool v Gale* 1996 (1) SA 163 (E) the position is summarised as follows:

'As I see the position, when an employee has access to the customers of a business and is in a position to build up a particular relationship with customers, with the result that when he leaves his employer's service he could easily influence customers to follow him and trade with him at the expense of his erstwhile employer there is no reason why, in principle, a restraint should not be enforced to protect the employer's trade connections.

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[7] *Xavier Hair Lab CC v CC v Versace-Peters and Another* (10/267730) [2010] ZAGPJHC 115 (19 November 2010).

[21] In the *Rawlins* case *supra* at 541D-I Nestadt JA has the following to say regarding the protection of trade connections:

'The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's services he could easily induce the customer to follow him to a new business (Joubert *General principles of the Law of Contract* at 149). Heydon *The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that the "customer contact" doctrine depends on the notion that the employee, by contact with the customer, gets the customer strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket'.

See also *Recycling Industries (Pty) Ltd v Mohammed and Another* 1981 (1) SA 250 (E) at 256C-F); *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (C) at 307G-H and 314C and G).

[22] It seems therefore, on the authorities referred to above, that the argument by Mr Meyer that there is no proprietary interest worthy of protection is devoid of any merit. The nature of the hair and beauty industry, where service is based on a particular stylist or beautician, client connection and the salon's employees do indeed form a substantial part of the goodwill of the business. Mr Meyer's attempt to trivialise the role of individual stylists by saying regular clients can be referred to any stylist, or to any other salon, is not only untenable, but disingenuous. The very fact of him wishing to branch out to set up his own business is a strong indicator that he relied on his 'personal touch' and relationships that he developed earlier, first as a part-owner of the salon of the second applicant, and later as a hairstylist of the business.

[23] I therefore conclude that the applicants have a proprietary interest worthy of protection at law.

Restraint is against public policy?

[24] The approach to be adopted in determining whether an agreement in restraint of trade is enforceable in law was established in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874(A). The effect of the judgment in that case is

summarised as follows in *Sunrise Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) at 794C-E:

'In determining whether a restriction on the freedom to trade or to practice a profession is enforceable, a court should have regards to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations a court will obviously have regard to the circumstances of the case before it. In general, however, it will be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade'.

See, too, *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SE) at 442C-F; *Den Braven SA (Pty) Ltd v Pillay* 2008 6 SA 229 (D) para [26].

[25] In *Basson v Chilwan and Others* 1993 (3) SA 743 (A) at 767E-F) it was held that a covenant in restraint of trade is unreasonable if:

'(D)it die een party verhinder om hom, na beëindiging van hul kontraktuele verhouding, vrylik in die handels-en beroepswêreld te laat geld, sonder dat 'n bestermingwaardige belang van die ander party na behore daardeur gedien word. So iets is op sigself strydig met openbare beleid.'

[26] The court went on to formulate the test for unreasonableness as being a 4-stage enquiry in which the following questions were considered:

(a) Does one party have an interest deserving protection at termination of the employment relationship?
(b) Is such interest being prejudiced by the other?
(c) If so, does the first party's interest weigh against the second party's, such that the second party should be economically inactive?
(d) Are there any other relevant facts of public policy?

[27] In *Reddy v Siemens Telecommunications (Pty) Ltd* Malan AJA weighed the respective interests of ex-employees and ex-employers in the context of the constitutional considerations: At para [17] the learned Judge of Appeal held:

'The four questions identified in *Basson* comprehend the considerations referred to in 36 (1) [of the constitution]. A fifth question, implied by question (c) which may be expressly added, *vis* whether the restraint goes further than necessary to protect the interest, corresponds

with s 36(1)(c) requiring considerations of less restrictive measures to achieve the purpose of the limitation. The value judgment required by *Basson* necessarily requires determining whether the restraint or limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

[28] The *onus* is on Mr Meyer to show, on a preponderance of probabilities, that is would be unreasonable to enforce the covenant in restraint of trade that he had undertaken in favour of the applicants (see *Magna Alloys* (above, at 893C-E); *Basson v Chilwan* (above, at 775I-777B) and that the applicants are not entitled to the protection of their customer connections (compare *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 573 (A) at 544H-I). The time at which reasonableness is to be tested, is when enforcement is sought. In other words the circumstances existing at the time enforcement is sought should be taken into account (*Reddy v Siemens* 2007 (2) SA 486 (SCA) para [16] and *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D) para [46].

[29] In this regard, it was contended on behalf of Mr Meyer that he should be absolved from the restraint because its enforcement would be contrary to public policy and 'a travesty of justice' for the following reasons: that Mr Potgieter acquired his interest in the second applicant 'almost free' (for R10 000); that the applicants have always known of his intention to be employed within 15 km radius of the business of the second applicant; that he was earning a salary of R20 000 per month and has no matric or other means of income; that there are 14 other salons within the immediate vicinity of the second applicant's business and hairstylists refer clients between each other; he would always have left the employ of the second applicant.

[30] In my view, none of the factors mentioned above qualify, either individually or cumulatively, as a basis to conclude that the enforcement of the restraint would be contrary to public policy. Most, if not all, of the factors were known to Mr Meyer when he agreed to the restraint of trade clause in the agreement. The enforcement of any restraint clause of necessity imposes some degree of hardship on the party to whom it applies. However, the mere fact that the restraint imposed hardship does not *per se* mean that it is unreasonable. On the facts of the present case, I find no unreasonableness. I find the period of 24 months to be reasonable. There has not

been any challenge to the territorial scope of the restraint. I have already found that the applicants have made out a case regarding the solicitation of the second applicants' employees.

Conclusion

[31] To sum up. The restraint of trade clause in the agreement concluded between the applicants and Mr Meyer is valid and enforceable. There was no error at all on the part of Meyer as to what he was agreeing to. There is nothing, from a policy point of view, that renders the restraint to be against public policy. The applicants have also satisfied the trite requisites[8] for a final interdict, all of which must be present: a clear right on the part of the applicant; an injury actually committed or reasonably apprehended; and the absence of any other satisfactory remedy. The application should therefore succeed. Costs should follow the event.

[32] In the result I made the order referred to in para 1. For the sake of completeness, I repeat the order here.

1. It is declared that the restraint of trade clause in the agreement concluded between the first and second applicants, on the one hand, and the respondent, on the other, on 12 March 2015, is valid and enforceable;
2. The respondent is accordingly, interdicted from:
   2.1 having an interest in any hair or beauty salon or business within a radius of fifteen kilometres from the second applicant;
   2.2 encouraging any employee to leave the employment of the second applicant;
   2.3 interfering with the employment relationships between the second applicant and any of its employees;
   2.4 in any manner offering employment to, or employment to be offered to, or cause to be employed or assist in the employment of any employee or former employee of the second applicant;
3. The respondent is ordered to pay the costs of the application.

[8] *Setlogelo v Setlogelo* 1914 AD 221

T.M. Makgoka
Judge of the High Court

Date of hearing: 25 February 2016

Order made: 4 March 2016

Date of judgment: 4 March 2016

For the applicants: Adv. J. A. Venter

Instructed by: WWB Botha Attorneys, Pretoria

For the respondent: Adv. P.I. Uys

Instructed by: Charle Rossouw Attorneys, Pretoria