**CASE NO: 7184/2010**

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG**
**REPUBLIC OF SOUTH AFRICA**

In the matter between:

**RALPH HORST KATZWINKEL t/a**
**SUMMERVELD EQUINE HOSPITAL** Applicant

and

**KAREN BEHRENS** First Respondent

**CARLA LANGLEY t/a EQUIS**
**VETERINARY PRACTICE** Second Respondent

**R E A S O N S F O R J U D G M E N T**

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[1] I discharged the rule *nisi* in this matter on the 14th February 2011, with costs, and indicated that my reasons would follow.

[2] The applicant is a veterinarian. His practice is known as the Summerveld Equine Hospital. It is situated in Gillitts. He specialises in the treatment of horses, including race horses. The two respondents are also

veterinarians. Both of them were formerly employed by the applicant. The first respondent is now employed by the second respondent, whose practice is known as Equis Veterinary Practice. It is also situated in Gillitts, some 800 metres from the applicant's practice.

[4] The applicant seeks, *inter alia*, an order restraining the first respondent from being involved in a veterinary practice which carries on business within a distance of 25 kilometres from his practice, and an order restraining the second respondent from employing the first respondent. The duration of the restraint which he seeks to enforce is two years, calculated from 21 December 2009.

[5] The second respondent was employed by the applicant and his former partners at the Summerveld Equine Hospital and the Gillitts Veterinary Hospital during the period 2000 to 2003. Her employment contract, which is annexed to the applicant's founding affidavit, contained a clause headed "Confidentiality and Restraint Provisions", which is in the same terms as the relevant clause in the first respondent's contract, save that the period of her restraint was one year and the area pertaining thereto 15 kilometres from the Gillitts and Summerveld practices.

[6] During April 2008 the applicant advertised locally and internationally for the services of an equine veterinarian assistant. One of the responses was from the first respondent, a German national, who was then living and practising in Sweden. On 17 April 2008 the applicant sent the first respondent an e-mail to which he attached what he called "our veterinary employment contract". He added: "This is the contract provided by our vet association to be used in the employment of vets in SA." A copy of the document is annexed to the founding affidavit, from page 82 to 88. She was not meant to sign it, and it was sent to her as an indication of the contract which she would be expected to sign. It provides for a two year restraint in clause 10. It appears from the papers that the applicant's statement that it was the contract provided by the "vet association" was not true. The contract provided by the "vet association" was put up by the first respondent (page 242) and provides, in clause 13 thereof, for a much more limited restraint, and only for a period of six months.

[7] The applicant says that during June 2008 he sent the first respondent a parcel via international courier in

which he included a contract of employment which he had signed on behalf of Summerveld Equine Hospital. He says the signed contract was vital to enable her to secure a work visa from the South African Embassy in Sweden. He annexed to his founding affidavit what he said was an unsigned copy of the contract which he had dispatched to her. This document appears at page 144 to 150 of the papers. It reflects the first respondent's name on the first page thereof, in clause 14 and also in clause 10, which deals with the restraint provisions.

[8] The applicant explained that when he sent the contract to the first respondent in June 2008 the Summerveld Equine Hospital partnership consisted of himself and Dr Rohwer. By the time when she commenced her employment in August 2008 the partnership had been dissolved and Rohwer had sold his interest to the applicant.

[9] In the founding affidavit the applicant endeavoured to prove that the first respondent had signed the contract of employment, because this had been put in issue in correspondence, and indeed in her answering affidavit. In a supplementary answering affidavit she

attached the signed contract, which she said she had in the meantime obtained. She then accepted that she had signed it. The production of the signed contract makes it clear that the document at page 144 of the papers is not the contract which the applicant had dispatched to her. The signed contract refers to Summerville in clause 10. The document at page 144, which the applicant says he signed and dispatched to the first respondent, reflects her name in clause 10. It seems plain that before the applicant annexed this document to his founding affidavit he changed it by substituting the first respondent's name for that of Summerville. This may not be of any great moment as far as a resolution of the issues is concerned, but it demonstrates how dangerous it is to tweak the facts in an attempt to strengthen one's case.

[10] The first respondent commenced employment with the applicant in August 2008. The applicant says the practice provides equine medical services, such as inoculations, vaccinations and orthopaedic and chiropractic examinations and treatments, as well as hospital services whenever surgical procedures are required. They deal with racehorses as well as non-racehorses (show jumpers, dressage horses, polo horses and those used for recreational riding). He says that the choice of an equine

veterinarian has become a very personal one, similar to that of choosing a family doctor, because of the special requirements of horses and their riders, trainers and owners, who are generally passionate about their horses and the sport.

[11] The practice appears to be a substantial one. The applicant says the practice has relationships with approximately 25 racehorse trainers (representing approximately 1200 horses) and approximately 800 to 1000 non-racing owners/horses. In total the practice regularly treats approximately 2200 horses. The practice employs approximately 35 staff members in different capacities, some in clerical/administrative roles and others in the direct treatment of horses.

[12] The applicant says he employed the first respondent because she held a particularly specialised qualification in equine medicine and he needed her to assist him in the more complicated medical procedures and treatments and to maintain the practice's contact with its various clients, which includes trainers and horse owners. He introduced the first respondent to all of the practice's clients and the two of them would travel, on a daily basis,

between the main four racing centres in the province, each performing the more complicated medical procedures and treatment and maintaining the practice's relationships with the various horse trainers and owners who were clients of the practice. He says the first respondent is a first class equine veterinarian and was very popular within the racing fraternity and developed a close relationship with the various trainers and owners she came into contact with.

[13] On the 1st October 2009 the first respondent notified the applicant that she had decided to resign and that she intended to go back to Europe and do some further courses there. Her resignation took effect on the 20th December 2009 and she returned to Sweden.

[14] The first respondent returned to South Africa in July 2010 and took up employment with the second respondent on the 1st August 2010.

[15] The applicant complains that the first respondent has been soliciting work on behalf of the second respondent from trainers with whom she had been associated during the course of her employment with him, and that she has attempted to poach clients from his practice so as to grow

the second respondent's practice and expand it to the treatment of racehorses, in addition to non-racing horses. He also complains that she has made use of his confidential information and trade secrets.

[16] The order which the applicant seeks is, in summary, the following:

(a) An order interdicting the first respondent from using or divulging or disclosing to others any of the applicant's trade secrets.

b) An order interdicting the first respondent for a period of two years from the 21st December 2009 from:

(i) being interested in or engaged in any veterinary practice which carries on business within 25 kilometres from the applicant's practice;

(ii) soliciting or obtaining business from any person who was a client of the applicant during the term of her employment;

(iii) employing or offering to employ any person who was employed by the applicant during the currency of the first respondent's employment with the applicant;

iv) inducing or attempting to induce any person employed by the applicant during the currency of the first respondent's employment with him to leave the applicant's service;

v) causing or assisting any other person to employ or offer to employ any person employed by the applicant during the currency of the first respondent's employment with him;

vi) causing or assisting any other person to induce or attempt to induce any person employed by the applicant during the currency of the first respondent's employment with him, to leave his services.

c) Interdicting the second respondent from using or divulging or disclosing to others any of the applicant's trade secrets that may have been revealed to her by the first respondent.

d) Interdicting the second respondent for a period of two years commencing on 21 December 2009 from engaging or employing the first respondent in any veterinary practice which carries on business within 25 kilometres from the applicant's practice.

[16] The first respondent confirms in her answering affidavit that she is employed by the second respondent, but says she has no shares or other financial interest in her business. She denies that there was a written contract of employment between her and the applicant. She says the applicant asked her for a copy of the signed contract but she was not prepared to give him one because she had grave reservations about the restraint of trade clause. She annexes to her answering affidavit a copy of the contract which the applicant had sent to her by courier, and which she had signed and used to obtain a work visa.

[17] I do not accept that the first respondent was not bound by the terms of this contract. She signed it without objection and notified the applicant that she had done so. It was on this basis that he employed her. At worst for the applicant the first respondent is estopped from denying that she was bound by the agreement. With regard to clause 10 of the contract and the reference therein to Summerville instead of the first respondent, it seems plain to me that the first respondent must have realised that the clause was intended to refer to her and mistakenly reflected the name of a former employee. The agreement is in my view subject to rectification by the substitution of the first respondent's name in clause 10 for that of Summerville.

[18] The first respondent says the second respondent's practice is not that of an equine hospital. It is a veterinary consultancy, which is very different from the applicant's equine hospital. She concedes that during the course of her employment with the applicant she became familiar with the names of clients, but says she had no specific access to client lists or their specific requirements. She denies that there were any trade secrets or confidential information. She says the names of

racehorse trainers, show jumping trainers, race horse owners and the like are readily ascertainable through the Gold Circle, the Turf Directory and the KwaZulu-Natal Horse Society. She says she was a trained and experienced veterinarian long before she took up employment with the applicant. She says she learned little or nothing from her employment with the applicant and if anything, the applicant benefitted from her expertise which she gained from years of working overseas within the racehorse and show jumping industry. She says she has no intention of soliciting clients or business away from the applicant or of inducing employees of the applicant to work for the second respondent. She says the second respondent does not conduct a racing practice and does not service the needs of the racing fraternity. She points to the fact that the applicant did not show that one of his clients had left him in order to support the second respondent's practice.

[19] In a supplementary answering affidavit the first respondent referred to the National Horseracing Authority website, which lists the name of every racehorse registered with that body. Also available on this website are the names of trainers, stud farms, racehorses and owners affiliated with the various racing clubs.

[20] The first respondent says that during the short period that she was employed with the applicant she had little or no opportunity of building bonds with customers such that they would readily remove their business from the applicant to the second respondent or to her.

[21] The applicant's description of his trade secrets or confidential information is limited and vague. In his heads of argument applicant's counsel referred to the applicant's trade secrets *"as defined in the relevant restraint clause"*. The relevant clause is number 10.1.2 and refers to *"the trade secrets and confidential information of the practice including, inter alia, the names of the practice's clients and prospective clients and their requirements"*. In the founding affidavit the applicant refers in this context to the close relationships which the first respondent built with the various trainers and owners, the practice's *"personal attitude and approach to equine medicine"* and the contact and feel which she developed for the horses, their various temperaments and natures and consequently their needs.

[22] These are not trade secrets or confidential information. In *Petre & Madco Ltd v Sanderson-Kasner &*

*Others* 1984 (3) SA 850 WLD, Conradie AJ (as he then was) said at 858 F to H:

> *"It seems to me highly unlikely that the applicant had any proprietary interest to protect by a restraint. There is a good deal of talk in the papers about unique product demonstrations, special sales methods, confidential information and that sort of thing but nothing to show why or how these are secret or confidential. It is trite law that one cannot make something secret by calling it secret. Facts must be proved from which it may be inferred that the matters alleged to be secret are indeed secret. In the nature of things it seems to me that it is unlikely that the applicant will operate in a way that is markedly different from the way in which its numerous competitors operate. There is nothing to show what is so unique about the product demonstrations or what is so special about the sales methods. Nor is there anything to show why the information said to be confidential can properly be regarded as confidential."*

[23] In *Dickinson Holdings (Group) (Pty) Ltd v Du Plessis* 2008 (4) SA 214 NPD (a Full Bench decision) the Court referred with approval to a statement by Kroon J in *Aranda Textile Mills (Pty) Ltd v Hurn & Another* [2000] 4 AllSA 183 E at 33:

> *"A man's skills and abilities are a part of*

*himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-how or skills. Such know-how and skills in the public domain become attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subject to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the marketplace, is unreasonable and contrary to*

*public policy."*

[24] It seems to me that the applicant's real complaint relates to what is commonly known as his trade or customer connection. He endeavours to make the case that in the course of her employment with him the first respondent developed such a close relationship with his clients and their horses that when she left she could easily induce the clients to follow her to a new practice. See *Rawlins & Another v CaravanTruck (Pty) Ltd* 1993 (1) SA 537 AD where Nestadt JA said the following at 541 D and further:

> *"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 service he could easily induce the customers 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 so strongly attached to him that when the employee quits and joins a rival he*

*automatically carries the customer with him in his pocket'. In Morris (Herbert) Ltd v Saxelby [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires 'such personal knowledge of and influence over the customers of his employer … as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection …'. This statement has been applied in our Courts (for example, by Eksteen J in Recycling Industries (Pty) Ltd v Mohammed & Another 1981 (3) SA 250 E at 256 C to F). Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left."*

He pointed out at 541 J to 542 A that where there are disputes on the papers the rule is to the broad effect that

an application for final relief is generally decided on the respondent's version, even where the onus of proof is on such respondent.

[25] Having regard to the first respondent's evidence with regard to the alleged customer connection, the fact that after she left the applicant's employment she went overseas for several months and the absence of any evidence that he has lost one client I am unpersuaded that he has a protectable interest which justifies the enforcement of the restraint.

[26] The period of the restraint in any event seems to me to be too long. The first respondent left the applicant's employment on the 21st December 2009 and returned to Europe. She returned the following year and commenced employment with the second respondent in June 2010. The application for the enforcement of the restraint was launched on 9 September 2010 and on 20 September 2010 Lopes J granted a consent order which regulated the interim position, which included an order that pending the return date the respondents were interdicted and restrained from providing any veterinary services of whatsoever nature to any of the racehorses referred to in an agreed list. The

only exception was that the respondents were not precluded from rendering reproductive veterinary services to racehorses. By the time the matter was argued before me on 14 February 2011 a period of nearly fourteen months had lapsed since the first respondent ceased to be employed by the applicant.

[27] The period of the restraint in the second respondent's employment contract with the applicant was one year. The period of the restraint in the draft agreement recommended by the Veterinary Association is six months.

[28] In *Den Braven SA (Pty) Ltd v Pillay & Another* 2008 (6) SA 229 D&CLD the Court said at 263 D that two years is the outer limit in a case of the type it was dealing with, which concerned a sales person. At 263 D Wallis AJ (as he then was) said:

> *"In my view the period of the restraint should not be any longer than is necessary to enable the applicant to place a new sales person in the field, enable them to become acquainted with the products and the customers and to make it plain to the latter that they are now the person with whom to deal on behalf of the applicant."*

[29] Mr Stewart, for the applicant, referred me to the decision in *Rogaly v Weingartz* 1954 (3) SA 791 D in which a medical practitioner was restrained from practicing in a certain part of Durban for a period of two years. Holmes J found that the period of two years was reasonable. One should however see this in its proper context, which was that the restraint nevertheless left the respondent free to practice in all the other suburbs of Durban and to have his surgery in town. Mr Stewart also referred me to the case of *Savage & Pugh v Knox* 1955 (3) SA 149 NPD where a Full Bench upheld a restraint clause which prohibited the respondent from practicing as a medical specialist within a radius of sixty miles from the City Hall in Durban for a period of three years. Brokensha J said that it had not been contended before them that the restraint was against public interest. Most of the debate seemed to centre on what the agreement meant. Nevertheless, Brokensha J expressed the view in the judgment that the period of three years seemed to him to be reasonable.

[30] It seems to me that our law relating to restraints of trade has evolved somewhat over the last two or three decades, and the Courts have focused on the tension between the sanctity of contracts, public policy and the need not to prevent people unreasonably from earning a living, and the values embodied in our Constitution, which shape our public policy.

[31] I am not persuaded by the *Rogaly* and *Savage* cases (*supra*) that the period of two years in the restraint clause before me is reasonable and should be enforced. A period which was reasonable five decades ago is not

necessarily reasonable today. My view is that the period is excessive and that the restraint has operated long enough. It now imposes an unreasonable restriction on the first respondent's freedom to work and it will be against public policy to enforce it.

[32] In the result I discharged the rule *nisi* with costs, including those which had been reserved.

9 March 2011

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| **DATE OF HEARING :** | 14 FEBRUARY 2011 |
| **DATE OF JUDGMENT :** | 14 FEBRUARY 2011 |
| **COUNSEL FOR APPLICANT :** | MR M. E. STEWART |
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