Reportable

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case no: C 390/2020

In the matter between:

TRENDY GREENIES (PTY) LTD
T/A SORBET GEORGE **First Applicant**

and

HESTELLE DE BRUYN **First Respondent**

Identity number: 94[….]

MICHELLE ANTHONY **Second Respondent**

Identity number: 840[….]

YOU'RE WORTHY **Third Respondent**

Date of Hearing: 15 October 2020

Date of Judgment:

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 21 October 2020

Summary: (Urgent - Restraint of Trade - existence and breach established - area of restraint - meaning of 'radius' in suburban environment considered - respondents failing to advance evidence that restraint unenforceable because contrary to public policy - relief granted)

JUDGMENT

LAGRANGE J

Introduction

[1] This is essentially application to enforce a restraint of trade agreement, and in particular, to restrain the first and second respondents, Ms De Bruyn ('De Bruyn') and Ms M Anthony ('Anthony') from working at the premises of the third respondent, You're Worthy ('Worthy'), situated at shop 10, Witfontein Road, Heather Park, George. It appears that 'You're Worthy' is the trade name of Ms K Botha.

[2] The application is opposed by all the respondents, even though only Anthony and De Bruyn filed answering affidavits.

[3] At the hearing it was argued that Worthy, was improperly joined as a party, but this point was ultimately withdrawn, after it was conceded that it had a legal interest in whether Anthony and De Bruyn were in breach of their restraints agreements by taking up employment with it.

Factual overview

[4] De Bruyn and Anthony were employed by the applicant, Trendy Greenies ('Trendy') a Sorbet franchisee, on 28 June and 1 September 2018 respectively.

[5] It is common cause that both of them received training in the application of a number of Environ and other proprietary cosmetic products in the course of their employment with Trendy. The respondents do not dispute that the training was extensive and trendy incurred great costs in providing it, which it was required to provide in terms of its franchise agreement with Sorbet. It is not disputed that the training provided is a factor setting Sorbet franchises apart from their competitors. As a result of the training, the individual respondents were graded as level I therapists.

[6] On being employed, both individual respondents signed contracts of employment which, *inter alia,* included identical restraint of trade agreements. Without repeating *verbatim* the content of those provisions, the restraints are applicable within a defined area for a period of one year commencing on the date of termination of employment and:

6.1 bars them from soliciting former clients, canvassing business or engaging in competitive activity which is the same or similar to that of trendy, and
6.2 prohibits them from taking employment with anyone else engaged in similar competitive activities.

[7] The only issue of contention in the interpretation of the restraint agreement concerns the definition of the geographic scope of the restraint. Clause 11.1
[f] defines the prescribed area thus:

"Prescribed Area" - means any area which falls within a 10 (ten) kilometre radius

measured from any location at which you rendered services at during the prescribed period.

[8] De Bruyn tendered her resignation on 29 August 2020, which took effect on 20 September 2020, but trendy released her from completing her notice period after 31 August 2020. Anthony handed in her resignation on 25 August, to take effect on 25 September 2020. De Bruyn claims she only started working for worthy on 5 October 2020. Anthony does not dispute that she was working for worthy by the end of September.

[9] A letter of demand was sent to both individuals on 3 September 2020 by which stage Trendy had got wind of their employment by Worthy warning them they were in breach of the restraint by taking up employment with Worthy and warning them that Trendy would seek an interdict if they persisted in the course of action they had taken.

[10] The following day the third respondent replied stating that neither of the individual respondents had yet "signed an actual contract", with the third respondent , but confirmed that Anthony would be working at the third respondent's new store with effect from the beginning of October 2 020. The individual respondents also replied 'without prejudice' complaining about the alleged unfair and unreasonable conditions of the restraint, but indicating their intention to oppose any effort to enforce it. In response, the applicant made a further appeal to the respondent to abide by the restraint. The applicant followed up on this on 10 and 15 September with the respondents' attorneys, not having received any reply from them, but these communications also elicited no response.

[11] The application was launched about a fortnight later on 3 October 2020 setting the matter down on the urgent roll for 15 October and requiring the respondent to file an answering affidavit by 9 October 2020. All three respondents

opposed the application but only the individual respondents filed answering affidavits.

Urgency

[12] In light of the sequence of events above, I am satisfied that the applicant allowed a reasonable time of approximately a fortnight for the individual respondents to reconsider their alleged breach of the restraint and acted reasonably quickly thereafter in launching these proceedings. The respondents also were given adequate time to file their answering affidavits.

[13] It is in the nature of a restraint application that a claim for damages in due course is not usually suitable substitute relief for enforcement of the primary obligation imposed on the former employee, which is not to enter into competition with the employer within the scope of the restraint.

[14] In the circumstances I am satisfied that the applicant has established that the application is urgent.

Merits

[15] In determining if Anthony and De Bruyn were in breach of their respective restraints, the only material factual dispute is whether the premises of the third respondent where they are employed falls within the geographical scope of the restraint.

[16] The third respondent's premises at shop 10, Cornerstone Centre, Witfontein Road , Heather Park, George is, 9,91 kilometres from the applicant's premises at shop 9, Eden Meander Lifestyle Centre, George, as the crow flies. The applicant supported its contention by attaching a Google maps distance measurement showing the distance measured on a straight line between the two premises. The respondents disputed this distance, stating baldly that the distance is 13.1

kilometres, but without providing any supporting evidence of the basis for this calculation. Their counsel, *Mr Van Zyl,* advised that this was based on the distance travelled by road, but this was not stated in the answering affidavit and no indication was provided with reference to a map which route between the two establishments was used to derive the measure.

[17] In support of his contention that the distance by road between the two establishments is the measure that should be applied when determining whether Worthy's business at Cornerstone Centre fell within the 10 kilometre 'radius' of Trendy's establishment, he referred the court to the case of *Roffey v Catterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N), which he contended supported this interpretation. In that judgment, the court was concerned with a restraint of trade applicable to an estate agent, where the geographical extent of the restraint was a seven mile radius from the last office of his former employer where he had worked. I could find nothing in that judgment in support of a road based calculation of the term 'radius '.

[18] However, given *Mr Van Zyl's* summation of the facts of the case that he intended to refer to, it seems he meant the case of *Malan en Andere v Van Jaarsveld en 'n Ander* 1972 (2) SA 243 (C). In that matter, a doctor was subject to a restraint preventing him from practicing within an area 50 miles from his former partnership practice with other doctors in Riversdale . In that case, the physical measurement of the geographical scope of the restraint agreement was described as *'binne 'n area van vyftig my/ vanaf Riversdale'* .[1] The court considered the respondent's contention that the geographical scope of the restraint was vague, thus:

'Respondent beweer dat hierdie omskrywing dubbelsinnig is, want Riversdal kan of die dorp of die distrik beteken, en dat selfs as bepaal kan word welke van die twee bedoel was, die omskrywing nog vaag bly, want geen punt word aangewys

[1] Viz: 'within an area of 50 miles from Riversdale ', at 2438 .

waarvandaan daar gemeet moet word om die vyftig myl te bepaal en daar ook nie gese word nie, of daardie vyftig myl per pad, per lug of op 'n kaart gemeet moet word. Hierdie bepalings was by die sluiting van die ooreenkoms van wesenlike belang want dit is hulle wat aan die inkortingsbeding inhoud gee. As die gebied en die tyd nie bepaal kan word nie, het die inkortingsbeding geen betekenis nie.
In omstandighede waar 'n bepaling dubbelsinnig of meersinnig is, moet ldie Hof deur toepassing van die erkende beginsels van uitleg sien of daar bepaal kan word wat die partye in werklikheid bedoel het.'

[19] The court considered the case of *Holland v Commissioner of Crown Lands and Public Works,* 1877 Buch 105 in which a carrier had undertaken to transport wool as 2s 6d per ton to a washing plant for premises a mile or less from a station, and at a higher tariff if the distance was greater. In that case, the court had to determine if the distance of a mile should be measured in a straight line or by the distance travelled by road. Unsurprisingly, the court found in that matter that the actual distance travelled by the carrier was obviously the correct measure because that was the distance the carrier would actually have to convey the wool. The court in Ma/an's case applied the same 'direct and practical approach' and reasoned that it was the actual distance that the doctor or patient had to travel which was important.[2]

[20] Do any these authorities necessarily mean that in this instance the term radius should not be given its ordinary meaning? The meaning of a radius when applied to an area means: "a circular area of which the extent is measured by the length of the radius of the circle which bounds it".[3]Clearly, any distance by road between the two premises in this case, will be further than 9.91 kilometres, except in the unlikely event of a road actually following a direct line between the two locations. However, there is no evidence that the shortest route between the two stores is necessarily more than 10 kilometres. It is evident from the map attached to the

[2] Viz, at 252C: 'Dieselfde direkte en praktiese benadering moet in hierdie geval ook toegepas word. Dit is die werklike distansie wat die dokter en sy pasiente moet reis wat van belang is.
[3] Shorter OED, 6ed, 2007

founding affidavit that both stores are contained within the same urban area, with a network of roads between them. Clients might approach either establishment on this network of roads from a number of different directions and suburbs. In *Ma/an's* case, the court determined that the centre of the area of 50 miles describing the geographical scope of the restraint necessarily referred to the town of Riversdale and not the district. The court was therefore concerned with determining the boundaries of the restraint area beyond the town limits, which itself was not a single geographical point. Moreover, this was in the context of determining how far a rural medical practice could extend its patient catchment area, which would be reached along a limited number of public roads. It was not dealing with patients and doctors located within a single agglomeration of suburbs.

[21] Apart from the fact that the term 'radius' as a way of measuring distance was not expressly used in *Malan 's* case, the practicality of using road distance as a way of delineating the boundaries of a rural medical practice is obvious. However, is not obviously the most practical and direct approach in the context of a much smaller area with interlocking suburban road networks. Logically it is quite possible that a competitor which establishes itself within a geographical radius seven kilometres of the applicant, could still be more than ten kilometres distant from the applicant's establishment, measured by the shortest path by road between the two establishments. The advantage of using the ordinary meaning of an area determined by a radius from a point is that it results in a much clearer boundary than an irregular boundary determined by all those points in a network of urban roads which are ten kilometres distant from a particular establishment.

[22] In the circumstances, I am satisfied that the ordinary meaning of an area defined by a radius from a fixed point is the most practical interpretation of the way in which the geographical scope of this restraint should be measured, and that is what the parties intended when using the term 'radius' as a method of measurement.

[23] It was also argued by the respondents that the geographical extent of the scope of the restraint is inherently vague because it refers to "any location at which you rendered services during the prescribed period." It was argued that because part of their duties required them to attend training sessions, those were part of the "services" that they rendered and some of that training was conducted at training facilities in different locations. Accordingly, the locations where they performed services was variable, which in turn rendered the issue of which location should be taken into account in measuring the radius of the restraint area a matter of uncertainty. I believe that this argument entails a strained interpretation of "services". In the context of what the applicant seeks to protect, it clearly refers to services rendered to clients of the applicant. It is true that their contracts do provide for the possibility of them working at other establishments or locations for the applicant, but in this instance there is no evidence that they worked at any other establishment than the one at Eden Meander Lifestyle Centre.

[24] For the reasons discussed above, I am satisfied that the area of the restraint is the area defined by a 10 kilometre radius from the applicant's premises and that the third respondent establishment falls within the ambit of that area.

[25] In the circumstances, it is clear that Anthony and De Bruyn are engaged in competitive activity with the applicant by taking up employment with the third respondent, which is in breach of the restraint agreements.

[26] The next question to determine is whether the respondent have established that the restraint agreements nonetheless should not be enforced.

[27] In this regard, at various points in the answering affidavits they submit that the restraints are unreasonable and *conta bonos mores* but do not set out an evidentiary basis for these arguments. Thus, they do not provide reasons why the area or duration of the restraints goes beyond what is necessary for Trendy to protect its proprietary interest and its customer connections. Consequently, counsel's

submissions to this effect lacked the necessary factual substratum for making them. I accept that the remuneration they are receiving from the third respondent might be more generous than what they received from the applicant, but that does not make the restraint unreasonable . If it were a consideration, it would also have to be weighed against the fact that they were trained by the applicant and the third respondent has not borne those costs. In any event, no concrete evidence was advanced why the duration or geographic scope of the restraint should be curtailed. Without an evidentiary basis being laid for limiting the ambit of the restraints, it is not for the court *mero motu* to embark on such an exercise based solely on its own assessment of the appropriate balance to be struck between the applicant's right to enforce a restraint of trade when weighed against the individual respondents' freedom to choose their occupation.

Conclusion

[28] In light of the above, unsatisfied that Anthony and De Bruyn are bound to comply with their restraint of trade agreements with Trendy, and that they have not established that the restraints are unreasonable or *contra bonos mores,* or should be curtailed.

[29] The respondents had ample opportunity to reconsider and rectify the breach of contract entailed, and there is no reason why costs should not follow the result in this instance. In any event, the Labour Appeal Court has made it clear that s 162 of the Labour Relations Act, 66 of 1995, is not applicable to cost awards in contractual disputes and the ordinary principles of costs apply in such cases.[4]

Order

[1] The Applicant's noncompliance with the Rules of the Labour Court pertaining

[4] *Baise v Mianzo Asset Management (Pty) Ltd* (2019) 40 *ILJ* 1987 (LAC) at 1999, para [48].

to form, process and service are condoned and the application is heard as an urgent application in terms of rule 8 of the Labour Court Rules.

[2] The First and Second Respondents are in breach of their respective restraint agreements concluded with the applicant on 28 June and 1 September 2018 respectively.

[3] The First And Second Respondents are interdicted and restrained from directly or indirectly, in any capacity whatsoever, working for the Third Respondent, or any competitor of the Applicant, or engage in any competitive activities, as defined in the restraint agreements, within a radius of 10 kilometres of the applicant's premises at shop 9, Eden meander lifestyle centre, George, Western Cape for a period of 12 months effective as of 29 August 2020 in the case of the First Respondent and as of 25 August 2020 in the case of the Second Respondent.

[4] The First, Second and Third Respondents are jointly and severally liable for the applicant's costs of the application, including the costs of counsel.

Lagrange J
Judge of the Labour Court of South Africa

Representatives -

For the Applicant: R Nyman instructed by Spencer Pitman Inc.

For the Respondents: L Van Zyl instructed by Ronel De Villiers Attorneys