DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

10 February 2023 Masutha
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case Number: J 67/2023

In the matter between:

GRANT MONAGHAN AND ASSOCIATES **Applicant**

and

YOVANKA TORRENTE **First Respondent**

YOVANKA TOORENTE AND ASSOCIATES (PTY) LTD **Second Respondent**

Heard: **02 February 2023**
Delivered: **10 February 2023**

J U D G M E N T

MATYOLO, AJ

Introduction

[1] This is an urgent application in which the applicant seeks an order interdicting

and restraining the first and second respondents from engaging either directly or indirectly and at any place within the greater Gauteng, for a period of two years (20 January 2023 to 19 January 2025) whether for her own account or as a principal, employee, agent, partner, representative, shareholder, consultant, advisor or in any similar manner or to have an interest in or be concerned in any business which is directly or indirectly in competition with the business of the applicant or its supplies and other ancillary relief.

[2] But for the denial of the existence of protectable interest, the facts in this matter are largely common cause as a result I need only set out a short synopsis of the overall picture.

Material facts

[3] The case of the applicant is that the first respondent approached the applicant during 2017 and asked it to employ her as a student intern to teach and train her to be a proficient practitioner and that the applicant employed her after she qualified as an Orthotist and Prosthetist.

[4] The applicant used its time and effort and poured resources into the first respondent's development supporting her and building her into a highly accomplished practitioner including funding the cranial qualification of the first respondent.

[5] The first respondent was exposed to source / referrals and business relationships to enable her to grow and gain experience. The first respondent was employed with effect from 2 January 2018. The contract of employment provided *inter alia* for the restrictions that the applicant seeks to enforce in this application.

[6] During the training the first respondent was exposed to the applicant's business relationships and the applicant would likewise build relationships with practitioners and patients as well as attend to consultations with patients, driving new business and overseeing employees and manufacturing

equipment.

[7] The first respondent has been exposed to the applicant's patient database, trade secrets, business know-how and confidential information since the beginning of her employment in 2018.

[8] The first respondent will conduct business in direct competition with the applicant and the services and products that the first and second respondents will provide will be in direct breach of the of the restraint of trade and confidentiality agreement

[9] Following her resignation but whilst still in the employment of the applicant, the first respondent has *inter alia*:

9.1.1 Received a WhatsApp message enquiring about the date upon which the first respondent would be opening her new practice in Bedfordview.

9.1.2 The first respondent submitted a prescribed minimum benefit application, under her practice number, to discovery for a Mr De Bruyn, a patient of the applicant.

9.1.3 The first respondent provided her personal number, instead of the applicant's number, to a patient

9.1.4 The first respondent approached referring doctors informing them that that she will have new rooms in January 2023

9.1.5 The first respondent provided her own practice number to Discovery, a medical aid service provider, in relation to a claim concerning Mr Reid, a patient of the applicant

9.1.6 The first respondent, submitted claims under her new practice number.

[10] The applicant further submits that the confidentiality and the restraint of trade agreed to between the applicant and the first respondent are presently of full force and effect and are reasonably necessary for the protection of the applicant's legitimate interests in the form of confidential information, trade secrets and trade connections.

[11] Lastly, the applicant submits that the information regarding its patients, referring doctors, suppliers, costing and fee structure as well as the techniques through which it crafts and identifies solutions are of a nature deserving protection through the restraint of trade.

[12] As indicated earlier, the application is opposed by the respondents. In opposition, the respondents have submitted *inter alia* the following:

12.1 There is no valid and enforceable restraint of trade agreement and even if this Court finds that there is a valid restraint of trade, there is no protectable interest.

12.2 If this Court finds that there is a protectable interest, the conduct of the respondents will not infringe on such interest and there is therefore no basis for the interdictory relief.

[13] The respondents do not dispute that an email was sent by a patient of the applicant asking when the respondents were going to open the new practice in Bedfordview. Whilst the first respondent submits that she did nothing to entice the patient, it is not clear how the patient would have known that the first respondent was opening a new practice in Bedfordview other than being told by the first respondent. More about this later.

[14] The first respondent also does not deny that, whilst still employed by the applicant, she submitted a prescribed minimum benefits application using the practice number of the second respondent. In her explanation the first respondent submits that this was because she is the one who administered the treatment, and the patient would have required treatment even after the respondent left the applicant's practice. The first respondent also admitted giving her personal number to a patient to allow the patient to contact her directly.

[15] The first respondent also admitted informing Drs Pearce and Halkas of her departure and of the opening of her own practice. The first respondent explained that she had long standing relationships with these doctors, and

she wanted them to know where they could contact her if they needed her services. The first respondent also did not deny that she provided her new practice number instead of that of the applicant when requesting a follow-up on a claim for Mr Reid.

[16] The first respondent admitted doing training for Drs Chin and Partners and does not deny advising the doctors to make payment directly into her bank account. The first respondent also admitted approaching an employee of the applicant to assist her with the manufacturing of devices for her practice.

[17] The first respondent also admitted advising a patient during September and October 2022 that she would attend to the patient in Bedfordview, her practice rooms. The first respondent explained that this was only to advise the patient that if she wanted to be treated by her, she would have to go to Bedfordview.

Principles relating to restraints of trade agreements

[18] As a point of departure, restraints of trade agreementa are valid, binding, and enforceable. It is the jurisprudence of this Court that an employer seeking to enforce a restraint of trade agreement must prove that there exists an obligation, a restraint, that applies to the employee. If the restraint is shown to exist, the employer must prove that the employee acted in breach of the restraint obligation imposed by the restraint agreement. Finally, the enforcement of the restraint must be shown to reasonable[1].

[19] In *Reddy v Siemens Telecommunications (Pty) Ltd*[2] the Supreme Court of Appeal held *inter alia* that:

> 'If the fact disclosed in the affidavits, assessed in the manner that I have described, disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgement, rather than a determination of what facts have been proved...'

[1] *AJ Charnaud and Co (Pty) Ltd v van der Merwe and Others* (2020) 41 ILJ 1661 (LC).
[2] (2007) 28 ILJ 317 (SCA) at para 14

[20] In *Basson v Chilwan and Others*[3] it was stated that, in assessing whether a restraint would be reasonable or not, regard must be had to, (i) whether the party seeking to enforce the restraint has an interest that deserves protection, (ii) if so, whether the interest is threatened (breached) by the other party, (iii) whether that interest weigh qualitatively and quantitatively against the interest of the other party (iv) whether there is an aspect of public policy in the relationship between the parties, (v) whether the restraint goes beyond what is necessary to protect the interest.

[21] This Court and indeed the Labour Appeal Court has maintained that the determination of reasonableness essentially entails undertaking a balancing of interests taking into consideration, the nature, extent, and duration of the restraint of trade and the factors peculiar to the parties and their respective bargaining powers.

[22] In *Labournet (Pty) Ltd v Jankielsohn and Another*[4] the Labour Appeal Court held *inter alia* that:

> 'A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The list of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests.

The matter before this Court

[23] The applicant was not able to convince this Court about the existence of any trade secrets that need to be protected. Instead, the evidence indicated that the first respondent developed skills and may have learnt practice management skills in the course of her employment and in the ordinary provision of the professional services to the patients of the applicant. I find that the applicant failed to prove the existence of trade secrets.

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[3] 1993 (3) SA 742 (A) at 767 G-H
[4] (2017) 38 ILJ 1302 (LAC) at para 41.

[24] On the other hand, the facts showed that the first respondent contacted several people during the period of her employment by the applicant, it also appears that the first respondent spoke to an employee of the applicant with a view to have the employee join her, passed information regarding the banking details and the practice number of her new practice as well and gave the address of her new practice to fellow professionals and some patients.

[25] In this regard, I am of the view that the applicant succeeded in establishing a protectable interest in relation to attempted inducement of customers and employees.

[26] Having said that, the restraint which is the subject of this matter seeks to restrain the first respondent from operating within the greater Gauteng area. In the circumstances, the only way for the first respondent to practice her craft would be to uproot herself and leave her home to an area outside greater Gauteng. This, in my view, is unreasonably wide.

[27] The first respondent's new practice is based in Bedfordview, some 27 kilometres from the applicant's business. This is, in my view, a reasonable distance away from the applicant's business and constitutes a more reasonable geographical restriction than what the applicant sought to enforce.

[28] In relation to the period of the restraint, I am of the view that a period of one year from the date of this order (10 February 2023) is reasonable when regard is had to the nature of the practice.

[29] Accordingly, the following order is made:

<u>Order</u>

1. The application is heard as one of urgency.
2. For a period of a year from 10 February 2023 to 9 February 2024, the first and second respondents are interdicted and restrained from conducting business closer than the radius of 27 km from the

applicant's business premises and from employing any employees of the applicant.

3. The first and second respondent are interdicted and restrained from directly or indirectly inducing; soliciting and enticing away any employees, agents or any persons that are customers or suppliers of the applicant.

4. There is no order as to costs.

Ratyolo AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant	:	Mr Charlie Higgs
Instructed by	:	Higgs Attorneys
For the Respondents	:	Adv Rushil Bhima
Instructed by	:	Pagel Schulenburg Incorporated Attorneys