IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE No: J 67/2023

In the matter between:

YOVANKA TORRENTE **First Applicant**

YOVANKA TORRENTE AND ASSOCIATES INCORPORATED **Second Applicant**

and

GRANT MONOGHAN AND ASSOCIATES INCORPORATED **Respondent**

Decided: **In Chambers**

Delivered: **25 April 2023**

JUDGMENT-LEAVE TO APPEAL

MATYOLO AJ

Introduction

[1] The applicant seeks leave to appeal against parts of the judgement and order of this Court which was handed down on 10 February 2023. The part of the judgement the Applicants seeks leave to appeal against is the part where this Court ordered that:

'1.1 For a period of a year from 10 February 2023 to 9 February 2024, the first and second applicants are interdicted and restrained from conducting business closer than the radius of 27 km from the respondent's business premises and from employing any employees of the respondent; and

1.2 The first and second respondent are interdicted and restrained from directly or indirectly soliciting and enticing away agents, customers, or suppliers of the respondent.'

[2] The grounds for leave to appeal are set out below briefly.

Grounds for leave to appeal

[3] The application for leave to appeal is premised on the grounds that this Court erred in finding that the respondent had a proprietary interest that was deserving of protection. The applicant avers that the regulations to the Health Professions Act[1], confirmed that doctors and patients cannot be regarded as "trade connections", while the suppliers of products actively market their products to the world and as such, could not have any protectable interests in these individuals and as correctly found by the Court, the respondent does not have any confidential information or trade secrets.

[4] Secondly, the respondent did not have any protectable interest, and as such, the restraint was unreasonable. In this regard, so goes the submission, the Court should have declined to enforce the restraint of trade and dismissed the application.

[5] The applicant submits that, in enforcing the restraint of trade (albeit to a limited extent), the Court failed to follow the *ratio decidendi* in *Reddy v Siemens Telecommunications (Pty) Ltd.*[2]

[6] Thirdly, the applicant argues that this Court erred in finding, as a fact, that the respondent provided teaching or training to the first applicant; poured any resources into the first applicant's development; exposed the first applicant to

[1] Act 56 of 1974.
[2] (2007) 28 ILJ 317 (SCA).

the respondent's business relationships or allowed her to source referrals; and exposed the first applicant to its trade secrets, business know-how and confidential information. The applicant submits that in actual fact; the respondent did not provide real training to the first applicant, nor did it pour any resources into the development of the first applicant; that the first respondent created her own source of referrals and business connections through her own skill, expertise, and workmanship; and that the respondent did not have any trade secrets, business know-how or confidential information.

[7] The applicant further submits that the learned Judge failed to give proper regard to issues of public policy, as it was in the interests of the public that the first applicant be allowed to pursue her profession, as held in *Kleyenstrüber v Barr and another*[3] and accordingly, the learned Judge thus failed to follow this judgement.

[8] The learned Judge erred in finding that the first applicant had breached the terms of the restraint of trade in holding that the first applicant had contacted several people and given them information regarding her new practice when such conduct was not aimed at enticing or inducing any of these people away from the respondent but was in furtherance of the first respondent's ethical duties as prescribed by the Health Professions Act.

[9] The learned Judge correctly found that the first applicant's new practice in Bedfordview was a reasonable distance away, however, in ordering that the first respondent may not conduct business within the radius of 27 km of the respondent's business, it remains unclear:

9.1 whether or not the first applicant may conduct business from her new practice as such practice falls within a 27 km radius; and

9.2 whether "conducting business" exclusively means operating a practice or includes seeing patients at other premises.

[10] The applicant submits that the learned Judge should have found that the first

[3] [2002] 1 All SA 560 (W).

applicant was entitled to conduct business anywhere as the restraint was unreasonable.

[11] The learned Judge erred in making an order prohibiting the first and second applicants from employing any employees of the respondent as such an order was never sought by the respondent and therefore not the case that needed to be met by the applicants.

[12] Finally, the learned Judge erred in making an order against the second applicant, as there existed no *lis* between the respondent and the second applicant. In any event, the parties had agreed that no order would be sought against the second applicant and based on that agreement, the second applicant delivered a notice to abide. No order should therefore have been made against the second applicant.

[13] The issues canvassed in this application have been dealt with and are addressed in detail in the main judgement. I defer to those reasons.

[14] I, however, need to point out that in submitting that the respondent did not have any legitimate protectable interest, the applicant appears to be indifferent to the following: that the applicant had approached an employee of the respondent and sought to persuade her to join her practice; that the applicant provided her personal number instead of the respondent's number to a patient of the respondent and whilst she was still employed by the respondent; that the applicant provided her own practice number to Discovery Medical Insurance in relation to a claim concerning a Mr Reid, who was a patient of the respondent; and that the applicant submitted claims under her new practice number in relation to the patients of the respondent.

[15] It is important to note that this Court interdicted the direct or indirect inducement, soliciting and enticing away of any employees, agents or any persons that are customers or suppliers of the respondent. In my view, these are legally recognisable interests. The interdicted conduct cannot be said to interdict the applicant from participating in trade or commerce, to be contrary to public policy or merely designed to exclude or eliminate competition.

[16] Secondly, in the answering affidavit, the applicant submitted that she intended to practice in Bedfordview and that the practice will be more than 27 kilometres away from the practice of the respondent. It is not clear how the same applicant is now submitting that the practice is in fact within the 27 km radius.

[17] In my view, the first applicant failed to show that interdicting and restraining her from opening her practice within a 27 km radius and from inducing, soliciting and enticement away employees, agents and any persons that are customers or suppliers of the respondent is unreasonable.

[18] I now consider the applicable principles to an application for leave to appeal below.

Principles governing applications for leave to appeal.

[19] Applications for leave to appeal are governed by sections 16 and 17 of the Superior Courts Act.[4] Section 17 provides as follows:

> '(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
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> (a)(i) the appeal would have a reasonable prospect of success; or
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> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
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> (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
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> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[20] In *Acting National Director of Public Prosecution and others v Democratic Alliance; in re: Democratic Alliance v National Director of Public Prosecutions and others (Society for the protection of our Constitution as*

[4] Act 10 of 2013.

amicus curiae),[5] Ledwaba DJP writing for the full court considered the test envisaged in section 17 of the Superior Courts Act, and referred[6] to the judgment of *Mont Chevaux Trust Goosen*[7] where it was held that:

> 'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. This new standard is applied by Section 37 (4) (b) of the Restitution of Land Rights Act 22 of 1994 to this court's duty to consider the prospects of an intended appeal.'

[21] In *Smith v S,*[8] the Supreme Court of Appeal held that the test of reasonable prospects of success postulates a dispassionate decision, based on facts and the law that a Court of appeal could reasonably arrive at a conclusion that is different from that of the trial Court.

[22] Therefore, to succeed an appellant must convince the Court that proper grounds exist for succeeding in the appeal and those grounds are not remote. In other words, there must be a sound, rational basis for the conclusion that there are prospects of success.

[23] The Labour Appeal Court in *Martin & East (Pty) Ltd v National Union of Mineworkers & Others*[9] called for caution as to when leave to appeal is to be granted. It drew attention to the fact that the statutory imperatives of expeditious and effective resolution of disputes necessarily require that appeals are limited to those matters in which there are reasonable prospects that a factual matrix could receive a different treatment or there is some legitimate dispute on the law.

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[5] [2016] JOL 36123 (GP).
[6] Ibid at para 25.
[7] 2014 JDR 2325 (LLC) at para 6.
[8] [2011] JOL 26908 (SCA) at para 7.
[9] (2014) 35 ILJ 2399 (LAC) at 2406A.

[24] This matter does not raise any novel points of law that need to be dealt with by the Labour Appeal Court. I am also not persuaded that there are reasonable prospects that the factual matrix in this case might receive a different treatment on appeal.

[25] Accordingly, the application for leave to appeal is dismissed with no order to costs.

X Matyolo
Acting Judge of the Labour Court of South Africa