



IN THE HIGH COURT OF SWAZILAND

Case No: 1507/2013

In the matter between:

KM BARBERSHOP

APPLICANT

AND

NKOSINATHI NKONYANE

FIRST RESPONDENT

FLAMINGO HAIR & BEAUTY PARLOUR

SECOND RESPONDENT

Neutral citation:

KM Barbershop v. The Nkosinathi Nkonyane and Another
(1507/2013) [2014] SZHC58 (3 April 2014)

Coram:

M.C.B. MAPHALALA, J

Summary

Civil Procedure – Final Interdict – essential requirements thereof considered – restraint of trade and the essential requirements discussed – application interdicting and restraining first respondent from acting in breach of the restraint clause contained in the contract of employment as between the parties – applicant further seeks an order interdicting and restraining the second respondent from engaging the services of the first respondent in so far as those services relate to those provided by a barber – applicant also seeks an order compelling and directing the first respondent to comply with the terms of the restraint of trade agreement – held that the restraint is unreasonable when considering the period of restraint, the distance of the restraint as well as the occupation of the first respondent – application dismissed.

JUDGMENT
3 APRIL 2014

[1] This is an urgent application for an order in the following terms: firstly, interdicting and restraining the first respondent from acting in breach of the restraint of trade clause entrenched in the contract of employment signed by the parties; secondly, interdicting and restraining the second respondent from engaging the services of the first respondent in so far as they relate to those provided by a barber; thirdly, compelling and directing the first respondent to comply with the terms of the agreement in so far as such terms relate to the restraint of trade. The applicant further seeks an order for costs.

[2] It is common cause that the parties concluded an employment contract on or about 10 August 2011, and, that the agreement came into effect on the 1st August 2011 notwithstanding the written agreement. The first respondent was employed as a barber. The material terms of the contract included, inter alia, that upon termination of the contract, whether by resignation or dismissal, the first respondent be restrained from operating a similar business as that undertaken by the applicant within a 40 km radius of applicant's business; that the restraint would endure for a period of 1.5 years; that information relating to applicant's business would not be used by the first respondent whether for his benefit or others, and, that the confidentiality clause would be enforceable during the currency of the agreement and after its termination.

[3] Clause 16, 17 and 18 of the contract are relevant for purposes of the issue before Court, and, they provide the following:

“16. upon leaving the business either through resignation or dismissal or otherwise you shall be restrained from operating a similar business within a 40 kilometre radius of the barbershop for a period of 1.5 years.

17. you shall not during the currency of this agreement, or after the termination thereof, be entitled, whether for your own benefit or that of others, to make use of or avail yourself or to derive profit from any information or knowledge specifically related to the business or affairs of the business, or may have acquired by reason of your position in or association with the business of the barbershop.

18. (1) you may, during your employment with the business, obtain information:

- regarding the company’s existing and planned production methods and processes;**
- regarding the manner in which the factor and all departments are operated and controlled;**
- regarding the planned or new projects;**
- of secretarial, financial, personnel/clients, commercial, technical and/or allied nature.**

(2) all the information referred to in paragraph 1 above is confidential and you may not divulge such information, whether during your period of employment with the business or after

termination thereof and shall only use such information in the normal course of your employment in the business.

18.3 You must cede to the business, without compensation, all your copyrights and other intellectual rights in and to all works obtained by you in the course of your employment with the business. Likewise, all inventions and discoveries by you in the course of your employment with the business shall become the property of the business, which may require any patent protection thereon and which shall own proprietary rights thereto.”

[4] It is not in dispute that the first respondent resigned from the applicant's employment on the 3rd September 2013. However, the first respondent contends that the applicant has himself breached clause 19 of the contract which entitles the first respondent to 2 % shares of the business upon completion of his probation period. The first respondent contends that clause 19 further entitles him to accumulation of conditional shares, and, that the applicant has not complied with this provision. According to the first respondent the applicant cannot rely on the agreement which he has breached.

[5] The first respondent also contends that the restraint of trade clause is unreasonable in the circumstances and contrary to public policy when considering that he has to secure employment outside the 40 km radius. He argued that finding employment is itself difficult, and, in the event, he

finds the employment, he would require money for transport and/or accommodation. He further argued that salaries of his occupation are low and he would not afford to support himself and his family. The first respondent further contends that clause 16 of the contract only restricts him from operating a business; he contends that he is not operating a business but merely employed. To that extent he argued that the restraint of trade clause was not applicable in the present case.

[6] The applicant contends that the second respondent is his competitor in business and that the relationship between the respondents has caused a significant decline in his business income. He further contends that the first respondent, through his relationship with him had access to his customers and trade secrets; and that the first respondent, in breach of the agreement, is likely to take with him, applicant's customers. According to the applicant the second respondent conducts business in Mbabane. He contends that he has a right to protect his business interest against the respondents. He argues that he has lost a number of customers since the first respondent resigned and took up employment with the second respondent.

[7] The first respondent further contends that applicant has acted in breach of the terms of the contract. According to him the applicant was obliged to

pay him a salary of E2 500.00 (two thousand five hundred emalangeni) on completion of probation in accordance with clause 5.3 of the contract but he did not do so for a period of six months thereafter. He contends that in terms of clause 5.6 he was entitled to a conditional bonus every December starting from December 2012, and, that the bonus was to be equivalent to 10% net profit made by the business; however, the applicant failed to do so notwithstanding the profit made by the business. He also contends that in terms of clause 5.7, his salary has to be increased at the end of every financial year where the profit made is 30% more than the previous year; but the applicant did not do so even though the requisite profit margin was reached. He argues that the applicant has failed to honour clause 9 of the contract which entitles him to fifteen working days per calendar year, and, that since the conclusion of the contract, he has never been on leave or paid for leave days.

- [8] The first respondent denies knowledge of applicant's client data as alleged; and, the director of the second respondent Chakazile Hlophe has deposed to an affidavit in which she confirms that the first respondent is employed by her business and earning E2 000.00 (two thousand emalangeni) per month. She further confirmed that the first respondent has not taken applicant's clients to his new place of employment, and, that they have their own

clients. The applicant has filed a replying affidavit in which he merely reiterates the allegations contained in the founding affidavit.

- [9] The first respondent does not deny concluding the contract as alleged but argued that the applicant did not abide by the terms of the contract as reflected in the preceding paragraphs. The conduct of the applicant towards the first respondent and his failure to observe the terms of the contract shows clearly that the applicant has repudiated the contract; hence the first respondent was entitled to cancel the contract and move on with his life. A contractant who has acquired a right to resile has an election between upholding and cancelling the contract. An election to cancel the contract is exercised by giving notice to the other contractant either orally, in writing or by a Court process; there are no formalities for cancellation unless the parties have expressly provided for the choice of cancellation.

See: *Associated Manganese Mines of SA Ltd V. Classens* 1954 (3) SA 768 (A) at 774; *Stewart Wrightson (Pty) Ltd v. Thorpe* 1977 (2) SA 943 (A) at 954; *Putco Ltd v. TV & Radio Guarantee Co. (Pty) Ltd* 1985 (4) SA 809 (A) at 830 E

Contract: General Principles, Van der Merwe *et al*, fourth edition, Juta & Co. 2012 at pp 342 – 347.

[10] Contracts in restraints of trade are treated like all other contractual terms, and, they are enforceable unless they are contrary to public interest. When determining public interest in respect of a restraint of trade, the Courts often inquire into the reasonableness of the restraint. The most important factors to be considered when the public interest is determined are the nature of the restricted activity, the geographical area in which the restriction is intended to operate, the period of the restriction, and, the particular interests which stand to be protected by the restriction. The party who alleges a restraint to be in conflict with the public interest bears the onus of proving such conflict. The Court would have regard to the circumstances obtaining at the time when it is asked to enforce the restriction.

See Contract: General Principles (supra) at p. 186; *Magna Alloys & Research (SA) (Pty) Ltd v. Ellis* 1984 (4) SA 874 (A)

[11] The first respondent is a barber earning a salary of E2 500.00 (two thousand five hundred emalangeni). As stated in the preceding paragraphs, he is resident in Mbabane. The restraint clause is unreasonable in as far as it seeks to move the first respondent forty kilometres away from his residence. As a barber it is difficult for him to secure employment of his occupation; even if he does, he would be saddled with transportation costs to his place of employment and back to his residence in Mbabane or secure

alternative accommodation on the mere salary of E2 500.00 (two thousand five hundred emalangen) per month. More importantly the applicant repudiated the contract and the first respondent accepted the repudiation and cancelled the contract; hence, no contract exists between the parties which could be enforced by the applicant. Furthermore, the period of one year five months is too long considering the nature of the occupation of the first respondent, his salary and the lack of other income to sustain himself. In addition this court cannot ignore the fact that the applicant has himself failed to abide the terms of the contract which he now seeks to enforce. In the final analysis I have come to the conclusion that the restraint of trade clause is unreasonable and consequently against public interest.

[12] Accordingly the application is dismissed with costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant

Attorney Sifiso Jele

For Respondents

Attorney Thoba Simelane