THE LABOUR COURT OF SOUTH AFRICA

AT CAPE TOWN

Of interest to other judges

Case no: 2024-126905

In the matter between:

ESMARIE DREYER PHYSIOTHERAPY INCORPORATED	**Applicant**
and	
SHUAB OMAR T/A OMAR PHYSIOTHERAPY	**Respondent**

Heard: 4 December 2024

Delivered: 12 December 2024

Summary: (Urgent application – Enforcement of a restraint of trade – Whether restraint provision prohibited respondent from competing with the applicant only if he was employed by another practice or whether it applied if he was practising as a sole practitioner)

JUDGMENT

LAGRANGE, J

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Introduction

[1] The applicant, a physiotherapy practice ('EDP') solely owned by Ms E Dreyer ('Dreyer'), seeks to enforce a restraint of trade agreement to prevent the respondent, Mr S Omar ('Omar') from competing with it by conducting his own physiotherapy practice on certain premises.

[2] The application, which is opposed, was launched on an urgent basis on 4 November 2024 and enrolled for hearing on 4 December 2024. The respondent does not dispute the matter being heard as a matter of urgency.

[3] The applicant seeks the following relief:

3.1 That the Respondent is ordered to comply with the restraint of trade agreement contained in the contract of employment between the Applicant and the Respondent as follows:

3.2 The Respondent shall not work, whether as an employee or in any other capacity, for any practice, whether in his own name or in the name of any other person or business, by rendering physiotherapy services at the Rondebosch Medical Centre building for a period of 1 year from the date of the Respondent's resignation on 1 October 2024 until 30 September 2025.

3.3 That the Respondent in specific shall cease to provide any physiotherapy services to Integrated Cardiac Services for the duration of the restraint of trade period.

3.4 That the Respondent in specific shall cease to provide any physiotherapy services in any ward or ICU wards situated within the Rondebosch Medical Centre for the duration of the restraint of Yade period.

3.5 That the Respondent be restrained from contacting any of the doctors providing services at the Rondebosch Medical Centre building to lure physiotherapy service referrals away from the Applicant to any other practice providing services at the Rondebosch

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Medical Centre, including all doctors and practices providing services within the Rondebosch Medical Centre building as a whole.

3.6 That the Respondent shall pay the costs of this application on attorney client scale, including the costs of counsel.

3.7 Further, or alternative relief.

Factual background

[4] Most of the pertinent facts are common cause.

[5] Since 2015, Dreyer has been operating a physiotherapy practice at Rondebosch Medical Centre ('RMC'), a private hospital. Her practice was incorporated in March 2021. EDP derives most of its income from services rendered at the RMC.

[6] Dreyer claims she had built up a good relationship with referring doctors operating from RMC and EDP could not sustain her practice without their suppport. From time to time other physiotherapists have been employed by the practice either permanently or as locums.

[7] These physiotherapists become known to the referring doctors by virtue of working for EDP, and the referring doctors get to know and trust them. One of the practices referring patients to EDP is the Integrated Cardiac Care practice ('ICC'), which provides fifty percent (50%) of EDP's patient load. Omar contends that it is the other physiotherapists working for EDP, like himself, that have developed good relationships with the doctors and alleges that Dreyer merely acted as a 'gatekeeper' in the relationship which developed between the physiotherapist rendering the service and the referring doctor. He specifically denies that Dreyer had developed a special trust relationship between EDP and the ICC doctors. He goes so far as to say that he personally *"secured those doctors"* and they wanted him to service their patients because of the standard of his service. They referred patients to him, not to EDP. He goes so far as to deny that the doctors he developed relationships with while working for EDP were never 'clients' of EDP but his own. Dreyer pertinently retorts that this begs the

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question why Omar was employed by her practice if the services he was providing were "*largely independent"* of her practice, as he contends.

[8] Dreyer disputes Omar's claim that ICC patients were only referred to EDP after he was employed, and asserts that he was introduced to ICC as an employee of her practice. When he rendered services to ICC clients he did so as an employee of EDP, not in his private capacity.

[9] Omar worked as a locum physiotherapist of EDP in July 2022 and was employed by the practice in a full-time capacity from January 2023.

[10] Dreyer left him in charge of day-to-day patient care in the practice, while she spent time trying to expand her practice in Durbanville. She was content for Omar to render services to EDP clients without supervision and trusted that he would maintain the practice's good relationship with the referring doctors at RMC.

[11] According to Dreyer, there was an understanding between her and Omar that once the latter practice had grown sufficiently, she would ultimately sell her practice at RMC to Omar, though no formal agreement to this effect was concluded by them.

[12] In June 2024 Dreyer acceded to a request from Omar for a salary increase, and she also allowed him to see his own private patients at the premises, provided he did so outside of normal EDP working hours. His contract of employment contained the following provision:

> *"Restriction of trade:*
>
> *Should the employee resign from this practice they will not be allowed to work for any other practice giving service at Rondebsoch Medical Centre (permanent or as a locum) for a period of 1 year."*

[13] On 2 September 2024, Omar resigned from EDP, claiming that he wanted to pursue an opportunity at a new clinic and that he wanted to start his own practice. However, Dreyer discovered that he was in the process of luring referring doctors away from EDP in favour of his own practice.

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[14] More particularly, Dreyer alleges Omar continued to render services as a physiotherapist at RMC after he left EDP. In discussions with Omar during his notice period, he intimated to Dreyer that he did not think ICC would continue to refer patients to EDP because they only did so because he was at the practice, though she disputes this because he was not the only physiotherapist in the EDP practice treating ICC patients. EDP is open every day of the year and there are always two physiotherapists on call to offer services.

[15] Omar admits that he had applied to have his practice registered under RMC, but he revoked that application and is confined to practice under RHC only. Yet he maintains the restraint does not prevent him from seeing RMC patients or from operating his own practice at the RMC building. EDP contends that, even if this is true, the restraint prevents him from working at RMC premises, where the RHC is situated.

[16] She reminded Omar of the restraint and asked him to engage with her if ICC approached him with referrals. She claims she was open to discuss a workable solution with him. Omar did not respond to her offer. Omar claims Dreyer asked him to enquire from the ICC doctors if they would continue referring patients to her practice after Omar left, but Dreyer claims she did this herself, thought she does not say what the response was.

[17] On 2 October 2024, Dreyer received a WhatApp message from one of the ICC partners advising that henceforth ICC would be making patient referrals to Omar *"in his private capacity*" owing to the *"excellent service"* he was providing. She accepted that they had the right to do so, but advised them that Omar was bound by a restraint of trade agreement.

[18] The next day she instructed attorneys, who issued a demand to Omar to desist from breaching the restraint agreement. However, on 4 October 2024, Omar began seeing patients of ICC at RMC premises. Omar's attorneys responded on his behalf disputing the enforceability of the agreement on the basis that none of it provisions were applicable to the circumstances.

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[19] Dreyer claims Omar is providing physiotherapy treatment to patients of ICC in RMC wards. He has issued a business card under the practice name of Omar Physiotherapy giving the practice address at RMC and displaying his name and qualifications. Omar does not dispute providing service at RMC but claims he is *"not consistently"* doing so. He asserts he does provide services at Rondebosch Heart Company ('RHC'), which is a distinct legal entity from RMC. He admits only to seeing five patients referred to him by ICC because he claimed he had an ethical duty to assist them. Dreyer points out that he was not the only available physiotherapist registered at RMC who could have treated those patients.

[20] In any event, he argues that he could only be in breach of the restraint if he was offering services whilst being employed by another physiotherapy practice, whereas he is practicing in his own name. Moreover, the restraint does not prevent him from rendering services at RMC premises as it refers to RMC, the legal entity, and not to the building it occupies. He freely admits that his principal place of business is the RMC Hospital property.

Legal principles

[21] For the purposes of this application, it is sufficient to highlight the following principles.

[22] Firstly, the existence of a binding restraint and whether it has been breached must be established. Then the enforceability of the restraint must be determined. The prevailing legal policy on the enforceability of restraint of trade agreements was laid down in *Reddy v Siemens Telecommunications (Pty) Ltd*[1]. In terms thereof contracts in restraint of trade are enforceable unless the person seeking to escape being bound by such a provision can show that it would be unreasonable to do so.[2] The determination of the reasonableness of enforcing the restraint, entails a court making a value judgment considering the proven facts.[3]

[1] 2007 (2) SA 486 (SCA)

[2] *Reddy* at paragraph [14].

[3] *Ibid.*

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[23] The test for determining if it would be unreasonable to enforce the restraint is well known. In *Reddy*, the Supreme Court of Appeal reaffirmed the test enunciated by its predecessor in *Basson v Chilwan and Others*[4]:

> *"[15] A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim pacta servanda sunt. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom to contract is an integral part of the fundamental right referred to in s 22. Section 22 of the Constitution guarantees '[e]very citizen . . . the right to choose their trade, occupation or profession freely' reflecting the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as contemplated by the Constitution. It is also an incident of the right to property to the extent that s 25 protects the acquisition, use, enjoyment and exploitation of property, and of the fundamental rights in respect of freedom of association (s 18), labour relations (s 23) and cultural, religious and linguistic communities (s 31).*
>
> *[16] In applying these two principal considerations, the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a*

[4] 1993 (3) SA 742 (A)

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corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest. Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest. In Basson v Chilwan and Others, Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint: (a) Does the one party have an interest that deserves protection after termination of the agreement? (b) If so, is that interest threatened by the other party? (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests."

(emphasis added)

Evaluation

The existence of the restraint and its interpretation.

[24] There is no dispute that Omar had agreed to the restraint provision cited in paragraph 13 above. The dispute between the parties is centered on the interpretation of the clause. The critical dispute is whether it prohibited him from providing physiotherapy services in his own practice at RMC.

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[25] The leading authority on interpretation of contracts and other documents is the Supreme Court of Appeal decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [5]

> *"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

(emphasis added)

[26] Before delving into the details of the interpretation dispute, it is necessary to address Omar's argument that any dispute of interpretation must be decided in his favour in accordance with the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[6] This is a novel proposition, for

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[5] 2012 (4) SA 593 (SCA)

[6] 1984 (3) SA 623 (A) at 634H-I, *viz*:

> *"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the*

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which no authority was cited. In my view, it is readily apparent from that judgment and its subsequent application by the courts, that the method for evaluating factual disputes in motion proceedings for final relief, which it confirmed, was never intended to apply to questions of law. The correct interpretation of a document may lead to a conclusion about what the document means, but that conclusion is reached by applying legal principles of interpretation to arrive at a result which is correct in law. That cannot be determined by deciding that one interpretation 'trumps' another just because it is asserted by the respondent party. Quite apart from the obvious absurdity this entails, it should be self-evident from the wording of the rule that any attempt to adapt it for the determination of questions of interpretation would raise insurmountable difficulties.

[27] Turning to the interpretation of the clause, it must be asked what the purpose of the clause is. The context in which it was concluded was one in which Dreyer had a practice located at RMC in which she employed other physiotherapists from time to time, sometimes as *locums* and at other times permanently. If one of those physiotherapists left her practice, having become familiar to referring doctors working at RMC and to the patients they treated, there is a risk they could start practicing at the same premises competing for the same referral work, which they previously rendered to EDP patients. Former physiotherapists employed by EDP could acquire the EDP patients they previously treated whilst working for EDP as the patients of another practice at those premises they were subsequently engaged with and they could exploit the connections they had developed whilst working for EDP to the advantage of that practice.

[28] It stands to reason that EDP would want to try to preserve the connections the practice had with the referring doctors and to preserve existing client relationships against being exploited in the way described. Concluding a restraint provision would be a way of trying to achieve that end. The clause in question was drafted by EDP and Omar had no hand in negotiating it.

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applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

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[29] Regarding the contentious issues, it is firstly a matter of dispute whether the reference to RMC in the restraint is a reference to RMC as a legal entity or simply the RMC premises. Omar argues that the reference to RMC must mean the legal entity. Consequently, as he is not registered to provide physiotherapy services to the hospital as an institution, and only provides services to RHC, he cannot be in breach of the prohibition against providing a service 'at' RMC.

[30] Although the restraint wording could have been better phrased, that does not mean it is incomprehensible. Nor is it necessary to effectively redraft it as Omar claims EDP is attempting to do based on the interpretation it advances. The provision of services by a physiotherapy practice concerns the provision of a service *"at"* RMC not *"to"* RMC. 'At' is a preposition of time or place. In the context of the clause it can only be a preposition of place. In addition, EDP's physiotherapy services are not confined to serving RMC as an entity, so it is reasonable to assume that the clause is intended to cover the scope of all the services it renders at the RMC premises. It makes little sense why EDP would only want to protect itself from Omar exploiting the relationship he developed with clients who were referred by the hospital alone, in circumstances where referrals are received not only from doctors employed by the hospital but by other practices on the same premises, such as the doctors of ICC. I am not persuaded that there is any sound reason the restraint would be confined to work performed in the treatment of RMC patients only.

[31] Quite apart from this, Omar argues that the restraint cannot prevent him from operating his own physiotherapy practice because he is not an employee of his own practice. He contends that by prohibiting him from *"working for any other practice giving service at Rondebosch Medical Centre (permanent or as a locum)*", the clause clearly intended only to prevent him being employed by another practice covered by the clause. In his view the clause is clear and unambiguous and EDP's interpretation of it amounts to an attempt to amend it.

[32] More specifically, Omar argues that in referring to working for a practice in a permanent or temporary capacity, that can only be a reference to him

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working as an employee of another practice. It cannot apply to him practicing in his own name as a freelance or 'self-employed' physiotherapist. If it was the intention of the parties to prohibit him practicing in that capacity, the clause would have expressly provided for that. Is that interpretation one that seems a sensible and businesslike, given the purpose of the document? That may be answered by asking the following question. If EDP felt it necessary to protect itself from Omar exploiting what he had acquired by working for it, and felt that it should ensure he was not employed by one of the other practices operating at RMC, would it be indifferent to him setting up his very own practice at the premises to compete directly with it? Posing the question demonstrates that it makes no sense why it would restrain him only if he was employed by a third party.

[33] It must also be noted that the more inexplicable interpretation, which Omar proposes, also relies on a very particular and narrow interpretation of what it means to be *"working for any other practice".* To bolster his argument that this can only refer to an employment relationship, Omar emphasises the phrase *"permanent or as a locum"*, which he contends is only compatible with an interpretation that the restraint only limits employment by a third part. However, it does not seem the only inference that can be drawn. Omar can work permanently for his own practice without being an employee, even if he cannot be a locum in his own practice.

[34] In light of the above, I do not think that it would be a sensible or businesslike interpretation of the restraint, considering its purpose in the context of the EDP's practice, to understand it to mean he is prevented from competing on the same premises only if he is employed by another practice, but not if he is practicing in the name of his own.

Breach

[35] Omar admits seeing 5 patients referred to him by ICC and defends his action as acting in obedience to an ethical duty, but he does not explain why that duty fell to him alone and none of the other physiotherapists

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working at RMC. He also states cryptically that he is not 'consistently' providing services at RMC, which simply means he does so, but on an inconsistent basis. He also treats patients of RHC which operates on the same premises. His intention to practice at the RMC premises is a clear indication, he has taken steps which will exacerbate the extent of the breach. Taking all this together, it is plain Omar has acted in breach of the restraint provision.

Existence of a protectible interest

[36] EDP contends that the patients seen by it and the referrals of patients by referring doctors at the premises to the practice are essentially the equivalent of customer and trade relations, which are intangible assets it acquired in the course of the conduct of its practice at RMC. are part of its assets and Omar is not entitled to exploit those for the benefit of another practice at RMC.

[37] Omar firmly believes that any connections with referring doctors or with patients, which were developed while he was permanently employed EDP, are his to utilise in his practice at RMC. It is also notable that even though it is common cause he was entitled to do private work outside of normal EDP practice hours, he does not claim that any of the contacts he made were acquired in his private capacity.

[38] In *Rawlins & Another v Caravantruck (Pty) Ltd*,[7] the Appellate Division said following:

> *"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*

[7] 1993 (1) SA 537 (AD)

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employee quits and joins a rival he automatically carries the customer with him in his pocket."[8]

[39] The upshot of the authorities is that so long as a person is an employee, the benefit of their efforts to expand the employer's market or its trade connections, enures to the employer and not to them personally. They cannot utilise the network they built whilst an employee for a competitive advantage when they leave, subject of course to the specific terms of a restraint. This applies equally to the contacts and relationships developed by Omar when he worked for EDP.[9] EDP is entitled to take steps to protect and preserve the integrity of those networks. While it is up to EDP whether it manages to maintain those relationships, the restraint prevents Omar from trying to utilise them for his own, or another's gain, at least insofar as he practices at RMC.

Reasonableness of the restraint

[40] The restraint may be a year in length but is very limited in its geographical scope. It only restrains Omar from providing physiotherapy services at the premises where RMC is located. It does not prevent him from establishing a practice nearby, nor is he barred from seeing patients referred to him by medical practitioners working at RMC. It may inconvenience him and somewhat restrict his ability to treat patients referred to him by such professionals. However, I am not persuaded it is an unreasonable imposition, since he developed his ability to exploit that market only through having been employed in EDP's practice.

[41] Omar argued that the detailed order sought by EDP goes further than the restraint provision itself. EDP contends that the order it seeks correctly expresses the practical import of the meaning of the restraint. I do agree it is necessary to clarify the portions of the restraint which were disputed in the order, but I do not think that extends to drafting the kind of detailed order sought by EDP.

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[8] At 541C-H. See also *Laser Junction (Pty) Ltd v Fick* (2017) 38 ILJ 2675 (KZD) at paragraph 38.

[9] See in this regard, the broadly comparable case of *Diedre Steyn Physiotherapy Inc v Stander* (440/2020) [2020] ZAECPEHC 14 (9 June 2020) in which the court was faced with a similar argument, at paragraph 27.

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[42] As this is essentially a contractual matter, for which an award of costs would be made in any other civil court, I see no reason why the fact it was enrolled in the Labour Court justifies a different approach even considering questions of law and fairness.

Order

1. The application is heard as one of urgency and any non-compliance with the rules of the court relating to time periods and service is condoned.
2. The Respondent is ordered to comply with the restriction of trade agreement contained in the contract of employment dated June 2024 between the Applicant and the Respondent, which is annexed to the Applicant's founding affidavit as Annexure "ED1".

3. In particular, the Respondent may not work in any capacity, for any practice, including his own, by rendering any physiotherapy services at the Rondebosch Medical Centre premises for a period of one year from the date of the Respondent's resignation on 1 October 2024 until 30 September 2025.

4. The Respondent shall pay the costs of this application, including the costs of counsel.

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R Lagrange

Judge of the Labour Court of South Africa.

For the Applicant:	C De Kock
Instructed by:	N Humphries and Associates
For the Respondent:	E Geldenhuys from MacGregor Erasmus Attorneys

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