IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 15678/17

8/8/17

In the matter between:

BRISAN DISTRIBUTORS CC **APPLICANT**

And

JOANI DU PLESSIS **FIRST RESPONDENT**

JOURNEY NAILS **SECOND RESPONDENT**

DELETE WHICHEVER IS NOT APP.
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
8/8/2017 DATE SIGNATURE

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This was an application brought on urgency for the following relief, that the first and second respondent:

"2.1 ..be interdicted and restrained from divulging any of the Applicant's confidential information and/or trade secrets, which include but not

limited to the identity and contact details of the Applicant's customers and/or Applicants client lists to anyone;

2.2 ..be interdicted and restrained from using any of the confidential information and/or trade secrets of the applicant as set out in 2.1 herein above, either directly or indirectly in any way whatsoever, including for the purposes of canvassing the Applicant's customers, or soliciting the business of the applicant's customers;

2.3 ..be interdicted and restrained from canvassing any of the applicant's customers for business or personal gain, and from soliciting or seeking any business whatsoever from any person, firm or company who was a customer of the applicant during the first respondent's period of employment with the applicant;

2.4 ..be interdicted and restrained from making contact in any way whatsoever with the applicant's customers for a period of 60 months, calculated from 31 January 2017;

2.5 ..be interdicted and restrained from conducting a business similar to that of the applicant, or taking up employment with another company offering similar services to the applicant, as the case may be, within a radius covering 50 kilometres from the applicant's address at 97 Elevation Road, Randjiesfontein, Gauteng.

3 ..be ordered to hand over to the applicant any soft and/or hard copies of documentation in the first and second respondent's possession and/or control, containing information relating to the identity and/or contact details of the applicant's customers, and/or client lists of the applicant, within two days from date of this order;

5 .....

6 in the alternative to prayers 2.1 and 2.5 and prayers 3 above

6.1 that interim relief with immediate effect be granted in favour of the applicant against the first and second respondents in terms of prayers 2.1 to 2.5, 3 , pending the outcome of this application and/or pending the outcome of final relief to be sought by the applicant against the first and second respondents in a action to be institutes by the applicant against the first and second respondents, with 30 days from the date of this order;"

The application was opposed and opposing and replying affidavits were filed. The applicant indicated that it was not proceedings with prayer 4 and urgency was conceded by the respondents.

BREACH OF THE RESTRAINT AGREEMENT

[2] The applicant averred that the first respondent had breached her common law duties; that she unlawfully used the applicant's confidential information and was as a result in unlawful competition by breaching several clauses in the employment contract, as summarized below:

Clauses 4.2 and 4.3 : that she failed to observe good faith in protecting the interests of the employer and customers, by refraining from 'removing copying, or extracting copies from documents or registers of the employer without authorisation;

Clauses 4.5: that she failed to observe her duty of confidentiality and non – disclosure of the applicant's information in the business, including but not limited to those mentioned in clause 4.5.4 of the contract. In clause 4.5.5 the first respondent unconditionally committed to be bound by the confidentiality and non- disclosure

clause which 'will remain in force indefinitely, irrespective of non-appointment or even after termination of the contractual obligation.'

Clause 7.3: that she failed to return working tools as stated in this clause, and client and or customer lists which were the property of the applicant upon termination of her employment;

Clause 12: that she failed to observe this restraint of trade clause as stated in 12.1 (shall not canvass any clients of the employer for business or personal gain); 12.2 (on termination shall not open similar business or employment with company offering similar services within a radius of 50km from the business of the employer; 12.3 (after termination shall not make contact in any way whatsoever with clients of the employer for 60 months);

BACKGROUND

[3] Mr Edward Brian Hunter, (Mr Hunter) has a 50% members interest in the applicant. He averred that the applicant conducts business from Midrand under the names "Brisan Distributors & Brisan Training Academy" and "Especially 4 U Health, Beauty and Nail Clinic". Its distribution comprises 45% of applicant's business and it has sole distribution rights in respect of the products it supplies. Its training academy comprises approximately 10% of the business. Training is provided to about 150 students per year in the use of its products as beauticians, nail technicians/stylists and beauty therapists. Approximately 45% of the business comprises beauty treatment which has been provided since 1992 and which is marketed as Especially 4 U Health and Beauty Clinic. The beauty treatments are offered to members of the public and consist of a wide 'variety of facials, specialized body and skin treatments; massages; professional make-up, body sugaring and nail style products and treatments. The applicant had approximately 400 clients on its books and databases and 80

of these clients were 'regular clients', who have over an extended period of time confirmed appointments to return bi – weekly for treatment.

[4] The beauty treatments and services were provided by employees engaged and trained by the applicant . The first respondent was one such employee, who was engaged by the applicant on probation as a nails stylist/ trainee therapist on 14 July 2014 and after training she was upgraded to a permanent position of Nail Stylist and a trainee therapist. On 27 November 2014 a written contract was entered into. According to Mr Hunter, the skills and know-how attained by the first respondent was as a result of extensive training, given on an ongoing basis on the products and services given to customers. In particular the skills attained comprised 'hand and feet nail care, specializing in nail art, exclusively marketed and distributed ' by the applicant. He contended that the skills acquired by the first respondent were unique to the business of the applicant and unknown to its competitors. It was contended that because the first respondent did a proper job, she became popular and familiar with the clients, with whom she would spend approximately 2 – 4 hours, depending on the treatment.

[5] The first respondent tendered her resignation on 31 October 2016 with her last day of service on 31 January 2017 and, such was accepted. On 18 January 2017 she intimated to one Mrs Hunter that she was relocating to Thailand, and it was also on this day when Mr Hunter reminded her of the content of their contract, in particular for her not to entertain or canvass the applicant's clients. On 31 January 2017 the first respondent was provided with a 'staff clearance' letter, annexure "B3", which among others, reminded the first respondent to return 'the applicant's property and, confidential information; about the restraint of trade agreement. The applicant did not sign the document but indicated that she was in a hurry and would return it the following day. She failed to do so.

[6] Mr Hunter averred that the first respondent had lied about moving to Thailand and

had failed to comply with the staff clearance documents in that she intended competing with the applicant's business. On 9 February 2017, he was made aware by his staff that there were several client cancellations which could have been occasioned by a Facebook Advertisement, by one Paula Jane Du Plessis, a close relative of the first respondent. The advertisement contained 'a price list of certain nail products, treatments and services offered and two photographs of products similar to those marketed by the applicant as shown in annexures "B4.1" and "B4.2" and "B4.5. The advertisement read:

"Journey Nails Rooihuiskraal

For bookings

Whatsapp 071 2444 709

[7] It was contended that the Facebook post was shared 8 times and received 11 comments. The number in the advert belonged to the first respondent as confirmed by her personal details in possession of the applicant. Ms Jagemann, an employee of the applicant was used as an alias to confirm first respondent's conduct. When applicant's suspicions were confirmed the appointment for nail treatment was cancelled. Mr Hunter contended that from what he subsequently discovered, he had reason to believe that the first respondent had planned as early as November 2016, when she resigned, to commence business in competition with him by utilising the second respondent. Furthermore, he believed that the photographs were taken at his business or from clients and that the products were appropriated from the applicant.

[8] Since the first respondent's departure the applicant experienced a 500% of increased cancellations because 60 regular clients had cancelled without rescheduling new appointments. The usual was that there were about 10 cancellations of appointments per month with a definite rescheduling of such cancellations. The reasonable inference was that the first respondent was in possession of client lists and details which she either unlawfully

took or, if she was in lawful possession thereof, she deliberately kept when she failed to comply with the staff clearance document. The client lists were compiled over a period of 25 years. These were not in the public domain and were the property of the applicant. Besides being in possession of the client lists, the first respondent had undercut prices as seen from a comparison of the prices in the applicant's catalogue (save for one item) and, those appearing in the Facebook advertisement. She had also removed from the applicant a set of various styling brushes and Privy nail art, such as that depicted in the photograph in "B5".

[9] Mr Hunter contended that the applicant was in unlawful competition with the business of the applicant by utilizing confidential information and client list. She had also prior to her departure misrepresented to clients that she was 'the creative stylist' and 'the producer of quality artwork' to advance the future business of the applicant. Furthermore, she was absent from her employment between August and November 2016, on the pretext that her child was sick, so that she could attend training with a rival and a competitor.

[10] The applicant contended that it had therefore demonstrated a clear right for the relief Sought, in that the applicant had lost approximately 60 clients as a result of the first and second respondents unlawful conduct. Letters were addressed to the respondents seeking an undertaking the first respondent to desist with its conduct. On 2 March 2017 she undertook not to canvass the applicant's clients, but indicated that she would continue to do business through the second respondent.

[11] The employment of the first respondent by the applicant and reasons for resignation, being her intention to relocate to Thailand were common cause. The first respondent averred that prior to her employment with the applicant and between 31 July 2009 and 5 April 2011 she had completed her qualifications and, acquired seven certificates in certain areas in the beauty industry, at the following institutions, Healing Hands, Bio Sculpture and Nimue. towards the end of 2009 beginning of 2010 she was employed at a beauty salon known as

JS Wellmed Clinic, which was part owned by one Sandri Addis, first on a full time basis and later on a part time basis until it closed down. Ms Sandri Addis was a daughter to Ms Sandra Hunter.

[12] Although she admits to signing the employment contract which was briefly explained to her, she contends that she signed under immense pressure and unequal circumstances. Mr Hunter denied her an opportunity to seek legal advice, on grounds that she had already been in employment for the four months while on probation and that she was bound by the terms anyhow.

[13] She contended that although she had access to applicant's client list, this was only by access to the computer at the workplace. She never possessed any other information pertaining to the client lists and contact details and never copied the lists for personal gain. She was not aware what the applicant meant by 'trade secrets' and confidential information and, she was not in possession of any such information, or property or products of the applicant which had the potential of prejudicing its business. She contended that applicant had failed to show which specific skills pertaining to nail treatment had been acquired from them. She contended that there were no unique and specific skills pertaining to nail art.

[14] Due to financial constraints after terminating her employment she was forced to work as a sole proprietor under the name of the second respondent. She admitted to servicing clients which she described as her old clients before employment with the applicant and, who had moved with her from JS Wellmed Clinic to the applicant's business. The services she offers are limited to doing nails as offered in "B4" of the founding affidavit, which are a very limited portion of the applicant's business conducted under 'Especially 4 U Health and beauty Clinic'.

[15] None of the clients who had cancelled appointments were serviced by her except

those described above. Two clients of the applicant who were not on list "B6" had contacted her of their own accord. One Carl Erasmus wanted to know how she was keeping and one Anne Botes who requested her to return to applicant's business. A copy of the latter message was annexed as JDP5. During her last month of employment and onwards she had seen some of her old clients. She provided a list describing her old clients in green and her new clients in orange. The latter consisted of friends and acquaintances who had no connection to the applicant. She denied using any products supplied by the respondent and stated that she was using those supplied from China, Shenzen Runbai Ze and the Bio Sculputer products.

[16] The first respondent contended that the purpose of this application was to stifle her financially. She had a right to work in her trade and to earn a living. She admitted working within 50 km radius, her father's house being 13 km from the business of the applicant. She denied that she was competing with the applicant to such an extent it would be prejudiced. She denied that she had stealthily commenced the business. The Facebook advertisement was posted by her sister but not on her instruction and was removed due to Mr Hunter's threats. There were many beauty salons in close proximity of the applicant's business and her home which offered similar treatments and service. She contended that the restraint clauses were against public policy, that they were extremely unreasonable, and that they killed 'healthy competition in a fair trade society.

[17] She denied that the applicant's business was as lucrative and a big as suggested and as compared to the big players in the industry. She also denied that she was trained in all the treatments offered by the applicant or that she was the face of the company. She gave a synopsis of the limited training she received from the applicant, the frequency of treatments and services she was offered and the number of clients she attended to while she was with the applicant. In as far as products were concerned these were obtainable from a plethora of distributors and sometimes clients brought their own along.

[18] She denied that the prices published were meant to undercut those of the applicant. She had no overheads and she had compared her prices with the many beauty salons in her area and found that in some she was cheaper and in others not. She denied that she had attended training with other institutions while in applicant's employment. A letter explaining her attendance at Bio Sculpture during November 2016 was given to the applicant on 2 March 2017.

[19] She denied that the staff clearance was handed over on her last day, 31 January 2017. She had been asked to go and assist the applicant on 7 February 2017 and the document partially completed by Mrs Hunter was given to her to sign. She advised Mr Hunter that she intended seeking legal advice first. The document amended certain terms of the employment contract e.g., the radius had been increased from 50km to 60km.

[20] The first respondent contended that the applicant failed to provide cogent proof of her having in particular canvassed and enticed clients away or, that she was responsible for their cancellations. The allegations were speculative and the applicant had failed to contact the clients to seek reasons. In dealing with the list of names on "B6" she explained her relationship with those with whom she had long standing relationship before taking up employment with the applicant as described in paragraph 40.3.1; Melissa's clients mentioned in 40.3.4, 40.3.5 whom she had occasionally assisted; those clients of the applicant whom she had regularly attended to and who had not been in touch with her, 40.3.6. In 40.3.7 she mentioned the services she had provided to clients mentioned therein and the limited interactions she had had with them preceding her termination of employment.

[21] The issues to be determined were (i) use of confidential information and trade secrets (ii) the canvassing and soliciting customers of the business for personal gain (iii)

establishing or taking up employment in a business similar to that of the applicant

(iv) handing over of information relating to customer details in possession of the first respondent and of assets and equipment of the applicant.

THE LAW

[22] The law applicable to restraint of trade agreements was laid down in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 891 A-C and this was aptly stated Didcott J in *J Louw and Co (Pty) Ltd v Richter and Others* 1987 (2) SA 237 (N), 243 B-D:

> "*Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenanter's freedom to trade or to work. In so far as it has that effect, the covenant will not therefore be enforced. Whether this is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought.*"

[23] The purpose of a restraint of trade agreement is to restrict an employee's activity within a particular geographic area and for a particular duration. According to *Magna Alloys supra* enforceability requires that the agreement must not be against public policy; it must be reasonable; its objective must be to protect a legitimate interest of the employer and it must not seek to unreasonably restrict an employee's freedom to trade or to practice his or her trade. It was argued for the respondents that the restraint of trade agreement infringed on section 22 of the Constitution. The competing rights of the employer and employee in as far

as the Constitution is concerned, are not absolute rights in that the agreement is deemed to be *prima facie* valid and enforceable in the spirit of holding contracting parties to agreements they enter into. The employer's right to protect certain interests, which are usually not in the public domain, from unfair competitive exploitation by an employee is recognized. On the other hand, the right of an employee to freely choose and exercise his or her trade and to engage in fair competition as long as the agreement is not against public policy is also recognized. In the heads of argument for the respondents the right to free trade by a competitor offering the same service or product was addressed. However, facts in the authorities cited in paragraphs 7 and 8 of these Heads of Argument are distinguishable and are not relevant, in as far as we are dealing here with competition where it pertains to restraint of trade agreements and in as far as it pertained to an employer seeking to protect a protectable interest as against his or her rival.

[24] The employer therefore has the onus to show that it has a protectable interest to protect in the restraint agreement which may, as alluded to in the founding affidavit, be in the form of trade secrets, pricing or customer connections. It will suffice if the employer can show that the acquisition of such protectable knowledge or interest prevailed during the term of employment of the first respondent and, that it had the potential to be used or has been used in competition against him or her, *Den Braven SA (Pty) v Pillay* 2008 (6) 229 (D) at paragraph [15]. The employee bears the onus on the other hand to show on a balance of probabilities that the restraint was unreasonable, with reference to the circumstances that prevailed when the agreement was concluded and, what occurred during the term of employment, in particular the events that caused the application to be launched, *J Louw and Co supra.* The protectable interest had to be in existence when the application was launched.

[25] Counsel for the respondents, relying on what was stated by Davis J in *Advtech Resourcing t/a Communicate Personel Group v Kuhn* 2008 (2) SA 375 (CPD) at para 28,

submitted that in relation to certain sections in the Constitution the employer 'was required to justify a restraint, i.e. that the employer bore the onus of proving reasonableness of a restraint'. The law in as far as who bore the onus regarding unreasonableness of a restraint of trade agreement still remains with the employee. In *Advetch supra* Davis J, in *obiter,* discussed the need to develop the common law in restraint of trade matters, so as to place the onus on the employer to justify the need for a restraint agreement, since these agreements entail a limitation on the right to work of an employee. This issue was not settled.

[26] In my view, the fact that the first respondent failed or refused to comply with the staff clearance document should not be of any consequence because the document reiterates most of the terms in the main contract except for where they differed. Besides the applicant knew from the beginning of November 2016, that the first respondent's last date was the 31 January 2017, therefore she had no obligation and cannot be faulted for failing to engage with the applicant after she left, regarding a document dated 2 February 2017.

[27] It was argued for the applicant that the respondents were in breach of the restraint of trade agreement and, had remained in unlawful ongoing competition despite an undertaking not to do so. The intention to compete had manifested itself even before date of termination of the employment. The restraint of trade agreement was in place from date of permanent appointment on 27 November 2014 and, in my view still remains in place until, this Court pronounces otherwise. It is common cause that in clause 12 the first respondent agreed not to canvass clients of the employer for personal gain, except for the benefit of the employer. The conduct of canvassing clients of the applicant can in my view be inferred from the following incidents:

1 tax invoice for R4 190.50 dated 24/11/2016, 'JDP10' for nail products issued in the name of the first respondent;

2 on her own admission her sister had bought products for her in China before termination of her employment;

3 she had access to applicant's client list including those she referred to as her own clients (para 40.3), which she brought over from JS Wellmed Clinic, her previous employer, and where the business of the previous employer was part owned by the daughter of one of the applicant's part owners, Mrs Sandra Hunter;

4 six days after 31 January 2017 an advertisement was placed on Facebook with the first respondent's telephone details;

5 after resigning from the applicant she continued to service those clients mentioned in 3 above; and serviced new clients mainly friends and acquaintances; two of applicant's client's contacted her, and they were not listed in annexure 'B6'; they called to enquire after her well- being, or to persuade her to return to the applicant; the conduct of these clients only shows the extent of interaction she had with the clients and familiarity as alluded to by the applicant;

6 she admitted to offering a very small portion of the applicant's business offered by 'Especially 4 U Health and Beauty Clinic' (para 8), even if the services rendered were minute, it is still a part of the applicant's business; and in paragraph 22 she gives an explanation of the treatment she gave but there is no explanation which of these were a part of or, similar to those offered by "Especially 4 U Health and Beauty Clinic;

7 while she would not canvass or entice any client away from the applicant she would continue to service them if they approached her as communicated on 2 March 2017.

8 services were rendered to Melissa's clients (para 40.3.4); Melissa's clients who became her clients (para 40.3.5); Melissa was employed by the applicant and these clients were also probably the applicant's client; by them agreeing

to be serviced by the first respondent shows familiarity with her and confidence in the services she was rendering;

[28] It is my view that the above conduct does establish on a balance of probabilities that there was direct and indirect canvassing or enticing of clients of the applicant and that the first respondent was in breach of clause 12.1 of the restraint of trade agreement. This view is strengthened by the fact that barely six days after resignation an advertisement was placed on Facebook giving her details. In as far as Melissa was concerned she knew that the individuals who were referred were applicants' clients. With regard to her previous employer she could not claim benefit from the mere fact that clients of the previous employer followed her to applicant's business. There does not seem to be any arrangement in the employment agreement giving recognition to her qualification, knowledge, skill and expertise she brought along prior to her taking up employment, dealing 'her clients'. She cannot claim a right to retain them as her clients. The restraint agreement provides;

> "*12.3 .....after termination she will not make any contact in any way whatsoever with the clients of the employer for a 60 month period and should any client contact the employee that employee will refer the client to the employer. The employee commits to not entertain such clients for business or self enrichment purposes"*

[29] Except for denying that she received training in all products and treatments, the first respondent admits that she did receive training to a limited extent of that which was advertised in "B1"and treatments pertaining to her qualifications. These services she offered for almost 30 months of her tenure and, she utilized products to which the applicant had sole distributorship. On her own admission she had access to applicant's trade secrets; she used applicant's pricing lists together with others to come up with prices favourable to hers.

[30] It was submitted that the terms of the restraint were too widely drawn and the court was entitled to indicate which conduct fell within the terms of the agreement. She was appointed as a Nail Stylist and Trainee Therapist and section 17 of the employment agreement refers to training, which was to be specified by the employer. It is from the affidavits where it can be established that the main issue related to the manicure/ pedicure service offered to clients after termination of employment. In this regard sight should also not be lost of the fact that the first respondent joined the applicant with certain qualifications in the beauty industry and that she had been practising her profession.

[31] In order to answer the question I have to determine in which format the restraint is to be exercised. In addition to the finding that there was a breach of clause 12.1 of the restraint agreement, it is important to look at confidential information, competition, radius and duration of the restraint.

31.1 Confidential Information: Clause 4.5 provides for the non-disclosure of non-public confidential information. The presence of protectable confidential information has to be objectively established and has to meet the following requirements (i) "*it must involve and be capable of application in trade or industry i.e it must be useful (ii) it must not be public knowledge and public property (iii) the information objectively determined must be of economic value to the person seeking to protect it*", *Alum-Phos (Proprietary) Limited v Spatz and Another* [1997] 1 All SA (WLD). In this matter Southwood J explored the difficulty any employer / trader would experience in determining how much of its confidential information must be disclosed in court proceedings, in order to determine the nature of the information to be protected and, this will depend on the circumstances of each case. In this instance of importance is the fact that the applicant has to acknowledge that the first respondent was not an ignorant party in the business when she took up employment. Where

to draw the line would prove to be difficult unless the applicant is pushed to reveal more than it wishes to, in protection of this interest. In *Coolair Ventilator Co (SA) (Pty) Limited v Liebenberg and another* 1967 (1) SA 686 (W) Marais J stated at 689 A-H:

"The difficult question in each case would be to decide what information gleaned by an employee is to be regarded as disclosable as being harmless or general knowledge and what items are confidential and secret. The dividing line may move from case to case, according to what general practice or convention in the category of trade or manufacture in which the plaintiff falls, with particular reference to existing or potential competitors of his. If however, it is objectively established that a particular item of information could reasonably be useful to a competitor as such, i.e to gain an advantage over the plaintiff, it would seem that such knowledge is prima facie confidential as between an employee and third parties and that disclosure would be a breach of the service contract. If use has in fact been made of it in an attempt to harm the business interests of the plaintiff, the presumption would be even stronger that the employer and employee, who would in the course of his employment obtain knowledge of it, intended it to be treated as confidential information not to be divulged to third parties"

31.1.2 Client lists: The first respondent did not deny having had access to client lists and I have already found that on a balance of probabilities the first respondent breached clause 12.1. In as far as these lists are concerned it could also be a breach of clause 4.5. Client lists are not in the public knowledge and although in this instance they were not divulged to third parties, the were nevertheless used by her for personal benefit.

31.1.3 Undercutting applicant's prices: The first respondent although having admitted that she had knowledge of the applicant's prices she also did a comparative study of prices of similar businesses in the area and attached JDP9. She further stated that she could afford to have cheaper prices because she did not have overheads. In reply the

applicant contended that her association with its clients, coupled with the fact that they would be receiving the same quality service for a lower price was the determining factor. I am not satisfied that the applicant established that the first respondent's cheaper prices prejudiced its business. The applicant did not deal with the fact that there were businesses in its surrounding area whose price lists were also used by the first respondent to provide a cheaper service.

31.1.4 Unlawful Competition: Client lists could be used in unlawful competition especially where an employee was considered to be an asset to the business, or where she had professed to have acquired special skills which could be used by her in breach of the restraint agreement. In this instance while in the employment of the applicant, during December 2016, she went about preparing to establish a business in competition to that of the applicant. Her sister assisted by purchasing tools of trade and by placing an advertisement in Facebook on her behalf. These activities prove that the first respondent did not enter the business because she was motivated by financial constraints, as averred to in paragraphs 5 of the answering affidavit or that she needed the income to prepare for her relocation to Thailand. Her refusal to desist servicing individuals who were clients of the applicant if they approached her was another factor to consider.

31.2 Radius: The first respondent made an important allegation about the number of similar businesses operating in the area of the business of the applicant and contended that the 50km radius was too wide. She presently operated from her father's house which was within about 13km of the applicant's business and claims that she had always lived approximately 10km from the applicant's business. In as far as similar businesses existing in the area, I am of the view that the first respondent could have provided better information by identifying them and providing distances from the applicant's business. Such information could have assisted to determine the reasonableness or not of the radius imposed. In the founding affidavit the applicant contended that the interaction with

the clients and the duration when such services were offered to them over lengthy period, which allowed for the first respondent to have a relationship with the client. The first respondent engaged with these clients for almost 30 months and even longer, when taking into account that her previous employer was connected to Mr Hunter. As I see it, it is not about the many similar businesses in the area, but about being in proximity to her clients which include those she referred to as her own, who were also clients of the applicant. This being said, I am however of the view that the 50km radius was too wide, given the nature of the business that the applicant conducts on the one hand and that which the first respondent is qualified to do and the need for her to practice her trade.

31.3 Duration of the restraint agreement: The employment agreement does not stipulate duration of the restraint of trade. Clause 12.3 does not stipulate such period except to state that the employee undertakes not to contact any of its clients for a period of 60 months, after termination of employment. Besides commenting that this period was unreasonable, it does not assist to determine what the duration of the restraint should be. This then leaves the door open to enquiring whether I may exercise a discretion to determine what a reasonable period might be. I am of the view that I may determine such period, given the facts herein and, the conduct of the first respondent, who set about a process to compete with the applicant in breach of the restraint agreement during the term of employment and shortly thereafter.

[32] Having determined that there was a breach of certain clauses of the employment agreement which contained restraint clauses the following order is given:

32.1 The first respondent is interdicted and restrained from, directly or indirectly canvassing, enticing business, from any person who was a client of the applicant during the first respondent's term of employment with the applicant;

32.2 The period of restraint shall be for eighteen (18) months calculated from 31 January 2017;

32.3 The first respondent is interdicted and restrained, within a radius of 30km of the business premises of the applicant and for the period in 32.2 from, directly or indirectly carrying on business or of being employed in a business similar to that conducted by the applicant during the period of restraint;

32.4 The first respondent is ordered to pay the costs of the application.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**22 MARCH 2017**
JUDGMENT RESERVED ON	:	**22 MARCH 2017**
ATTORNEYS FOR THEAPPLICANT	:	**MACINTOSH CROSS & FARQUHARSON**
ATTORNEYS FOR THE RESPONDENTS	:	**TIM DU TOIT ATTORNEYS**