



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

REPORTABLE

CASE NO: D12967/2022

In the matter between:

ASHTON INTERNATIONAL COLLEGE

BALLITO (PTY) LTD

Applicant

and

PETRUS CORNELIUS JOHANNES ERASMUS

CURRO SALT ROCK PRIMARY SCHOOL (PTY) LTD

First Respondent

Second Respondent

JUDGMENT

Ploos van Amstel J

[1] The applicant in this matter is Ashton International College Ballito (Pty) Ltd. It functions as an independent private school in Ballito, not far from Durban, on the north coast. The first respondent is Mr PCJ Erasmus, who was previously employed by the applicant, first as headmaster of its school in Ballito, and later as its managing director. The second respondent is Curro Salt Rock Primary School (Pty) Ltd. It too functions as an independent private school, and has its school in Salt Rock, a small town some eight kilometres to the north of Ballito.

[2] In this application the applicant sought an order interdicting the first respondent from breaching a so-called restraint of trade agreement and taking up employment with the second respondent, for a period of eight months, with effect from 15 December 2022. The matter was argued before me in motion court on 30 December 2022, after which I made an order dismissing the application with costs, and said my reasons would follow before the end of January 2023. I thought it would be in the interests of the parties to know the outcome as soon as possible, as the schools start again early in the new year.

[3] I refer herein, where it is convenient to do so, to the applicant as Ashton College or Ashton, to the first respondent as Mr Erasmus and to the second respondent as Curro College or Curro.

[4] The deponent to the founding affidavit, Mr Buys, says Ashton College provides independent education and schooling and is an independent English-medium co-educational school with a Christian ethos, catering for students from Grade 0000 to Grade 12. He says it is one of the biggest private schools on the north coast.

[5] He says Curro College is a trade rival and offers the same services as Ashton College. They compete in the same community for student attendance and against each other in sporting events. It seems clear from the papers that both schools offer quality educational, cultural and sporting activities and have state-of-the-art facilities.

[6] Mr Erasmus commenced employment with Ashton College in Ballito as its headmaster in January 2010. In May 2010 he purchased 6% of the shares in the applicant, and in January 2017 he was promoted to managing director. He resigned in August 2021, and Ashton announced that he was taking early retirement.

[7] For the next 16 months or so Mr Erasmus was effectively retired. Towards the

end of 2022 Curro College announced that he had been appointed as the head of its primary school, and he says in his answering affidavit that he hopes to take up that position at the beginning of January 2023.

[8] On 2 December 2022 the applicant's attorney sent an e-mail to Mr Erasmus, in which she contended that he was in breach of 'Confidentiality and Restraint Undertakings' contained in a Mutual Separation Agreement which he and the applicant had concluded in August 2021, and demanded that he sign an undertaking that he would honour those terms. He declined to sign it, on the basis of advice from his attorney that he was under no obligation to do so. The application for an interdict was launched on 6 December 2022. The matter was opposed by Mr Erasmus, but Curro played no part in it, save for the delivery of a notice that it would abide the outcome.

[9] The agreement on which the applicant relies was concluded on 17 August 2021. It recorded that Mr Erasmus wanted to go on early retirement with immediate effect; it provided for a separation package, part of which was the purchase by the applicant of his shares, with the purchase price payable over a period of 24 months; and it provided that Mr Erasmus would not for a period of two years be employed by any company which carries on business within a radius of 50 km and renders 'competing services'.

[10] The agreement is poorly drafted. It appears to be the product of a so-called 'cut and paste exercise'. It refers, by way of example, to definitions of 'prescribed customers', 'prescribed services', 'competing services' and 'prescribed area'. There are no such definitions in the agreement.

[11] Some of the clauses are so badly worded that it is not possible to work out what they were intended to say. Clause 14.3 is an example. So is clause 16, which provides as follows:

'Notwithstanding that the clauses themselves do not expressly provide for this, the expiration or termination of this Mutual Separation Agreement shall not affect such provisions of this Mutual Separation Agreement and they will operate after any such expiration or termination where there is a necessity that they must continue to have effect after such expiration or termination'.

It is not clear what the expression 'such provisions' refers to, which leaves the clause meaningless.

[12] Clause 11 provides as follows: 'A failure to comply with conditions by either party herein will with immediate effect force this Mutual Separation Agreement to be null and void'. This is a most unusual clause. I thought perhaps it was borrowed from an agreement which was subject to suspensive or resolutive conditions. But in the Separation Agreement there are no conditions which had to be fulfilled. And in clause 9 it is recorded: 'Both parties completely and willingly agree to the conditions set out in this Mutual Separation Agreement...' The reference in clause 11 to 'conditions' therefore means the terms of the agreement.

[13] On the applicant's case Mr Erasmus has breached a material term of the agreement. In terms of clause 11 the consequence is that the agreement became null and void. Mr Erasmus says the applicant breached the agreement by cancelling its purchase of his shares in the company and failing to pay him the balance of the purchase price. That provides another reason for the agreement being null and void. This all appears non-sensical, but that is the result of the wording of the agreement. A court is obliged to interpret an agreement with regard to its wording, purpose and the apparent intention of the parties, but where that cannot be ascertained it is not for the court to fashion an agreement for the parties.

[14] There is a further difficulty with the applicant's attempt to enforce the restraint clause in the Separation Agreement. I do not see how it can cancel its purchase of Mr Erasmus' shares but be entitled to enforce the restraint clause. These were reciprocal

obligations, as Mr Buys confirms in the founding affidavit.

[15] The applicant contended, in the alternative, that it is entitled to enforce the restraint clause provided for in the shareholders' agreement of 11 May 2010. The simple answer to this is that the applicant was not a party to that agreement and cannot enforce it. The papers do not make a case for a *stipulatio alteri* and counsel did not rely on one.

[16] Apart from the difficulties to which I have referred, there is another fundamental shortcoming in the applicant's case. It relates to the requirement of a protectable interest. A restraint clause such as the one that the applicant wants to enforce is against public policy and unenforceable if its sole aim is to stifle competition. In *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another*¹ Davis J said the following:

'In crisp terms, a restraint of trade raises significant questions regarding its enforceability when examined through the prism of public policy. In deciding whether a restraint of trade is contrary to public policy, regard must be had to two principal considerations; firstly, agreements freely concluded should be honoured; secondly, each person should be free to enter into business, a profession or trade in the manner they deem fit. For this reason unreasonable restraint of trade clauses are contrary to public policy.... An important guideline in the evaluation process is that a restraint should, as far as activities, area and duration are concerned, be necessary to protect the infringed or threatened interest. Furthermore, it is trite that goodwill such as trade connections, trade secrets and confidential information are recognised as protectable interests'.

[17] By way of example, where a sales person in a shoe shop is offered a better salary by a competing shoe shop he will ordinarily not be bound by a restraint clause in favour of his previous employer, because there is nothing to protect. There is no protectable interest. The only purpose of the restraint will be to prevent a competitor from acquiring his sales person. The fact that the sales person may be experienced and competent does not justify restraining him from changing his employment. Public policy demands that businesses should be allowed to compete, and individuals to work

¹ *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) at 82H-83C.

and ply their trade freely, wherever they choose. This is why the law requires a protectable interest for a restraint clause to be enforceable. It is to protect the employer's confidential information from falling into the hands of a competitor.

[18] The founding affidavit deals with confidentiality, trade secrets and customer and supplier connections in general and unspecific terms. Mr Buys refers to the applicant's own unique and enhanced curriculum; trade secrets; relationships and tailor-made deals with longstanding customers; the relationships that Mr Erasmus has developed with strategic partners, including the applicant's customers, suppliers, parents and connections with the communities in general; and access to the names of customers, students' parents and suppliers.

[19] There is no information with regard to the nature of the trade secrets, or the connections with customers and suppliers, or indeed any of the so-called confidential information. There is no evidence to suggest that the Ashton curriculum is confidential, or that the identity of its customers and suppliers is confidential. As a matter of probability, a school's curriculum is available to any parent who is considering sending a child there. Mr Buys' say-so with regard to confidentiality is not enough.

[20] The description in parts of the founding affidavit of the applicant's confidential information also appears to be the product of 'cut and paste'. It is said to include 'manufacturing techniques..., structures and internal moves, designs, circuit diagrams, instruction manuals, blueprints, electronic artwork, samples, devices, demonstrations, formulae, know-how,' and so forth. There is no explanation as to how these apply to a school.

[21] In his answering affidavit Mr Erasmus denies that any of the information referred to by Mr Buys is confidential. He says there are no trade secrets or trade connections. The curriculum is not confidential. Ashton College offers the curriculum set by the Independent Examinations Board as well as the Cambridge curriculum.

Curro offers the IEB curriculum, as do most private schools. He says his skill and ability to head a school is a product of his own experience and expertise developed over the years in the teaching profession. He is good at what he does, and that is recognised. He is a well-known member of the Salt Rock community and known to be skilled at running a school.

[22] Where there is a dispute of fact on the affidavits the court will, with some exceptions, decide the matter on those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent.² I see no basis for not accepting the facts averred by Mr Erasmus. On his evidence the applicant has not shown a protectable interest.

[23] It must be clearly understood that a school is not entitled to enforce a restraint of trade agreement to prevent an employee from moving to a competing school if its sole purpose is to retain, for example, a popular or particularly competent teacher or headmaster, or to prevent a competitor from acquiring his services. The agreement will be unenforceable unless there is a protectable interest as I have described.

[24] For these reasons I dismissed the application with costs.



Ploos Van Amstel J

² *Bailey v Bailey* 1979 (3) SA 128 (A); *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

Case Information

Date of Hearing : 30 December 2022
 Date of Reasons : 23 January 2023

Appearances

Counsel for the Applicant : Mr H C van Zyl

Instructed by
 Applicant's Attorneys : Dowling Grobler Attorneys
 c/o EVH Inc. Attorneys
 Unit 4, 7 Holwood Office Park
 5 Canegate Road
 La Lucia Ridge
 DURBAN

Tel: 013 492 7971
 Email: sine@evhinc.co.za
gail@dg-law.co.za
 Ref: ASH/GJD
 EVH/Sine/D0048/0001

Counsel for the First
 Respondents : Mr M Pillemer SC

Instructed by
 First Respondents Attorneys: Kruger Attorneys
 2 Ncondo Place
 Ridgeside
 UMHLANGA RIDGE

Tel: 031 830 5046
 Email: litigation@krugerattorneys.co.za
general@krugerattorneys.co.za

Instructed by
 Second Respondents Attorneys: Couzyn Hertzog and Horak Attorneys

Tel: 012 0003 2891
 Email: bruyns@couzyn.co.za
wernerB@couzyn.co.za
 Ref: WS Bruyns/bm/C284