IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO. 06/105

In the matter between:

PETROS MAGOS AND ASSOCIATES (T/A PMA) Applicant

and

KENNETH CYRIL NTA First Respondent
AFRISUN INTERNATIONAL GAUTENG (PTY) LTD
(T/A CARNIVAL CITY) Second Respondent

JUDGMENT

The applicant launched an application on 6 January 2006 in which it sought an order, inter alia, restraining the first respondent from being employed with the second respondent as a promotion jockey or from carrying on employment or being associated in any manner whatsoever in a similar capacity with the second respondent from 18 January 2006 up until 18 January 2007. Applicant sought, as well, to extend the operation of the interdict to Sun City and Gold Reef City (GRC) casinos. The applicant also sought the costs of the application. The applicant alleged that it had been in the business of supplying promotional jockeys to the casino industry in South Africa for the past seven years. The applicant enters into contracts with various casinos whereby promotional jockeys are supplied to the casinos.

The concept of a promotional jockey was, according to the applicant, created by it and these persons were trained personnel who were provided by the applicant to, *inter alia*, host, compère, present and/or perform for events and promotions within the realm of the gaming industry on the casino floors. This was apparently aimed at attracting patrons to the casino floors.

On 25 July 2003, Applicant concluded a written contract of employment ("the agreement") with the first respondent in terms of which it was stated that:

1. the applicant had concluded an agreement with the second respondent in terms of which the applicant would provide artistes/performers/emcees to carry out promotions for the second respondent;

2. the applicant trained and coached the first respondent as a promotion jockey specifically to host, compère, present and/or perform promotions for events and promotions in the realm of the gaming industry;

3. the first respondent confirmed that he would not have entered into the realm of the gaming industry but for the coaching and introduction he received from the applicant;

4. the contract was to commence in July 2003 and endure for a fixed period of twelve months, terminating in July 2004;

5. the first respondent was to report to and receive instructions from the applicant and not from the second respondent, and there would be no contractual link between the first and second respondents;

6. the first respondent would keep confidential all information relating to the applicant and the second respondent which may be disclosed to him by the applicant or the second respondent and which was stated to be, or by its nature was, confidential;

7. the first respondent acknowledged that:

    a. he would during his employment be made aware of the trade secrets of the applicant and the second respondent which secrets would include and relate to the client base of the applicant, the applicant's pricing structure and the specific skills required;
    b. that if he, during the course of his employment or after he had severed his association with the applicant, made such expertise, knowledge, experience and business contacts available to a competitor, such action would cause the applicant to suffer considerable financial loss;
    c. it would therefore be necessary for the applicant, in order to protect its goodwill and trade secrets, to restrain the first respondent in certain respects;

8. the first respondent therefore undertook that:

    a. he would not, during the currency of his employment with the applicant or for a period of twenty four months thereafter (*sic*) he ceases to be associated with the applicant either solely or jointly, in any manner carry on, assist financially or otherwise be engaged or concerned or interested in or be a shareholder or a director of any company or entity which does business similar to the business of the applicant in the gaming industry unless prior written consent of the applicant was first obtained;
    b. he would, in no manner, disclose or use or trade in the trade secrets of the applicant or the second respondent.

In July 2003 the first respondent was employed by the applicant in terms of the agreement. At the time, the first respondent was an actor and was also employed in other capacities which included, *inter alia*, appearances on television, recording of music, and appearances in commercials.

The applicant in its heads of argument conceded that it was unable to persist with the relief sought in terms of prayer 2 of the notice of motion (relating to confidential information), and accordingly sought an order that the first respondent be interdicted and restrained from breaching clause 6.2.1 of the agreement concluded between the applicant and the first respondent on 25 July 2003 up to and including 18 January 2007. Applicant sought to claim the relief

in relation to its customer connection with the second respondent as well as with Sun City and GRC.

The applicant's case accordingly depends upon whether or not it has a proprietary interest in its trade connections being the customer connection that it has with Carnival City, the second respondent as well as Sun City and GRC.

It is trite law that agreements in restraint of trade are *prima facie* enforceable and an onus rests on the party seeking to avoid the restraint clause to prove that its enforcement would be contrary to public policy. See **Magna Alloys and Research (SA) (Pty) Ltd v Ellis** 1984 (4) SA 874 A at 897 F – 898 D. This proposition in regard to the onus was challenged in **Canon Kwa-Zulu Natal(Pty) Ltd t/a Canon Office Automation v Booth & Another** 2005 (3) SA 205 N at 209 F – G where Kondile J stated the following in referring to **Basson v Chilwan & Others** 1993 (3) SA 742 A at 776 I – 777 B:

> "*Applying this conclusion to the views expressed by Botha J (in Basson v Chilwan & Others) it seems to me that the applicant needs to do more than to invoke the provisions of the contract and prove the breach. In addition and in terms of section 36 of the Constitution, it has to show that the restraint is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.*"

This judgment of Kondile J was dealt with by MacLaren J in the, as yet unreported, case of **Rectron (Pty) Ltd & Ruthnavani Shantal Govender and**

Axiz (Pty) Ltd under case no. 14110/2005 (D & CLD). MacLaren J stated as follows:

> "*Before me the correctness of the judgment of Kondile J regarding the incidence of the onus of proof pertinently arose for decision. I am bound by that judgment unless I am satisfied that it is plainly wrong. For the reasons which follow I am with respect to my learned colleague so satisfied.*"

MacLaren J then went on to refer to, *inter alia*, **Waltons Stationery Co (Edms) Bpk v Fourie en 'n Ander** 1994 (4) SA 505 (O) at 511 G – H, **Kotzé en Genis (Edms) Bpk en Ander v Potgieter en Andere** 1995 (3) SA 782 (C) at 786 B – 787 A and **Knox D'Arcy Ltd & Another v Shaw & Another** 1996 (2) SA 651 (W) at 661 D – F. None of these authorities appear to have been referred to in the Canon case. In **Waltons Stationery Co** (supra) Edeling J held that our new Constitution did not bring about any change in the incidence of the onus. Conradie J in **Kotzé en Genis** (supra) agreed with the conclusion of Edeling J. Van Schalkwyk J in the **Knox D'Arcy** case (supra) reached the opposite conclusion to that reached by Kondile J. Van Schalkwyk J, in referring to the argument that the effect of section 26(1) of the Constitution on contracts and restraint of trade requires a reversion to the pre-Magna Alloys dispensation stated as follows:

> "*In practice this would mean that the onus would be shifted to the covenantee to demonstrate the reasonableness of the restraint*

> *inter partes. …….. There was no reasonable principle which would justify the reversion to that law and section 26(1) of the Constitution certainly does not require it. Where the common law is compatible with the provisions of the Constitution, the common law should be maintained.*"

From the above authorities, MacLaren J held that the onus remains as set out in the **Magna Alloys & Research SA (Pty) Ltd** case (supra). I am in agreement with such conclusion.

The trade connection being the customer connection (in this case between the applicant and the second respondent) is, according to the applicant, a proprietary interest that can legitimately be protected. In this regard the applicant relied on **Basson v Chilwan and Others** supra and **Rawlins and Another v Caravan Truck (Pty) Ltd** 1993 (1) SA 537 A and **Walter McNaughtan (Pty) Ltd v Schwartz and Others** 2004 (3) SA 381 C.

In **Rawlins and Another** (supra) Nestadt JA stated as follows:

> "*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.*"

On the authorities quoted above, the onus is on the first respondent to show on a balance of probabilities that it would be unreasonable to enforce the restraint of trade as there is no legitimate “trade connection” to protect.

The first respondent admitted that he signed the agreement which contained the relevant clause, but stated that he did not read the agreement and was not told that it contained a restraint. The first respondent’s counsel at the hearing did not rely upon this defence.

The first respondent admitted that it was only through his employment with the applicant that he was introduced to opportunities in the gaming industry, and more specifically the second respondent.

THE FACTS

In July 2004 the agreement between the applicant and the first respondent came to a conclusion by effluxion of time, and the applicant did not renew the first respondent’s employment contract. It, however, continued to employ him as a promotion jockey for the second respondent on the same terms and conditions, states the applicant, until 18 January 2005. It also employed him at Sun City and GRC.

In about June 2004, the contract between it and the second respondent terminated but, according to applicant, same continued on a monthly basis until it was finally terminated by second respondent in or about October 2004. The applicant states, however, that the second respondent continued to use the applicant’s services on an *ad hoc* basis up until approximately January 2005.

According to the applicant, in about July 2005, it came to the applicant's attention that "*the first respondent in breach of the agreement was* carrying on the business of the applicant *in the gaming industry*" (my emphasis). The allegation was phrased in this way because the agreement, and in particular clause 6.2.1 thereof, states as follows:

> "*6.2. The sub-contractor (first respondent) undertakes that:*
>
> *6.2.1 he/she shall not during the currency of this employment with the contractor or for a period of twenty four months thereafter(sic) he/she ceases to be associated with the contractor, either solely or jointly, in any manner, carry on, assist financially or otherwise be engaged or concerned or interested in … any company or entity <u>which does the business similar to the business of the contractor in the gaming industry</u> unless prior written consent of the contractor is first obtained by the sub-contractor;*"(my emphasis)

The applicant's counsel argued that the phrase "*which does business similar to the business of the contractor*" would include the first respondent making himself available to the second respondent as a promotion jockey.

The first respondent argued that his employment with the second respondent, was not in breach of the restraint as this did not fall within the activity which the restraint of trade seeks to prohibit. His contention was that the clause seeks to prevent the first respondent from carrying on or being engaged in an entity "*which does business similar to the business of the contractor*", that is the business of supplying promotion jockeys to various casinos. The first respondent therefore contends that, on the applicant's own version, it has failed to show that the first respondent's conduct constitutes a breach of the restraint of trade clause. Accordingly, first respondent argues that the normal rule regarding onus referred to in **Magna Alloys** (supra) would not apply. First respondent argues the applicant must first prove that the conduct complained of constitutes a breach of the restraint clause. The applicant's contention in this regard is that the first respondent cannot circumvent the restraint provisions in this manner in that what he is in effect doing is being involved in a business similar to the business of the contractor by "*contracting himself out*" to second respondent. Although the restraint provisions are not an example of clear drafting skills, this proposition of applicant is probably correct. It should, however, be mentioned that the actual wording and, in particular, the inclusion of the word "thereafter", in fact renders the clause unintelligible. One is compelled to replace the word "thereafter" with the word "after" to render the clause capable of any meaning at all. I, however, find it unnecessary to delve into the area of contractual interpretation, in view of the conclusion to which I have come on the merits of the matter.

The first respondent's main defence is based upon its contention that the agreement between it and the applicant was terminated by the effluxion of time as it was not renewed after July 2004. The applicant, on the other hand, relies upon the phrase in clause 6.2.1 of the agreement which states " … *he/she ceases to be associated with the contractor …*". The applicant contends that the association between the applicant and the first respondent only ceased in January 2005.

The first respondent further states that at the end of July 2004, the second respondent had decided not to continue with its contract with the applicant. The second respondent had decided that it would employ persons directly and would not act through agents. The first respondent did not encourage or induce the second respondent to terminate its association with applicant. On the contrary, the first respondent was in fact offered direct employment by second respondent but refused same as he felt that he had a relationship with the applicant and did not want to be employed by the second respondent unless the applicant was also "*part of the deal*".

After October 2004, applicant employed the first respondent as a compère at Sun City where he remained until January 2005. First respondent concedes that after July 2004 and on the odd occasion, he worked at second respondent at the instance of the applicant on an *ad hoc* basis until approximately October 2004. The first respondent further states that from July 2004 until January 2005, he worked at Sun City through the agency of the applicant. The applicant's case in relation to its protectable "customer connection" with Sun City and GRC goes no further than this. There was no contractual relationship

and/or contractual restraint relating to these latter two casinos. Applicant has not established any protectable interest in its customer connection with them.

First respondent in January 2005 decided to relocate to the United States of America, and accordingly made those arrangements, which, for reasons not relevant to this application, did not materialize.

In approximately July 2005, the second respondent indicated to first respondent that it wished to employ him for several days per month. The first respondent was impecunious having exhausted his assets in the process of his intended emigration, and accordingly became employed by the second respondent. The first respondent however states that having regard to the fact that the second respondent terminated its contract with the applicant, the opportunity to place employees at the second respondent did not exist for the applicant, and therefore it cannot suffer any damages as a result of the first respondent working there.

It is pertinent that the applicant, although it relies upon the customer connection between it and the second respondent, has in no way put any information before this court as to what period is appropriate for the purposes of this particular restraint. In saying this, I am mindful that the respondents bear the onus to show that the period of the restraint is unreasonable. However, in the face of a challenge to same, the applicant bore an evidentiary burden to refute the challenge. One would have expected the applicant to set out some basis for justifying the restraint of twenty four months. In this regard, the facts and circumstances in **Ntsanwisi v Mbombi** 2004 (3) SA 58 T are of relevance. In that case, two doctors were in partnership practicing in a particular town. The restraint of trade in the agreement between them stated that the respondent, at

the termination of the partnership, would not be entitled to practice for three years as a medical practitioner or in any related field in the particular area or in a radius of 50km from the practice. After termination of the partnership, the respondent set up a rival practice in the same town. It was held that the applicant did have a protectable interest in the form of customer connections in respect of the patients of the practice, and that such interest was worthy of protection from the date of termination of the agreement. Botha J held that "The legitimate purpose of the restraint can only be to withhold the option of going over to the respondent from those patients who might be so inclined for such a time as is necessary for the applicant to take the necessary steps to retain and nurture the loyalty of his patients. It is obvious that he would need time to rearrange his practice to fill the gap left by the respondent, whether by means of locums, professional assistants or new partners. Once he has done that and made his patients accustomed to the substitutes for the respondent, there is no reason to prolong the restraint. I cannot accept that the period must be long enough for the applicant's patients to forget the respondent and for the desire to be treated by him to vanish. In the circumstances, I do not see any justification for a restraint of more than twelve months. The purpose of a restraint is not to punish."

If, as was stated by Botha J in **Ntsanwisi** (supra), the legitimate purpose of the restraint can only be to withhold the option of going over to the respondent from those patients who might be so inclined for such time as is necessary for the applicant to take the necessary steps to retain and nurture the loyalty of his patients, the applicant in the present case is met with a hurdle. It no longer has the "*loyalty*" of the second respondent. It no longer needs protection in the

sense that a time period is required during which it can rearrange its business to fill the gap left by the first respondent so that it can, during that time, train someone and/or introduce a person to the second respondent who will be able to perform in the same way as the first respondent has. As stated, the applicant has provided the court with no facts in this regard. It probably cannot do so because of the fact that it no longer has a contractual relationship with the second respondent, but even if it did, it seems to me that it could not possibly take a period of twenty four months for the applicant to rearrange its business so that it could provide the second respondent with an adequate substitute for the first respondent. At a stretch, and if a restraint was applicable in the present matter, perhaps a period of one year from the date of termination of the contract would have been sufficient. The applicant's reliance on the fact that its "*association with the first respondent*" continued until January 2005 does not assist it. It seems to me that the contractual relationship provided the basis of the association and at best, even on the applicant's own version, any association ceased in January 2005.

The relief sought by the applicant is in the form of a final interdict. The requirements for a final interdict are well known. They are the following:

1. a clear right;

2. an injury actually committed or reasonably apprehended or an actual or threatened invasion of that right; and

3. the absence of similar protection by any other ordinary or suitable legal remedy.

In relation to the existence of a protectable "trade connection", the court, as was held in **Sunshine Records (Pty) Ltd v Frohling & Others** 1990 (4) SA 782 (A) at 795 D – H, must consider the relevant facts and circumstances at the time when the enforcement of the restraint is sought. As was further stated in **IIR South Africa BV (Incorporated in The Netherlands) t/a The Institute for International Research v Hall & Another** 2004 (4) SA 174 (W) at 184 G – H

> "*An interdict is granted to prevent a future unlawful act, wrongdoing or harm*".

A further aspect which was raised was whether or not an interdict was the appropriate remedy in that the applicant would have been entitled to seek damages if it had suffered any. Further submissions were made to me in writing by the applicant's counsel, but in view of the decision at which I have arrived, it is not necessary to consider that aspect of the argument.

The applicant instituted the proceedings in January 2006 when, on its own version, it became aware of the alleged infringement in July 2005. Other than certain correspondence which took place, nothing further was done by the applicant until it launched the application. In view of what I have stated above in regard to the fact that, if a restraint would have been viable in the present circumstances, twelve months would have been sufficient, and in view of the conclusion to which I have come that any such association ceased at the latest

in January 2005, the period of twelve months has now expired. It would accordingly serve no purpose to make an order that would have no effect. The applicant could have brought the application by way of urgency. It waited some six months before it launched the application. The replying affidavit was only filed on 15 March 2006. I am accordingly of the view that:

1. although clause 6.2.1 might cover the situation where the first respondent in effect contracted himself out and in so doing was involved in a business similar to the business of the applicant;

2. the association with the first respondent and the applicant ceased at the latest by January 2005;

3. the relationship between first and second respondent was terminated by October 2004 alternatively at the latest, January 2005;

4. first respondent was not responsible for the second respondent terminating its agreement with the applicant;

5. the second respondent no longer wished to do business with the applicant;

6. accordingly, there is no damage that can be suffered by the applicant in the first respondent working for the second respondent.

Even if the first respondent did not take up employment with the second respondent, the latter would not have utilised the services of the applicant;

7. if any restraint would have been applicable (which in view of what is set out above is doubtful), the period would have been at most twelve months;

8. that period had expired prior to the application being heard;

9. the applicant delayed in launching its proceedings.

In view of what is stated above the applicant is not entitled to the order that it seeks and the application is dismissed with costs.

S WEINER AJ

Date of Judgment : 02 May 2006