

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2013/39121

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
1. REPORTABLE: YES/NO	
2. OF INTEREST TO OTHER JUDGES: YES/NO	
3. REVISED.	
.....	
DATE	SIGNATURE

In the application of:-

DOVELIGHT TRADING 17 (PTY) LTD t/a**AUTO-MATE SERVICE CENTRE****Applicant**

and

SCYTON AUTOCC formerly AUTO-MATE FOURWAYS**First Respondent****RODNEY RAI GOVENDER****Second Respondent****RAKHEE DHARRAMRAJH BALRAM****Third Respondent****AUTO CREW FOURWAYS****Fourth Respondent**

JUDGMENT

NICHOLLS, J

- [1] The applicant seeks to enforce a restraint of trade clause contained in a franchise agreement. It claims interdictory relief against the first and second respondent restraining them from being engaged in any business which directly or indirectly competes with, or is similar to, the business that was carried on by first respondent, the franchisee, within a 15 km radius of the specific premises. The interdict is sought from 24 July 2013 to 24 July 2014.
- [2] The applicant is the successor in title to Auto-Mate Franchising (Pty) Ltd ("Auto-Mate") which entered into a written franchise agreement with first respondent as franchisee and the second respondent as principal member of the first respondent. The first respondent has been placed in liquidation and consequently no relief is sought against the first respondent. The third respondent is the wife of the second respondent. The third respondent is the director of the fourth respondent, a company which now effectively carries on an identical business to that which the first respondent conducted in terms of the franchise agreement, at the same premises. Relief is sought only against the second respondent.
- [3] The first respondent, represented by the second respondent, concluded a franchise agreement with Auto-Mate on 23 July 2008 for a period of 5 years. The franchise agreement entitled the franchisor to cede and assign its rights and obligations in terms of the agreement.¹ On 10 October 2012, the applicant and Auto-mate concluded a written assignment agreement in terms of which Auto-Mate's right, title, interest and obligations in respect of the franchise agreement were ceded to the applicant. The applicant is as a result the successor in title to Auto-Mate.
- [4] The restraint of trade contended for by the applicant is found in clause 35 of the franchise agreement and provides:

¹ Franchise agreement clause 48

“35. RESTRAINT OF TRADE

35.1 As consideration for the granting of the franchise by the franchisor, the franchisee or the principal, as the case may be, undertakes that during the term of this agreement and for a period of 1 (one) year from the date of termination of this agreement for whatever reasons, he will not:

35.1.1 in any capacity whatsoever, be directly or indirectly engaged, interested or concerned in any business which directly or indirectly competes with or which is similar or related to the business;

35.1.2 ...

35.1.3 ...

35.2 The restraints above shall apply with in a 15 km radius (as the crow flies) from the premises.

35.3 Except for the sole purpose of conducting its business in accordance with the provisions of this agreement, at any time, whether before or after the termination of this agreement, the franchisee and the principal shall not disclose or use, or permit the disclosure or use, whether directly or indirectly, for the franchisee's own benefit or for the benefit of any third party, any information or knowledge concerning the business system which may be communicated to the franchisee and/or the principal or which the franchisee and/or the principal may acquire in carrying out their obligations under this agreement.

35.4 The franchisee and the principal record and agree that the undertakings given by them in terms of this clause are fair and reasonable as regards their nature, extent and period and necessary to protect the franchisor's interest.

35.5 The restraints set out in paragraphs 35.1 to 35.3 shall be construed as being severable and divisible and in the event that any of them is or becomes invalid and/or unenforceable, it shall not affect the rest of this agreement, which shall remain in full force and effect."

[5] Clause 2.1 of the franchise agreement provides that the agreement is subject to a lease agreement being concluded by the first respondent and the landlord over the premises. Further, the lease should give Auto-Mate a right of first refusal over the leased premises. Although the applicant positively asserted that this suspensive condition had been fulfilled, it is now common cause that the lease agreement contained no right of first refusal in favour of Auto-Mate. This means that Auto-mate or its successor in title was unable to exercise this right at the expiry of the 5 year lease.

[6] On 25 June 2013, approximately a month before the 5 year period of the agreement came to an end, the applicant addressed a letter to the first respondent making various demands for financial records in terms of the franchise agreement, and informing the first respondent that upon termination of the franchise agreement, the lease agreement should be ceded to it.

[7] In response thereto the first respondent's attorneys addressed a letter to the applicant dated 5 July 2013 stating that the franchise agreement had failed for want of fulfilment of the suspensive condition contained in clause 2.1. It was accordingly denied that there was any valid written franchise agreement in

existence. Instead it was contended that although a “franchise relationship” had been established, this relationship was not governed by the terms of the failed written franchise agreement, but had its own terms and conditions. This was the first time that the applicant was made aware of the non-fulfilment of the suspensive condition. The letter went on to cancel the “franchise relationship” with effect from 24H00, 31 July 2013.

- [8] The second respondent now runs a similar business from the same premises, being the fourth respondent. The respondents contend that the franchise agreement is null and void in that the suspensive condition was not fulfilled. Therefore the restraint of trade clause is unenforceable. This argument fails to take into account Clause 2.2 of the franchise agreement which provides:

“2.2 Should the suspensive conditions not be fulfilled within a reasonable period of time then:

2.2.1 the confidentiality undertakings and restraints set out herein shall nonetheless apply by virtue of the disclosures which have been made to the franchisee both before and after the commencement date regarding, inter alia, the franchisor’s trade secrets and the business system;

2.2.2 this agreement shall terminate and cease to be of any further force and effect and the parties shall be restored to their status quo ante and any of equipment and/or product and all documentation delivered by either party to the other party shall be returned

- [9] This clause caters for the eventuality where, as in this matter, a suspensive condition is not fulfilled but the franchisee has been privy to trade secrets and

confidential information. This is precisely the situation envisaged by clause 2.2.1. Here the suspensive condition has been partially fulfilled in that the first respondent entered into the lease agreement over the premises but failed to include a right of first refusal in favour of Auto-Mate. In such instances it is expressly stated in clause 2.2.1 that the restraints and confidentiality undertakings remain intact, irrespective of whether the suspensive agreement is fulfilled or not.

[10] Clause 2.2.2 restores the status quo ante should the suspensive condition not be fulfilled in a reasonable time. On the second respondent's own version the franchise agreement continued, albeit in terms of a tacit agreement whose terms were essentially those of the written franchise agreement. It does not assist the respondent to argue that the agreement was terminated in terms of clause 2.2.2 once there was no right of first refusal contained in the lease agreement. In this instance the fact that the suspensive condition had not been fulfilled was within the exclusive knowledge of the first and second respondents until the applicant was alerted thereto by the respondents' attorneys in July 2013. Counsel for the respondents was constrained to concede that the terms of the oral agreement contended for were the same as those of the written franchise agreement, including the restraint clause. There can be no doubt that notwithstanding non-fulfilment of the suspensive conditions, the restraints and confidentiality undertakings nonetheless apply.

[11] Insofar as it is argued by the second respondent that should the restraints survive, the restraint period commenced within a reasonable period after the non-fulfilment of the suspensive condition, namely in November 2008, and has accordingly expired, this proposition has no merit. Such an interpretation would lead to the untenable situation where the first respondent while conducting its business as a franchisee of the applicant for almost five years using the applicant's goodwill, signage and intellectual property, was simultaneously serving its period of restraint of trade. To suggest that the restraint operated during this period would make a mockery of the restraint.

Such an interpretation of clause 2.2 leads to a patent absurdity which could never have been within the contemplation of the parties.

- [11] Equally problematic is the submission that the restraint of trade provisions are enforceable only against the first respondent as the agreement provides for the first respondent **or** the second respondent to be bound by the restraint, as opposed to the first **and** second respondents. The wording of clause 35.1 sets out that the undertaking is by the *“franchisee or the principal, as the case may be”*. The second respondent is the principal of the franchisee, the first respondent, and therefore the restraint is applicable to him.
- [12] The respondent’s further submission is that the assignment only pertains to the rights and obligations between Auto-Mate and the first respondent and therefore there is no cause of action against the second respondent. It is contended that on a clear and unmistakeable reading of the assignment agreement, Auto-Mate sold, ceded and transferred, ceded and assigned to the applicant as a going concern, all of its rights, interest and obligations in and to the franchise agreement with the first respondent² (as opposed to first and the second respondent). Therefore, so the argument goes, the applicant acquired no rights or claims against the second respondent in terms of the assignment agreement and has no cause of action against the second respondent.
- [13] The assignment agreement transfers and cedes all rights and interest and obligation in the *“merx”* which is defined as the franchise agreements and the intellectual property. It is common cause that this includes the franchise agreement between Auto-Mate and the first respondent. The assignment agreement does not distinguish between a written franchise agreement or the tacit agreement contended for by the second respondent. The restraint of trade clause binds the second respondent as principal of the first respondent.

² Assignment agreement, clause 3

The applicant has a cause of action against the second respondent, either in terms of the written agreement or the tacit agreement.

- [14] The further submission of the second respondent is that based on a proper interpretation of the franchise agreement the restraint of trade clause was intended to operate only in the event that the franchise business continued to operate from the premises after the termination of the franchise agreement. As it is common cause that the franchise business no longer operates from the premises, and a new business is operated by the second respondent from the same premises, this business cannot be regarded as a *“business which directly or indirectly competes with, or is similar or related to, the business”*. The rationale behind the restraint was to protect the business from competition from the first and second respondent but if the business no longer operates the need for protection falls away.
- [15] What this argument fails to consider is that the restraint of trade is intended to protect the intellectual property of the applicant as franchisor. It does not operate to protect the goodwill of the franchisee. Whilst the agreement was in force the applicant received license fees from the first and second respondent for the use of its name and intellectual property. What is being protected in terms of clause 35 is not the goodwill of the franchisee’s business but the goodwill of the applicant as franchisor. It is irrelevant whether the new business operates from the original premises or next door.
- [16] Finally it is argued that there is a material dispute of fact which cannot be resolved on the papers and for this reason alone the application should be dismissed. It is common cause that: there was a franchise agreement between Auto-Mate and the first respondent for a period of five years; the agreement, either written or tacit, was assigned to the applicant in terms of the assignment agreement; the suspensive condition was partially fulfilled; the second respondent operates a similar, if not identical, business from the

same premises. The real question is whether on a proper interpretation of the relevant clauses of the franchise agreement, the second respondent was entitled to do so, or whether his conduct by doing so fell foul of the restraint of trade clauses. There is no dispute of fact that cannot be resolved on the papers alone. Most of the facts are common cause and what is in dispute is the interpretation of the franchise agreement.

- [17] On a proper interpretation of the franchise agreement, read in the light of its context and purpose,³ it is clear that the conduct of the first and second respondents constituted a breach of the restraint of trade clause. For the reasons set out above the applicant should succeed in its application. The applicant seeks attorney client costs including the costs of two counsel. The punitive costs are provided for in clause 39.4 of the franchise agreement and I shall therefore grant this prayer. However, I am of the view that this matter does not warrant the cost of two counsel.

In the result I make the following order:

1. The second respondent is interdicted and restrained from being engaged, interested or concerned with any business which directly or indirectly competes with, or is similar to, the business that was carried on by the first respondent, within a radius of 15km from the premises situate at shop No LG1, The Buzz Shopping Centre, Cnr Witkoppen and Nerine Road, Fourways, Johannesburg, with effect from 24 July 2013 until 24 July 2014.
2. The second respondent is to pay the costs of this application on an attorney client scale.

³ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA)

**C. H. NICHOLLS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Appearances

Counsel for the applicant	:	Adv. J. Daniels
Instructing Attorneys	:	Cliffe Dekker Hofmeyr Inc.
Counsel for the 2 nd respondent	:	Adv. E. A. Limberis SC
Instructing Attorneys	:	Goldman Judin Attorneys
Date of hearing	:	8 MAY 2014
Date of judgement	:	21 MAY 2014