

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 18784/2008

DATE: 1 DECEMBER 2008

5 In the matter between:

MOZART ICE CREAM CLASSIC

FRANCHISES (PTY) LIMITED

Applicant

and

DENNIS DAVIDOFF

1st Respondent

10 TARIDOR SIXTEEN CC

2nd Respondent

JUDGMENT

15 DAVIS, J

Applicant seeks to enforce a restraint of trade contained in a franchise agreement concluded between the parties. The restraints which are relevant to this dispute are set out in clause

20 13 of the agreement and reads thus:

"13.1 The franchisee shall not be entitled to
twenty four (24) months reckoned from
the termination date, whether directly

or indirectly, as principal, agent, sole proprietor, partner, shareholder, director, member, trustee, beneficiary, employee, consultant, advisor or a financier from a representative or in any other capacity, to be employed by or be engaged in or be interested in or be associated with any person or legal entity which carries on a business which is similar to, or which competes with or which endeavours to compete with the franchise business within South Africa.

13.2 The franchisee acknowledges and agrees that the restraint referred to in sub-clause 14.1 is reasonable to the subject matter, area and duration and it is reasonably necessary for the protection of the franchisor as well as the intellectual property.

13.3 The franchisee shall not at any time before or after the determination date, whether directly or indirectly, itself or together with

any other person or entity in any capacity whatsoever, employ or seek to employ any person who was at that time or who was at any time in the previous 12 (twelve) month period been employed by the franchisor or by any other franchisee or agent to the franchisor, nor shall the franchisee induce or seek to induce any such person to leave such employment.”

To the extent that it is relevant, the words “franchise business” means the Mozart franchise business of running a Mozart ice cream franchise, using the franchisor’s intellectual property (clause 2.1.3).

In brief, Clause 13 provide for two distinct restraints: clause 13.1 restricts what can broadly be termed competitive trade and clause 13.2 which prevents of soliciting of employees of the applicant or other franchisees.

The applicant now comes to court for final relief.

Factual Matrix

From the papers it would appear that the following facts can be
5 accepted by this Court.

- 1) The first respondent was a franchisee in terms of the franchise agreement that was concluded with the applicant;
- 10 2) The first respondent trades from Shop 122 N1 City Mall, Louwtjie Rothman Street, Goodwood, Cape Town;
- 3) Second respondent is the franchisee in terms of the franchise agreement concluded with applicant;
- 15 4) It trades from Shop 12A Bayside Mall, Corner Blaauwberg and West Coast Roads, Tableview, Cape Town.
- 5) Second respondent's has traded as Bayside Mozart
20 Express and currently trades as the Lucky Marble.
- 6) On 1 October 2008 applicant received a telefax from second respondent in which it was expressly stated that

applicant was given 30 days notice of its intention to de-franchise from the applicant by 31 October 2008.

5 7) On 22nd October 2008 in respect of the trading name Lucky Marble, second respondent applied for credit facilities with L.P. Agencies CC in respect of a business that was being operating prior to 31 October 2008.

10 8) On 27 October 2008 attorneys representing the respondents addressed a telefax to the applicant's attorneys in which the Mozart Ice Cream intellectual property and trademark were acknowledged and two it was unequivocally recorded that respondents did not believe that the applicant was entitled to prevent them
15 from trading as independent businesses, competing with the applicant. Further, it was expressly stated that respondent shall continue trading from the same premises but would remove all reference to Mozart Ice Cream and its product.

20 9) Second respondent has converted the Bayside premises from a Mozart franchise and now runs this business under the sign age of Lucky Marble.

10) On 23rd September 2008, at the same time as giving applicant on ultimatum to make a decision about their future relationship by no later than 30 September 2008, first respondent reiterated its decision to pursue a new business model with immediate effect.

11) On 31 October 2008 first respondent addressed an e-mail to other franchisees and the applicant in which he stated that he had de-franchised from the applicant to its great displeasure, his lawyers had advised applicant of his view that there was no valid contract and further the shop would trade as the Lucky Marble and that all Mozart signs had been removed.

Mr Howie who appeared on behalf of the applicant, submitted that in the circumstances on these facts, first and second respondent were bound by the restraint of trade provisions which were contained in the franchise agreement and which they had concluded with the applicant some years previously.

It is important at this stage to emphasize that when this case was launched in great haste, the cause of the application was predicated on both the trademark and a restraint of trade provisions. The trademark issue disappeared in argument before

this Court. Applicant now relies exclusively upon the restraint of trade provisions. Mr Howie submitted that the protectible interest which necessitated the enforcement of the restraint of trade included the following:

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1) Applicant's reputation has been built over the past twenty five years in which it has developed and perfected the creation by virtue of advance methods, both in relation to ingredients and processing of unique ice cream flavours and quality.

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2) Its unique "Rand per kg" system in which the ice cream is weighed and which in turn maximises the way the franchisee can control the quantity of ice cream sold and therefore maximise profits.

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3) Unique serving spoons which were designed by the applicant with the specific intention to ensure that the correct shape of ice cream is presented to the customer in a cone.

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4) In Mr Howie's view, what the respondents had done was to unlawfully repudiate the franchise agreements. There has been no provision in the agreements entitling them to

cancel the agreement unilaterally as they indeed have done. In order to commence their own business, they have relied upon, the established Mozart customers, or walk-in customers, the familiar locality of the business, the fact that customers associate the business at the Bayside and Goodwood premises with the quality product provided by the applicant and that customer loyalty and customer inertia associated with purchasing ice cream from a Mozart outlet at the premises in question.

Mr Howie contended that the respondents have failed to advance any evidence to establish a basis from which it could be found by that this Court that the enforcement of the restraint was unreasonable and that they were not unenforceable. In brief, Mr Howie submitted that the applicants have shown, on the papers, that there was a protectible interest in terms of the restraint of trade which is reasonable, enforceable and that the respondent should be held to the bargain they had struck previously. He further contended that the urgent application had been precipitated by respondents' repudiating the agreements by unilaterally "de-franchising" themselves at the end of October 2008 and in particular by its undertaking to compete with the applicant in the selfsame franchise premises from which they

traded under the Mozart franchise in direct competition with the applicant.

Accordingly, Mr Howie submitted that respondents had flagrantly
5 breached the restraint of trade which binds them. Applicant was
entitled to seek urgent interdictory relief. There was no basis for
applicant simply to content itself with seeking damages as an
alternative remedy when it was vested with the enforceable
restraint provisions in the franchise agreements which were
10 designed to protect the very nature of its own business.

Interdictory Relief

The test for a final interdict is trite. An applicant must establish a
15 clear right, a reasonable apprehension of immediate harm if the
relief sought is not granted, and a lack of a suitable alternative
remedy. The availability of an alternative remedy is a factor that
may be taken into account in considering whether and to what
extent the restraint should be enforced.

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The onus to establish a constraint is unreasonable and that it
ought not as a matter of public policy to be enforced rests clearly
on the respondents. The applicant however bears the onus of
establishing the other requirements in order to justify the relief

sought. The approach set out in Plascon Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) governs the way in which the Court must evaluate the evidence in disputes of this nature.

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As noted, applicants case is that it has shown how respondents have “ridden on the back of the Mozart trademark” in order to prey upon customer loyalty to start competing business of their own in breach of the restraint of trade. Applicant contends that such behaviour amounts to a form of irreparable harm, having been done to the applicant almost on a daily basis. Furthermore, applicant contends that there is no cogent reason as to why respondents who are in flagrant breach of their premises should be given the luxury of continuing to trade

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. The question to be posed at the commencement of the evaluation of applicant’s argument is the issue of whether the restraint of trade in this particular case must be enforced in the manner intended for by applicant.

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20 Enforcement of Restraint Clauses

It is trite that a restraint clause designed solely to stifle competition is generally speaking not enforceable because it is contrary to public policy. See Humphries v Laser Transport

Holdings Ltd 1994(4) SA 388 (C), and Basson v Chilwan Indaba 1993(3) SA 742 (A) at 771. In crisp terms, a restraint of trade raises significant questions regarding its enforceability when examined through the prism of public policy. In deciding whether
5 a restraint of trade is contrary to public policy regard must be had to two principle considerations: firstly agreements freely concluded should be honoured; secondly each person should be free to enter the business, or professional world or trading world in the manner they deem fit. For this reason, unreasonable
10 restraint of trade clauses are contrary to public policy. In Sunshine Records (Pty) Ltd v Frohling 1990(4) SA 782 (A) at 794 EM Grosskopf, JA summarised the position thus:

15 "In determining whether a restriction on the freedom to trade and to practice a profession is enforceable, a Court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if
20 these are unreasonable or unfair. The second consideration is that all persons in the interests of society, be permitted as far as possible to engage in commerce or professions or, expressing this differently, that it is detrimental

to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations, the Court will obviously have regard to the circumstances of the case before it".

An important guideline in the evaluation process is that a restraint should, as far as activities, area and duration is concerned be necessary to protect the infringed or threatened interest.

Furthermore, it is trite that goodwill such as trade connections trade secrets, confidential information are recognised as protectible interests. As to the meaning of these concepts see J Neethling: van Heerden – Neethling: Unlawful Competition (Second Edition) at 20.

Recently in an impressively scholarly and thoughtful judgment Wallis, AJ in Den Braven SA (Pty) Ltd v Pillay [2008](3) SA 518 (D) embarked on a muscular affirmation of the *jurisprudence* of restraint of trade set out initially in Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1983(4) SA 874 (A). In support of the proposition that *pacta sunt servanda* is the animating principle in giving effect to the right of individuals to exercise their autonomy in concluding contracts, Wallis, AJ developed a defence of the principles initially set out in Magna Alloys by invoking the

judgment of Ngcobo, J in Barkhuizen v Napier 2007(5) SA 323 (CC) at para 57 in support of the enforceability of restraint provisions. See paras 28-32.

5 But the learned judge of the Constitutional Court's judgment must be read as a whole and not merely as a confirmation of the doctrine of *pacta sunt servanda*.

In dealing with the relationship of public policy to contractual
10 terms, Ngcobo, J said the following:

15 "Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions for the community; it represents those values that are held most dear by the society. Determining the content of public policy was one fraught with difficulties. That is no longer the
20 case since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values underlying it. Indeed the founding principles of our Constitution make it plain: our Constitutional democracy is

founded on, among other values, the values of human dignity, the achievable equality and the advancement of human rights and freedoms and the rule of law. And the Bill of Rights as the Constitution proclaims, "is the cornerstone" of that democracy; "it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom.

What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of Bill of Rights. Thus a term in a contract that is inimical to the values enshrined by the Constitution, is contrary to public policy and is, therefore, unenforceable.

In my view the proper approach to the constitutional challenges to contractual terms is to determine whether a term challenged is contrary to public policy as evidenced by the constitutional values, in particular those found in

the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows our courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."

Paras 28-30.

Moseneke DCJ albeit is a minority judgment, went even further in asserting the importance of the public policy threshold:

"Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties. In effect, on the subjective approach that the majority judgment favours, identical stipulations could be good or bad in a manner that renders whimsical the reasonableness standard of public policy."... Trite as it is that our constitutional values allows individuals the dignity and freedom to regulate their affairs, they also require that bargains, even if freely struck,

may not steer a course inimical to public notions of equity or fairness which are now sourced from constitutional values.”

Para 98, 104.

- 5 The judgment in Den Bremen, fails with respect, to capture this nuanced approach by both majority and minority.

Thus Wallis, AJ concludes with the following:

10 “I know of no developing system of *jurisprudence* that does not recognise the need, subject to some exceptions such as fraud, misrepresentation, public policy or the like, to enforce contractual obligations. Problems that
15 may arise from the disparate power relationships of the parties are dealt with in a variety of ways and particularly by legislation. However as a general proposition most societies regard the enforcement of contractual obligations as having
20 a value itself. This is hardly surprising as recent studies in the field of economics have recognised that economic development is closely linked to the rule of law – one of our fundamental constitutional principles – one of the aspects of

which is seen as manifested in free and independent Courts that among other things enforce contractual obligations.”

5 This passage, more in keeping with World Bank development reports of the 1990's than our Constitutional core, with the greatest respect to the learned Acting Judge, mischaracterises the very core nature of the dispute. It is not about the importance of *pacta sunt servanda*. Manifestly without this principle the law of
10 contract would be subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties. The core dispute concerns the balance between the bargain, as it is phrased in the contract, and the demands of public policy that give content to the idea of a constitutional community. In our
15 country there should be no need to remind the legal community of the importance of power and its abuse, even when sourced in private hands. See the mischaracterisation of the law fashioned by private power at para 30 of Den Braven. Private power in South Africa is also accountable to the principles of the
20 Constitution. Madala J reminds us of this important point of our history when he wrote in Du Plessis v De Klerk 1996(3) SA 850 (CC) at para 163;

“Ours is a multiracial, multi-cultural, multi-legal society in which the ravages of apartheid disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in the previous racist society.”

For an important *jurisprudential* analysis of the effects of this dictum, the meaning and scope of transformation and in particular, the proposition that power be rendered accountable to the Constitution. See Karl Klare (1998) 14 SAJHR 146.

The challenge of our constitution is therefore not to reproduce uncritically the shibboleths of the past, but to transform (as opposed to abolish or ignore) legal concepts in the image of the Constitution. Contract law cannot be reduced to a museum of a

past *jurisprudence*. Expressed differently, the methodology mandated by 539(2) of the Constitution needs to be implemented whenever a dispute such as the present is placed before a Court

5 Application

With this particular context in mind, it is possible to summarise the key issues which must be interrogated by the Court in the present dispute.

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1) Is there an interest on the part of the applicant that is deserving of protection after the termination of a business relationship?

2) Is that interest prejudiced by the conduct of respondents?

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3) If the interest is so prejudiced, how does that prejudice get weighed both qualitatively and quantitatively against the interest of the respondent to be gainfully employed and to pursue the right of the dignity of work if the order sought is so granted?

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4) Is there any other aspect of public policy as mediated by the Constitution and which is unrelated to the relation between the parties that, nonetheless, requires the restraint either to be upheld or to be struck down?

- 5) Does the restraint go further than absolutely necessary to protect the legitimate interest of the applicant that it is deserving of legal protection in terms of the balance of exercise which I have outlined?

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With these questions in mind I now turn to the issue of the protectible interest.

Protectible Interest

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To recapitulate the protectible interest for which applicant contends are set out in the founding affidavits follows:

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“(a) the creation by virtue of advanced methods (both in relation to ingredients and processing) of unique ice cream flavours and the quality thereof which has been developed and protected by the applicant over the past twenty five years.

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(b) the layout of shop premises (ie store designs) which had been affected to attract customers.

(c) imported display freezers placed and located in prominent positions which are

uniquely shaped to house specifically designed ice cream tubs, thereby maintaining the correct temperature to serve a perfect ice cream.

- 5 (d) our patented cups and cones, and
- (e) unique "Rand per kg" system in which the ice cream is weighed in turn maximising the way the franchisee can control the quantity of ice cream sold in relation to profits (this prevents pilferage and maximises profits).
- 10 (f) our serving spoons which were designed with the specific intention to ensure the correct shape to be presented in a cone making us unique
- 15 (g) the "Mozart" trademark associated with high quality superior ice cream

Mr Kember who deposed to the founding affidavit then goes on to summarise applicants case:

"the most obvious problem for the applicant would be that both established and walk-in customers would accept that the franchise had simply undergone a name change, and would as such

support the first respondent by virtue of the previous association of the locality of the business. This in turn will effectively close the door on any possibility of the applicant selling any further franchise business least of all profitably.”

These averments require analysis through the prism of the outlined *jurisprudence*, which generally recognises two forms of proprietary interests as deserving of protection. The first is trade or customer connections and the second concerns confidential information or trade secrets. See in particular Sibex Engineering Services (Pty) Ltd v Van Wyk and Another 1991(2) SA 482 (T) at 502 D-F. Applicant has sought to rely on both of these interests to justify the enforcement of the restraint of trade.

It is clear however, given the nature of the Plascon Evans rule, that the mere *ipse dixit* of the applicant cannot suffice on its own to establish these proprietary interests. As Olivier, AJ noted in Viamedia (Pty) Ltd v Sessa (unreported judgment of CPD: case number 8679/2008);

“Information does not become confidential and a process or practice does not become secret

merely because Viamedia contends that they do –
 or, perhaps, even if Mr Sessa subjectively
 believed them to be so. It does not suffice for
 Viamedia to say that it has confidential
 5 information or trade secrets. It must set out what
 they are and when and how Mr Sessa was
 exposed to them. It must set up the facts from
 which the conclusion could be drawn that
 something is indeed confidential or secret.”

10 See also Automated Tooling System (Pty) Ltd v Wilkens and
 Others 2007(2) SA 271 (SCA) at 281B-D. The key to the resolution
 of dispute turns on an examination of these two components,
 customer connections and trade secrets.

15 Customer Connections

To recapitulate applicant’s case in this regard is that “established
 (presumably, meaning repeat customers to respondent’s premises)
 and walk-in customers (presumably, meaning casual first time
 20 customers) would accept that the franchise had undergone a name
 change. Customer connections are worthy of protection must be
 something more than simple information as to the identity of
 customers, that is where, as in this case, customers who were
 obtained by respondents, not by the applicant, and where neither

party, certainly not the applicant is aware of the identity of the customers.

As Mr Mitchell, who appeared on behalf of the respondents,
5 submitted, customer connections in the context of a protectible interest denote a knowledge of the needs of the customer, the way in which those needs are fulfilled by the party seeking to enforce the restraint and the identify of those within the customer's organisation who are in a position to influence a move of the
10 custom to the person sought to be restrained. Sibex Engineering Services, *supra*, at 503A-505D.

Trade Secrets

15 Most of the averments which I have already noted, fall under this heading. In Walter McNaughtan (Pty) Ltd v Schwartz and Others 2004(3) SA 381 (C) at 388J – 389B, Van Reenen, J outlined the basis of the inquiry comprehensively as follows:

20 "Whether the information constitutes a trade secret is a factual question For information to be confidential it must (a) be capable of application in trade or industry, that is it must be useful; not be public knowledge or property; (b) it

must be known only to a restricted number of people or a closed circle and (c) be of economic value to the person seeking to protect it.”

5 As Mr Mitchell emphasized, the applicant is a distributor of ice cream products to its franchisees for the purposes of resale to the public. There is no suggestion on the papers that the respondents were privy to the ingredients or processing methods of the ice cream distributed by the
10 applicant nor that they were or are a manufacturer of ice cream products. Respondents aver that thus:

“The applicant sells its ice cream to its franchisees. The franchisees do not manufacture the product nor are they privy to the recipes for
15 the product. The applicant does not suggest that they are or that they can harm the applicant by using any such information.”

This answer is not challenged in reply. No details of the
20 uniqueness of the layout of the stores were given by the applicant in its founding papers nor in its reply. However respondent answers thus:

“Apart from the trademark there is nothing to distinguish the shop depicted on annexure CK11

from any number of other ice cream and snack shops in any number of urban shopping malls.”

Applicant has made much of photographs annexed to the papers, being CK11, CK12 (and perhaps further CK13). However it does not respond to the answer that most ice cream shops look similar to the shops depicted in these photographs. The uniqueness of the display freezers was disputed on the papers. No details of the unique freezers were given in the replying affidavits.

10 Mr Mitchell also noted that the averment reveals a fundamental ignorance of the terms of the franchise agreement. The freezers did not belong to the applicant, but were sold and delivered to the respondent. The applicant itself stipulated the right to repurchase these items. See Clause 15.4.2 of the contract. The cups and
15 cones were not being used by the respondent and applicant admits in reply that there is no evidence to show to the contrary. The applicant gives no details of its so-called “unique Rand per kg system” which could enable the Court to consider whether this constitutes a kind of confidential information set out in the Walter
20 McNaughtan case, supra.

This Court is therefore not able to embark upon the factual inquiries so indicated by Mr Howie in his argument. As illustrative

of the evidential problem. Having said that the first respondent refused to use the "Rand per kg" system, applicant in reply now seeks to backtrack on this statement but fails to controvert the allegation in the answering affidavit that the system is only valid
5 using the costs, weights and certain prices of applicant's products. Accordingly there is the question as to what protected information has been shown in the papers. Similarly, respondents deny the applicant's *ipse dixit* that its serving spoons are unique. Nothing is added in reply.

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As is clear from the analysis undertaken by this Court there is a need to weigh up the potential prejudice, if any, to the applicant, caused by respondent's continued trading against the public consideration the gainful employment, providing the employment
15 opportunities and competition, should be encouraged.

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This application was brought in great haste before me as the Duty Judge dealing with urgent applications. It was heard and decided as a matter of urgency. While I accept that breaches of restraint
of trade have an inherent quality of urgency, this application transmogrified, within about three days, from one for interim relief to an application for final relief.

The case made out by applicant which falls short of the requisite test may have benefited from a less dramatic launching of the proceedings. Given the conclusion to which I have come, namely that a case has not been made out, on the Plascon Evans test, to show either that these exist customer connections sufficient to justify the enforcement of the restraint or the use of trade secrets as that ?, there is no need to consider the further question which may otherwise have been of importance, namely whether the restraint provisions apply only if the agreements are terminated by the applicant in terms of clause 15.

I also do not need to determine whether the applicant showed that it terminated the agreements and that respondents' cancellation thereof was groundless and constituted a repudiation.

For these reasons, the APPLICATION IS DISMISSED WITH COSTS.



DAVIS, J