

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2025-212312

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 2-12-2025

SIGNATURE OF JUDGES:

In the matter between

TUMBLING TIGREZ (PTY) LTD
(Registration No. 2016/052101/07)

Applicant

and

AMORETHA LOUW
(Identity Number: 9[...])

First Respondent

AMI HEALTH SOLUTIONS (PTY) LTD
(Registration No. 2019/175143/07)

Second Respondent

This Judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be on this 2 day of December 2025

JUDGMENT

T. STRYDOM AJ:

Introduction

[1] The applicant brought an urgent application, and the relief claimed, (summarised in the applicant's Heads of Argument) are as follows:

- a. Interdicting and restraining the first, second and third respondents ("the respondents") from using the applicant's confidential information;
- b. Interdicting the respondents from competing unlawfully with the applicant, directly or indirectly, whether in their personal capacities or acting through the second respondent;
- c. Enforcing the restraint of trade provisions in clause 18 of the Franchise Agreement; and
- d. Ordering the respondents to deliver all equipment/information/manuals/ documents and legal documentation provided to the first respondent by the applicant for purposes of operating a franchise, as well as any replicas or copies made of such equipment, within 5 days of the granting of the order.

[2] At the outset of the hearing, I accepted that the issues relating to the restraint of trade, which is only applicable until 5 June 2026, are sufficiently urgent, and requested counsel to focus on the merits of the case.

[3] As the matter developed, the main issues were the following:

- a. Whether the applicants made out a case against the third respondent, considering the **Plascon Evans** rule, that the third respondent breached the Confidentiality Agreement entered between the applicant and the third respondent? If not, what the possible risk is of the third respondent breaching the Confidentiality Agreement in future.
- b. Whether the applicants made out a case against the first and second respondents, considering the **Plascon Evans** rule, that the first respondent, be that through the second defendant, breached the Restraint of Trade Agreement entered between the applicant and the first respondent? If so, what the possible risk is, on the first respondent breaching the Restraint of Trade in future.
- c. The issues relating to the applicant returning the equipment purchased by first respondent in terms of the Franchise Agreement.

[4] I accepted, for purpose of this application, that applicant had a protectable interest in protecting its rights in terms of the Franchise Agreement, and that the restraint of trade was valid and enforceable.

[5] The issue was whether the applicant had shown that the respondents were in breach of the Confidentiality Agreement and/or the Restraint of Trade Agreement, respectively, and whether prejudice was flowing from it.

[6] **THE PLASCON EVANS RULE:**¹

¹ See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 SCA at para [26].

“[26] *Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.*² *The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.*³”

THE THIRD RESPONDENT: THE CONFIDENTIALLY AGREEMENT:

[7] It is common cause that the third respondent signed a Non-Disclosure and Confidentiality Agreement (“the Confidentiality Agreement”), which agreement refers to the applicant as “*the Disclosing Party*” and to the third respondent as “*the Receiving Party*”, and *inter alia* provides:

“1. **CONFIDENTIALITY UNDERTAKING**

1.1. *The Receiving Party undertakes to the Disclosing Party that: -*

1.1.1. *It shall maintain and uphold utmost confidentiality and good faith*

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-5; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 (2) SACR 421 (CC) para 8-10.

³ *Sewmungal NNO v Regent Cinema* 1977 (1) SA 814 (N); *Trust Bank van Afrika Bpk v Western Bank Bpk NNO* 1978 (4) SA 281 (A).

in relation to confidential information disclosed in any manner (this includes but is not limited to any manner that is verbal/written or electronic).

1.1.2. It shall not divulge, publish, apply, use, implement or disclose in any manner as mentioned in clause 1.1.1 above, any of the confidential information received from the Disclosing Party, to any third party (this includes but is not limited to any person, firm, company, corporation, trust or other entity whatsoever).

1.1.3. It shall not at any time use any of the confidential information or any part or extract thereof for their own benefit (financial or otherwise) or for such benefit of any third party.

1.2. ...

1.3. ...

1.4. It shall safeguard all confidential information and shall take all necessary precautions to prevent the confidential information from being disclosed to any person, firm, corporation or entity and without limiting the foregoing, the Receiving Party agrees to use due and reasonable care in the storage of confidential information.”

[8] In the preamble to the Confidentiality Agreement, confidential information is described as all information marked or indicated as such and includes electronic, written and verbal information and without limiting the foregoing, shall include all business plans, financial figures, presentations, discussion papers, business models, email/SMS/instant messages, reports and research and/or inventions prepared and distributed by any employee of the Disclosing Party or any Designated Person who is instructed by the Disclosing Party to do so.

[9] There is no specific definition in the content of the Confidentiality Agreement to what confidential information is. For purposes of considering whether there was a breach of the Confidentiality Agreement, the court accepts that the parties intended to refer to confidential information as in the preamble.

- [10] On a perusal of the founding affidavit, the court could not find that any case was made out by the applicant that the third respondent breached the Confidentiality Agreement, by utilising any of the confidential information as described in the preamble of the Confidentiality Agreement.
- [11] The applicant failed to show what specific confidential information the first respondent was using in breach of the Confidentiality Agreement.
- [12] The high watermark of allegations made against the third respondent is directed at his involvement with the second respondent.
- [13] The bald allegation that the third respondent, through his involvement with the second respondent, is in breach of the confidentially agreements by using applicant's trade secrets and confidential information to unlawfully complete with applicant's business operation, remains unsubstantiated.
- [14] The aforesaid must be measured with reference to the content of the answering affidavit, where it is stated that the second respondent's involvement is limited to children 10 and older, grade 4 and up.
- [15] The third respondent, according to the respondents, has a limited involvement in the second respondent in that he does neuro-profiling, based on neuroscience aimed at children 10 and older, grade 4 and up.
- [16] Accordingly, the court cannot find that the third respondent breached the Confidentiality Agreement or that there is a risk that it will occur in future.

THE FIRST AND SECOND RESPONDENTS: THE RESTRAINT OF TRADE AGREEMENT CONTAINED IN THE FRANCHISE AGREEMENT:

- [17] It is common cause that the applicant conducts business by providing a specialised programme to minor children between the ages of 3 – 9 years old (up to grade 3).
- [18] It is common cause that the applicant also provides franchising opportunities,

in terms whereof franchisees may provide the programme on the terms and conditions set out in a written franchise agreement.

[19] It is common cause that the first respondent concluded a written Franchise Agreement with the applicant on 17 November 2021, in terms whereof the first respondent was granted the license to utilise the applicant's business model, brand, goodwill, training and marketing as set out in the franchise agreement, in the territory of Hartbeespoort, North-West Province.

[20] It is common cause that the following definitions, appear in the franchise agreement:

“1.1.3 **“Business Operations”** or **“Services”** means the services provided by the Franchisor to consumers centred on child development including inter alia fully endorsed **Programmes** designed to engage minor children, under the age of 10 (ten) years old, in different Lessons and Sessions focused on healthy physical activity intended to improve and develop minor children's physical and mental health, attention span, stability, strength, flexibility, athleticism, cognitive and perceptive abilities, enthusiasm and exposes minor children to an active lifestyle and numerous sporting disciplines. The **Services** are conducted by highly qualified and experienced trainers and incorporate an array of influences including but not limited to Pilates, gymnastics, boxing and ball skills.”

and

“1.1.4 **“Confidential Information”** means the Franchisor's trade, commercial, operational, financial and management information, as well as confidential and other proprietary information howsoever such Confidential Information may be disclosed or made available to the Franchisee including, without limiting the foregoing, whether direct or indirect, orally, visually, in writing or in electronic format or by reason of inspection of documentation or sessions or lessons or other

matter on or at the Franchisor's premises, places of operations or elsewhere including, but not limited to the following information:

- 1.1.4.1. software, technologies, technical information and expertise, concepts, ideas, inventions, methods, methodologies, procedures, processes, systems, techniques, designs, formulations, sessions, lessons, programmes, models, templates or work papers;*
- 1.1.4.2. know-how, and methods of management, marketing strategies, financial information, sales estimates, business structures, operation or conducting business and strategy used or to be used, development and growth tools and projections, target markets;*
- 1.1.4.3. technical data, product or process specifications and all other technical, mechanical and computer information;*
- 1.1.4.4. financial, supply, operational, exclusivity or other contractual arrangements between the Franchisor and its suppliers, employees, contractors, clients, sources of material, partners, agents, franchisees and business associates;*
- 1.1.4.5. any material or information subject to copyright, trademark, patent or other form of intellectual property rights;*
- 1.1.4.6. any information that relates to past projects of the Franchisor;*
- 1.1.4.7. any supplier, employee, franchisee and/ or client information;*
- 1.1.4.8. the contents of the Agreement and all schedules, annexures, addendums thereto;*
- 1.1.4.9. any other matter that relates to the business of the Franchisor in respect of which information is not readily available in the normal course of business and which may come to the knowledge of the*

Franchisee;

- 1.1.4.10. *information that, by its nature or content, is identifiable as confidential and/ or proprietary to the Franchisor and information that is intended or by its nature or content could reasonably be expected to be confidential and/ or proprietary to the Franchisor;*
- 1.1.4.11. *names, addresses and particulars of clients, children, customers, employees, contractors, suppliers, importers, exporters, licensors, licensees, shareholders, franchisees, directors and other stakeholders of the disclosing Party.”*

and

“119 **”Intellectual Property”** means patents, trademarks, work marks, design rights, copyright (including all copyright in any designs and computer software), source code, any concepts, ideas, methods, methodologies, procedures, processes, know-how, techniques, models, manuals, templates, software, software tools, lessons, programmes, training, sessions, technology, utilities, routines, designs, drawings, documentation, records, specifications, memorandum, recordings or items of a similar nature, trade or business names, marks, brands and other similar rights or obligations, whether capable of registration or not, but including any right to register same.”

and

“1.1.12 **“Programmes”, “Lessons” or “Sessions”** means the numerous programmes and/or lessons and/or sessions and associated content, daily activities, workshops, training and any other activity or operation designed around the **Business Operations** aimed at the development of minor children as set out in the Business Operations and designed by the Franchisor.”

“8.3. *The Franchisee declares that it has read and understood the Franchisor's disclosure document, the draft employment contract, the Franchisor's Policies, the **Franchisor's Restraint of Trade, the Franchisor's confidentiality undertaking** and the Franchisor's Disciplinary Code.*

8.4. *The Franchisee is subject to the terms and conditions set out in the Franchisor's Policies, the Franchisor's Restraint of Trade, the Franchisor's confidentiality undertaking and the Franchisor's Disciplinary Code and the Franchisee undertakes to ensure that all of its employees, staff and contractors are provided with such documentation before signing contracts of employment or other like agreements with the Franchisee and further to ensure that all of its employees, staff and contractors undertake to abide by the terms and conditions set out in such documentation.”*

[22] Although the clauses refer to a separate confidentiality agreement, it appears that applicant's case is not based on a separate confidentiality agreement signed by first respondent, outside the ambit of the Franchise Agreement. No such separate confidentiality undertaking signed by first respondent is annexed to or relied upon by the applicant in the founding affidavit. The applicant, in its case against first respondent, relies only on the Franchise Agreement and the restrictions contained therein.

[23] The restraint of trade clause is contained in clause 18 of the Franchise Agreement:

“18. Restraint of Trade

18.1. *The prescribed period for the purposes of this paragraph will be 18 (eighteen) months from the date of termination, cancellation or assignment of this Agreement by the Franchisee.*

18.2. *The prescribed area for the purposes of this paragraph shall be any area in which the Franchise operates including, without limitation, the Territory.*

18.3. *It is recorded that in the course and scope of owning a*

franchise, that the Franchisee will acquire a considerable level of know-how and knowledge regarding the Franchise's techniques relating to both the programme and the confidential information of the Franchise as a whole.

18.4. This includes, inter alia, the following;

18.4.1. Information of clientele;

18.4.2. Trade secrets;

18.4.3. Personal relationships with clients;

18.4.4. Knowledge of the Company Operations, Programmes, Services, Confidential Information and Intellectual Property.

18.5. It is acknowledged that the only effective and reasonable manner in which the Franchisor's rights can be protected in such regard is that a restraint of trade is imposed on the Franchisee.

18.6. During the prescribed period the Franchisee undertakes not to, whether directly or indirectly, compete with the business of the Franchise in any way whatsoever and shall not:

18.6.1. Engage, entice, persuade or induce any employee or staff of the Franchisor to terminate their employment with the franchisor, or any employee or staff of other franchisees of the Franchise to terminate their employment with such franchisee; or

18.6.2. Solicit orders from the Franchisor's clients or the other franchisee's clients for the rendering of the services or any competing services of the Franchisor's or the other franchisee's clients; or

18.6.3. Place orders on the suppliers of the Franchise for the supply of any part of the Franchise's Programme and Business Operations; or

18.6.4. Furnish any information or advise to any supplier that the Franchisee intends to, whether directly or indirectly, be engaged with or employed by the Franchise in any of the prescribed areas which conducts Business Operations and supplies

services and/ or products similar to that of the Franchise; or

18.6.5. Furnish any information or advice to any client or use any other means or take other action which is directly or indirectly designed to result in a client to terminate its association with the Franchise, or attempt to do so;

18.7. Without derogating from the obligations involved in this Agreement, the Franchisee undertakes that it, directly or indirectly, shall during the prescribed period in any of the prescribed areas and whether for reward or not:

18.7.1. Solicit or attempt to solicit orders directly from clients of the Franchise for the supply of products or rendering of services;

18.7.2. Solicit or attempt to solicit the supply of products from any of the suppliers of the Franchise;

18.7.3. Canvass business directly from the suppliers and clients of the Franchise without written consent given by the Franchisor;

18.7.4. Undertake any supply of products or rendering of services from the Franchise's clients unless such requests are received through the Franchise and authorised by the Franchisor in writing;

18.7.5. Undertake to place orders for the supply of any goods or services unless such orders are placed through the Franchise or are authorised with the consent of the Franchisee.”

[24] It is common cause that the duration of the restraint of trade is for a period of 18 months, from date of cancellation on 5 December 2024, and only applicable to the Hartbeespoort area.

[25] The first respondent disputes that she, either in person or through the second respondent supply services or similar services to anyone, in competition with the applicant.

[26] Should no such services be rendered, it cannot infringe upon the applicant's protectable interest, or for that matter in any way prejudice the applicant.

[27] The following are the facts and events broadly summarised:

- a. The applicant's business operations involve presenting a specialised program to minor children between the ages of 3 to 9. The applicant developed its programme in consultation with various child-development experts with a view to creating a fun, functional and balanced 30- minute exercise programme in accordance with the physical needs of minor children between the ages of 3-9 years old. The 3-9 years group covers pre-schools to grade 3.
- b. The programme is marketed to pre-schools, playgroups, creches, early education schools (*"early education schools"*) under the name and style of ***Tumbling Tigerz***.
- c. Early education schools then decide whether or not they want to sign up with the applicant, in which case its programme is presented at the school during school hours. However, for the children to participate in the programme, parents must register and enroll their children with the applicant and remain liable for payment of the applicant's fees themselves (as opposed to payment being processed through the school itself).
- d. The applicant's relationships with its clients (parents), signed up schools, and suppliers of their specifically designed and produced equipment all contribute to the success of the ***Tumbling Tigerz Programme*** and its brand and reputation.
- e. The first and third respondents conduct business through the second respondent and are directors of the second respondent.
- f. According to the first respondent, the second respondent offers services in a different market, different than the applicant's service

and market, being under 3 categories: AMI Fitness, AMI Swimming and AMI Education.

- g. It is common cause that the categories AMI Swimming and AMI Education pose no problem for applicant, thus only the fitness programme remains an issue.
- h. According to the first respondent, the second respondent offers a holistic approach to advance general wellness, and its main clientele are intermediary children and adults, corporate entities and students 10 years and older (grade 4 and older).
- i. The first respondent alleges that the AMI Fitness programme is not yet fully operational but is still being developed.

[28] The applicant states that the allegations by the first respondent that the fitness programme is only for children 10 years and older (grade 4 and older), are untrue considering the circumstances, which are briefly summarised below:

- a. One day after the franchise agreement came to an end, on 6 December 2024, the first respondent approached the Willow Tree Academy, which is a school signed up by the applicant. The first respondent provided pamphlets to Willow Tree Academy, which pamphlets did not state any age limit. This, according to applicant, signifies a soliciting of the applicant's business.
- b. On the first respondent's version, the fitness programme is provided only to 5 students, 10 years and older, at Millstream, which is also a school signed up by applicant.
- c. Despite saying that the fitness programme is only for children 10 years and older, the first respondent's home page displayed that it provides the programme for students 9 years and older. However, the home page was later amended the December 2014, to provide

for 10 years and older.

- d. On the 29 August 2025 the first respondent attended an open day at Millstream Preparatory School (“Millstream”), which is a school that caters for children grade 000 to grade 7, as well as Little Minnows Early Learning Centre (“Little Minnows”), a nursing school which caters for children 2 ½ in years of age until age 5/6. The first respondent had set up a stand there, displaying information flyers. The applicant argues that the first respondent had no business there, as the schools were for the younger children, and not for the intermediary children, which the first respondent professes to cater for. The applicant therefore poses the question of what the first respondent was doing there and argues that it signifies the first respondent’s intention to infringe upon the applicant’s business and clientele.
- e. The applicant also points out that the first respondent’s during its attendance to Little Minnows distributed pamphlets provided regarding its fitness programme and a Facebook message appeared thereafter stating that AMI Fitness enjoyed every moment at Little Minnows at Millstream Preparatory school.
- f. The first respondent admitted attendance at Little Minnows, but states that the visit was aimed at marketing its fitness programme for learners in the intermediary group and the respondents’ swimming programme. In response to the first respondent, the applicant states it is untrue and should be rejected.

[29] The applicant’s case, with reference to the question whether the first respondent has breached the restraint of trade clause, should be considered with reference to a proper interpretation of such clause, applying the normal principles of the **Natal Joint Pension Fund v Endumeni**,⁴ and with reference to the text, context and purpose and circumstances prevailing.

⁴ 2012(4) SA 593 (SCA) at para [18]

- [30] Paragraph 18.6 of the restraint of trade clause, states that the undertaking is not to compete, directly or indirectly with the business of the franchisee.
- [31] Considering a proper interpretation of clauses 18.6 and 18.7 of the restraint of trade clause, I am of the view that the interests that the applicant intended to protect is to prevent a previous franchisee, such as the first respondent, to compete with the applicant's business, to its detriment, and to the infringe on the applicant's protectable interest, being its business.
- [32] If any other business is done outside the scope of the applicant's business, such business could not be prejudicial, as it does not infringe on the applicant's protectable interest.
- [33] No specific incidence of prejudice was presented, either in the papers or during oral argument.
- [34] Applying the **Plascon Evans** rule, and considering the responses in the answering affidavit where the respondents pointed out that they are not venturing on the same business as the applicant, or in competition with the applicant, and do not intend to do so while the restraint of trade which they acknowledge to be in existence, is applicable, there is no reasons for the court to reject such responses applying the robust approach.
- [35] Under the circumstances, the applicant has failed to show that the first respondent, or for that matter the second respondent, breached the restraint of trade clause, or that they intended to do so. In fact, it appears to the court that the first respondent is aware of the content of the restraint of trade, acknowledging it and is intending to respect it. There is accordingly no risk, or well-grounded apprehension of a breach.

EQUIPMENT:

- [36] Clause 9 pertains to the equipment provided to franchisees in order to present the programme. Clause 9.8, 9.9 and 9.10 further specifically deals with the

prohibition on disclosure of confidential information:

“9.3. In the event that this Agreement terminates for any reason whatsoever, and with cognisance of the fact that the Franchisee will be prohibited thereafter from utilising the Franchisor's **Confidential Information** and Intellectual Property, with specific reference to the Franchisor's Programme and Services, brand, goodwill and logo, the Franchisor shall purchase such equipment back from the Franchisee at a reduced rate and in proportion to the damage, depreciation and reasonable wear and tear that may have been occasioned by the Franchisee's ownership of such equipment. Alternatively, and at the Franchisor's sole election, the Franchisee must destroy all such equipment at the Franchisor's behest. This clause applies to all equipment that the Franchisee obtains in order to conduct the Business Operations and which possesses any of the Franchisor's **Confidential Information** or Intellectual Property, whether provided by the Franchisor to the Franchisee or purchased by the Franchisee thereafter.

...

9.8. Some of the items listed above fall part of the **Confidential Information** that the Franchise possesses in order to complete its Business Operations and objectives and as such should remain privy only to the Franchise itself and not to any external source whatsoever unless agreed to in writing between the Parties or unless impossible to keep confidential given the nature of the Business Operations and exposure of certain equipment to 3rd parties.

9.9. The Franchisee and its actors, contractors, employees, members, staff, directors and other stakeholders as the case may be shall not disclose the contents of the Programme and **Confidential Information**, or associated thereto, which knowledge does not fall part of the public domain to any person unless such individual has

signed a form of confidentiality and a non- disclosure agreement and is regarded as an employee of the Franchisee.

9.10. The Franchisee agrees to use the equipment listed herein solely for the purposes of the Programme and Business Operations.”

- [37] The applicant developed its own specialised equipment in conjunction with Damascus Sport, that is used in the programme. Several items, for example, the play equipment, speed paddles, hurdles and sensory tunnels are bespoke, manufactured exclusively for the applicant, and not available for direct retail sale to the general public.
- [38] During March 2025, the first respondent contacted Mr Butler to negotiate a sale of the equipment still in the first respondent’s possession back to the applicant, but the parties reached no agreement regarding the price and sale.
- [39] Only some of the equipment was branded with the prescribed Tumbling Tigerz trademarks.
- [40] The first respondent was thereafter verbally instructed by Mr Mirek Gavel to destroy the equipment in terms of the provisions of clause 9.3 of the franchise agreement.
- [41] The first respondent did not destroy the equipment, and, instead instructed Bundu Trailers to replicate (or as the first respondent contends, modify) a specific item of the applicant’s equipment (a yellow/orange PVC tunnel), which forms part of its confidential information, to unlawfully compete with the applicant.
- [42] The first respondent, in its heads of argument, and during the hearing tendered the return of all branded items, and as I understand also the 4 tunnels, such as the one left at Bundu Trailers.

[43] I note from the notice of motion, prayer 6, that the applicant is seeking the delivery of the equipment, from the respondents.

[44] Although clause 9.3, referred to above, does not make provision for the return of the items, only for the destroying of it, the return of the goods mentioned above are voluntarily tendered, and the applicant can take steps to collect it.

[45] It is noted that clause 9.3 only applies to equipment which possesses the franchise's confidential information or intellectual property, and no more. Unbranded equipment, which can be purchased in the open market do not fall within such category.

Order

Accordingly, I make the following order:

[1] The applicant's application is dismissed;

[2] the applicant must pay the first, second and third respondents' costs, on a party and party basis, and the appropriate scale is scale B.

STRYDOM AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the Applicants:

Adv M Snyman SC
Adv A Maré

Instructed by:

Fisher Roeland Attorneys

For the Respondents:

AC Diamond

Instructed by:

Date of Hearing:

27 November 2025

Date of Judgment:

02 December 2025